



University
of Glasgow

Gordon, Gerald H. (1960) *Criminal responsibility in Scots law*. PhD thesis.

<http://theses.gla.ac.uk/2753/>

Copyright and moral rights for this thesis are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Criminal Responsibility in Scots Law.

A thesis presented by

Gerald H. Gordon, M.A., LL.B.

as a result of research in the Faculty of Law

for the degree of Ph.D.
in the University of Glasgow.

September, 1959.

BEST COPY

AVAILABLE

Poor text in the original
thesis.

Summary of a thesis presented by
Gerald H. Gordon, M.A., LL.B.,
as a result of research in the
Faculty of Law on Criminal Responsibility
in Scots Law.

Presented September, 1959, for
the Doctorate in Philosophy of
Glasgow University.

This thesis deals with those general principles of criminal law which apply to most crimes. The approach adopted is analytical and critical: the various principles are discussed in general terms, and an attempt is then made to analyse the Scots cases in the light of the general discussion, and to extract the rules and principles implicit in them.

Chapter 1 deals with the formal definition of 'crime', and then considers the distinction between crimes mala in se and mala prohibita as representative of a difference between the attitudes of the public to crimes such as murder and theft and their attitudes to modern statutory offences. The chapter then considers the exercise by the High Court of its power to declare criminal acts not previously held to be so.

Chapter 2 discusses the philosophical problems which are inherent in the most common concepts used in discussions of criminal responsibility. This is merely an introductory and brief treatment intended to clear the way for the later discussions of particular problems involving these concepts.

Chapter 3 deals with the concept of the criminal act, or actus reus, and with that of criminal conduct.

It distinguishes between factors whose presence is necessary to the constitution of an actus reus, and factors whose presence may take away its criminal nature from what would otherwise be an actus reus. It considers the kinds of behaviour which may constitute criminal conduct, and deals in particular with criminal omissions, and the way in which these are restricted to omissions to fulfil pre-existing legal duties. It considers the problem of causality with particular reference to situations in which two or more persons acting independently contribute to the creation of an actus reus. Finally it considers the questions of crimes in which the criminal conduct and the actus reus occur in different countries.

Chapter 4 deals with the law of art and part guilt, and analyses it in the light of the principles set out in chapter 3. It includes a discussion of 3 modern unreported cases on the problem of the criminal responsibility of the members of a group for the consequences of the activities of the group.

Chapter 5 discusses the leading theories on attempted crimes, and then analyses the Scots cases in the light of the theories and of the principles set out in chapters 3 and 4. It then considers the law of conspiracy and incitement, and the effect of the development of these crimes on the principles of attempt.

Chapter 6 deals with mens rea. It distinguishes between mens rea as a general reprehensible disposition, and as a subjective state required for guilt of a particular crime. Parallel with this distinction it distinguishes between mental factors which may operate to mitigate the accused's liability to punishment,

and those which may operate to exculpate him from criminal responsibility. It then considers the concepts of intention, recklessness, and negligence. In the course of this discussion it considers the concept of the reasonable man, and the 'principles of disfacilitation' whereby discrepancies between an accused's account of his mental state and the assumed mental state of the reasonable man are resolved against the accused where acceptance of the accused's statement would lead to his acquittal or to a mitigation of punishment, on the ground that to do otherwise would make it too easy for accused persons to secure acquittals or reductions in penalty.

Chapter 7 deals with the defence of error, with the connection between error and the doctrine of transferred intent, and with the meaning of 'reasonable' error.

Chapters 8 and 9 deal with the concepts of insanity and diminished responsibility respectively, both generally and by way of an analysis of the Scots cases on the subjects. Chapter 9 includes a brief discussion of the problem of the psychopath.

Chapter 10 deals with the position of intoxication in the criminal law, and is mainly devoted to exhibiting the unsatisfactory nature of the present law.

Chapters 11, 12 and 13, deal with the pleas of necessity - including coercion and superior orders, self-defence, and provocation, respectively. Self-defence and provocation are dealt with by analysing the law as stated by Hume and comparing it with the modern law, all in the light of the principles discussed in the earlier chapters.

Chapter 14 deals with criminal negligence, and in particular with the crime of involuntary culpable homicide. It distinguishes culpable homicide by

persons lawfully employed and culpable homicide by persons unlawfully employed, and criticises the rule that wherever a person causes death while unlawfully employed he is guilty of culpable homicide.

Contents

	<u>Page No.</u>
<u>Preface</u>	iv
<u>List of Abbreviations</u>	xi
<u>Chapter 1.</u> <u>Crime in general</u>	1
The definition of 'crime'	1
<u>Mala in se</u> and <u>mala prohibita</u>	7
The declaratory power of the High Court	18
<u>Chapter 2.</u> <u>Responsibility in general</u>	40
Legal and moral responsibility	40
Voluntary actions	47
Intention and motive	54
Acts and consequences	65
Punishment and responsibility	75
<u>Chapter 3.</u> <u>The Criminal Act</u>	86
The <u>actus reus</u>	86
Criminal conduct	90
The problem of causation	111
The place of the act	139
<u>Chapter 4.</u> <u>Actings art and part</u>	151
Art and part and acting in concert	151
The forms of art and part guilt	156
Responsibility for the unintended consequences of a plot	170
Assession after the fact	192
<u>Chapter 5.</u> <u>Inchoate crimes</u>	194
I - Attempted crimes	194
The general theory of responsibility for attempts	194

	<u>Page No.</u>
Theories of criminal attempts	197
Attempts to do the impossible	242
Attempts to commit unintentional crimes	246
II - Conspiracy and incitement	250
<u>Chapter 6. The criminal mind</u>	264
<u>Mens rea</u>	264
Intention	270
Recklessness	277
Negligence	296
<u>Chapter 7. Error</u>	305
<u>Chapter 8. Insanity</u>	324
I - Insanity as a defence	324
Insanity and irresponsibility	325
The Scots cases	346
The modern law	361
II - Insanity as a plea in bar	364
III - The disposal of insane accused	374
<u>Chapter 9. Diminished responsibility</u>	380
The general principle	380
The development of the doctrine	386
Psychopathic personality	404
The treatment of persons of diminished responsibility	411
<u>Chapter 10. Intoxication</u>	418
<u>Chapter 11. Necessity, Coercion, and Superior Orders</u>	442
I - Necessity	444
The general problem	444
Two English cases	452
The law of Scotland	460

	<u>Page No.</u>
II - Coercion	464
III - Superior orders	475
<u>Chapter 12.</u> <u>Self-defence</u>	484
Hume's treatment of self-defence	487
The law Since Hume	495
<u>Chapter 13.</u> <u>Provocation</u>	504
Provocation and self-defence	505
Provocation by serious assault	509
Provocation and loss of self-control	512
The degree of provocation	527
<u>Chapter 14.</u> <u>Criminal Negligence</u>	536
I - Culpable homicide	536
Homicide in the course of lawful conduct	538
Homicide in the course of unlawful conduct	550
II - Other crimes of negligence	574

PREFACE

This thesis deals with 'the principles, doctrines, legal standards, and ways of reasoning employed by lawyers and judges in that branch of the law that deals with' crimes (cf. Hall & Glueck, p. 46). It is concerned with matters which are common to all or to most crimes, and not with those which are special to any particular crime. It deals to a large extent with the law of murder and of culpable homicide because most of the cases in which general principles are discussed, especially those concerning criminal intention, or mens rea, are cases of homicide; but it is not a treatise on the law of homicide.

In discussing the 'ways of reasoning' employed in the Courts I have tried to take into account not only the explicit logic and rationes decidendi of the various principles and decisions, but also the implicit reasons, sociological, ethical, or even personal, for their adoption, and the underlying attitudes they reveal.

Discussion of the principles of Scots criminal law is especially difficult for a number of reasons. The wealth of periodical literature and case law which lies behind such works as those of Hall in America and of Glanville Williams in England has no counterpart in Scotland. American and English criminal law often employ the same terminology as does Scots, and there is a fairly wide area of agreement between their ultimate results and those of Scots law, but Scots criminal law has grown up more or less independently of Anglo-American law, and Anglo-American concepts and cases must therefore be treated with great care when considering the Scots law. This care is

especially called for in dealing with English cases which do not have the same persuasive authority in criminal matters that they have in other branches of law. I have therefore tried to avoid more than occasional citation of English authority, and have indeed preferred to go to American or Dominion cases, and to Continental law, for examples of any propositions I wish to advance which are not yet covered by a Scots case. I have also tried to avoid detailed discussion of problems which have not yet arisen in Scotland, and to refrain from embarking on long speculative discussions of matters on which there is no Scots authority.

The dearth of literature or authority in Scotland is not due only to the fact that a small country offers fewer examples of criminal activity than does a large one. Criminal law is the Cinderella of the Scots legal system. There has been no extended discussion of its principles since Hume's Commentaries. Alison merely repeats Hume with the addition of a few English cases; Anderson is a very brief treatment and avoids discussion; Macdonald is little more than a convenient digest, and is confused and inaccurate. The only systematic modern treatment is that contained in three comparatively short chapters of Professor Smith's volume on Scotland in the British Commonwealth series (T.B.Smith, pp. 695-783).

The position is not very much better with regard to case law. Since 1913 there have been very few reports of criminal trials, so that it is difficult to know what actually goes on in the criminal Courts, especially the summary ones. Before 1927 there was no appeal from conviction in the High Court, so that, except for occasional references by circuit

Judges of particularly difficult cases to the High Court, the cases before 1927 are only decisions of single Judges. The principle of diminished responsibility, one of Scotland's few contributions to British criminal jurisprudence, grew up or at any rate became crystallised mainly because one particular Judge applied it in a number of cases. This process started in 1867 - so far as reported cases go - yet as late as 1913 another Judge could deny the existence of the principle and leave the accused without redress (Higgins, 1914, J.C.1). Even the existence of the Court of Criminal Appeal has not led to the settlement, or to an authoritative discussion, of all the problems of criminal law or theory - there seems to be a tendency to avoid discussion of the meaning of words like 'intention', 'negligence', or 'recklessness'. The then Lord Justice-General, Lord Cooper, Lord Keith, the Faculty of Advocates, and the Crown Agent, all gave evidence to the Royal Commission on Capital Punishment, and none could produce an authoritative definition of murder. Other important questions, such as the definition of insanity, have never been dealt with by the Appeal Court, so that the law is unknown even to those who administer it (cf. infra. ch. 8). (It should also be noted that the vast bulk of serious crime is dealt with in Glasgow Sheriff Court, and that cases there are hardly ever reported unless appealed.) Where there is no decision by the Court of Criminal Appeal the law must still be sought in such examples of Judge's charges as are available. These are of their nature unsatisfactory sources for general principles, being given with the facts of a particular case in mind, and deliberately

couched in non-technical language (cf. Stephen, 2 H.C.L., p. 152).

In addition there is a more fundamental difficulty, one which springs from the nature of Scots criminal procedure. The conduct of prosecutions, the decision whether or not to prosecute, or for what crime to prosecute in any case, lie almost entirely with the Crown Office. The prosecutor in any case can, and often does, accept a plea of guilty to all or part of the indictment, or to a lesser crime than that charged, such as culpable homicide on a murder charge, or reset on a charge of theft, or to attempting to commit the crime charged (cf. T.B. Smith, pp. 754-5, 776-71). In all these ways the Crown Office can materially alter the law in practice while leaving it unchanged literally. For example, it may once have been felt that to cease to include adultery in the catalogue of crimes would have offended the upholders of conventional morality, so it is still literally the law of Scotland that at any rate 'notour' adultery is a crime, but nobody is ever prosecuted for it. In the same way, rape was a capital offence until 1887, but executions had ceased long before (cf. Sweeney, (1858) 3 Irv. 109).

The clearest example of the Crown Office's control over the criminal law in modern times is the practice of accepting pleas of culpable homicide in charges of murder. (Very recently there have been signs of a decrease in this practice.) As a result, the Courts are deprived of many opportunities of pronouncing on the distinction between the two crimes, and thus of exploring the principles of provocation, self-defence, diminished responsibility, recklessness, and so on. It is apposite in this connection to recall Holmes'

famous statement,

'Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English Courts are likely to do in fact.' ('The Path of the Law', (1897) 10 H.L.R. 457, 461).

If Holmes' friend lived in Scotland he would be more interested in what the Crown Office are likely to do in fact, than in what the Courts are likely to do. And he would discover that it is almost impossible to find out and to state the principles on which the Crown Office acts, and very difficult to predict their actions. For the decisions of the Crown Office are in the last resort administrative decisions: like those taken by the Secretary of State in considering the commutation of death sentences, they may be based on precedent and general rules (R.C. para. 49), but the precedents and rules are private. This system makes Scots criminal law flexible, and has many practical advantages, but it makes it very difficult to state and discuss the law from a theoretical standpoint.

(The most important and useful source of the modern law is contained in the evidence given before the Royal Commission on Capital Punishment by Lord Cooper, Lord Keith, the Crown Agent, and the Faculty of Advocates, respectively, since this evidence gives the principles on which prosecutions are brought, and juries directed - of how the living law is administered. Unfortunately the Royal Commission was

concerned only with the law of murder, and the evidence deals with only some of the matters dealt with in this thesis.)

As a result of all the above factors it is often very difficult to find any starting point for a discussion of many questions of criminal responsibility in Scots law. Anglo-American and Continental writers can start with the law as it has been laid down in their respective countries and go on to discuss its value and implications - a Scots writer has to start by groping towards a formulation of the law to be discussed.

In view of its purpose this thesis is concerned to discover, analyse, and criticise, the criminal law of Scotland as it exists today. It is not concerned with the historical development of the law, as such, and I have been content to accept Hume's analysis of the law of his day without enquiring into his sources. Again, apart from references to a few modern unreported cases, the material on which the thesis is based is more or less readily available in published form. The originality which is claimed for the thesis lies in the fact that it is the first attempt for over a century - since the last edition of Hume in 1844 - to analyse the reported Scots cases in order to derive from them a systematic statement of the law, and to discuss in the light of the Scots cases those general principles and concepts of criminal law which are dealt with in relation to their respective countries by such writers as Glanville Williams, Hall, Donnedieu de Vabres, and Schönke-Schröder, to whose works frequent reference is made in the text.

I am indebted to Professor D. M. Walker, Q.C. for reading a draft of the thesis, and for his criticisms and suggestions regarding its form and substance; and also to the permanent officials of the Crown Office, and, more especially, those of the Justiciary Office, for information regarding recent and current law and practice.

List of abbreviations

(other than those relating to recognised law reports)

- Alison Principles and Practice of the Criminal Law of Scotland, by A. Alison (2 vols.: vol.i, Principles, Edin., 1852; vol.ii, Practice, Edin., 1833).
- Anderson The Criminal Law of Scotland, by A.M.Anderson, 2nd ed. (Edin., 1904).
- Beccaria An Essay on Crimes and Punishments, by Marquis Beccaria, 5th ed. in English (London, 1804).
- Bell's Notes A Supplement to Hume's Commentaries on the Law of Scotland respecting Crimes, by B.R.Bell (Edin., 1844).
- Bentham Introduction to the Principles of Morals and Legislation, by J. Bentham, ed. W. Harrison (Oxford, 1948 - published with A Fragment of Government).
- Burnett A Treatise on various Branches of the Criminal Law of Scotland, by J. Burnett (Edin., 1811).
- C.P. Code Pénal Francais, Libr. Dalloz, 47th ed. (Paris, 1950).
- D. Digesta Justiniani, ed. Th. Mommsen (2 vols., Berlin, 1870).
- Donnedieu de Vabres Traité de Droit Crininel et de Legislation Penale Comparée, by H. Donnedieu de Vabres, 3rd ed. (Paris, 1947).
- Gl. Williams Criminal Law: The General Part, by Glanville L. Williams (London, 1953).
- Hall General Principles of Criminal Law, by J. Hall (Indianapolis, 1947).

- Hall and Glueck Cases and Materials on Criminal Law by L. Hall and S. Glueck (St. Paul, Minn., 1940).
- Hume Commentaries on the Law of Scotland respecting Crimes, by Baron Hume, 4th ed., by B.R. Bell (2 vols. Edin., 1844).
- Kenny Outlines of Criminal Law, by C.S. Kenny, 17th ed., by J.W.C. Turner (Cambridge, 1958).
- Macaulay Notes on the Indian Penal Code, by Lord Macaulay, References are to The Collected Works of Lord Macaulay, ed. Lady Trevelyan, Vol. VII (London, 1875).
- Macdonald A Practical Treatise on the Criminal Law of Scotland, by J.H.A. Macdonald, Lord Kingsburgh, 5th ed., by J. Walker and D.J. Stevenson (Edin., 1948).
- Mackenzie The Laws and Customs of Scotland in Matters Criminal, by Sir G. Mackenzie, 2nd ed. (Edin., 1699).
- Maclaurin Arguments and Decisions in remarkable Cases before the High Court of Justiciary and other Supreme Courts in Scotland, by Mr. Maclaurin (Edin., 1774).
- Mental Abnormality Mental Abnormality and Crime, ed. L. Radzinowicz and J.W.C. Turner (London, 1944).
- Modern Approach The modern Approach to Criminal Law ed. L. Radzinowicz and J.W.C. Turner (London, 1945).
- N.E.D. A New English Dictionary on Historical Principles, ed. J.H.A. Murray (Oxford, 1888-1933).
- Nich. Ethics The Ethics of Aristotle, trans. J.A.K. Thomson (Penguin Books, 1955).

- R.C. Report of Royal Commission on Capital Punishment, 1949-53, Cmd. 8932 (London, 1953).
- R.C. Evid.^{1/2} Minutes of Evidence before Royal Commission on Capital Punishment (London, 1949-51).
- Report of Royal Commission on Draft Code, 1879 Report of the Royal Commission appointed to consider the law Relating to Indictable Offences with an Appendix containing a Draft Code embodying the Suggestions of the Commissioners, 1879, C.-2345 (London, 1879).
- Renton and Brown Criminal Procedure according to the Law of Scotland, by R.W. Renton and H. H. Brown, 3rd. ed., by F.C. Watt, (Edinburgh, 1956).
- Salmond Salmond on Jurisprudence, 11th ed. by Gl. L. Williams (London, 1957).
- Sayre A Collection of Cases on Criminal Law, by F.B. Sayre (Rochester, N. Y., 1927).
- Schönke-Schröder Strafgesetzbuch: Kommentar, by A. Schönke, 8th ed., by H. Schröder (Munich and Berlin, 1957).
- T. B. Smith The British Commonwealth, The Development of its Laws and Constitutions, Vol. I, The United Kingdom: Scotland, by T.B. Smith (London, 1955).
- Stephen, 2 H.C.L. History of the Criminal Law, by Sir J.F. Stephen, Vol. II (London, 1883).
- SchwStGB Swiss Criminal Code (Schweizerische Strafgesetzbuch, ed. P. Thormann and A. von Overbeck (Zurich, 1940).
- StGB German Criminal Code (Strafgesetzbuch), printed in Schönke-Schröder (supra).
- Cr. L. Rev. Criminal Law Review

J. Cr. Sc.	Journal of Criminal Science.
Jur. Rev.	Juridical Review.
H.L.R.	Harvard Law Review.
L.Q.R.	Law Quarterly Review.
M.L.R.	Modern Law Review.

Scots criminal cases, other than those originally summary prosecutions, are cited by the name, and after 1887 the surname, of the accused, and the relevant volume of the Justiciary Reports. Unreported cases are cited by the name or surname of the accused, and the place and date of trial. I am indebted to the Depute-Clerks of Justiciary for their help in tracing unreported cases, and their kindness in making the papers in them available to me. I am also indebted to them and to the senior permanent officials of the Crown Officials for helpful information and discussions.

Where several references are given for a case, the one used is cited last.

References and footnotes have been placed between brackets in the text.

Chapter 1: Crime in General

The definition of 'Crime'

Crime, Criminal Law, and Criminal Procedure.

The terms 'crime' and 'criminal law' are well-known but it is not easy to give a comprehensive definition of them, or to state clearly the difference between criminal and civil law. The now repealed Summary Procedure (Scotland) Act of 1864 (27 & 28 Vict., c. 53, s.28) divided the jurisdiction of summary courts into civil and criminal, and described the criminal jurisdiction as that where 'the Court shall be required or shall be authorized to pronounce Sentence of Imprisonment against the Respondent, or shall be authorized or required in case of Default of Payment or Recovery of a Penalty or Expenses, or in case of Disobedience to their Order, to grant Warrant for the Imprisonment of the Respondent for a Period limited to a certain Time, at the Expiration of which he shall be entitled to Liberation'. This Act was repealed by the Summary Jurisdiction (Scotland) Act 1908 (8 Edw. VII, c. 65), and neither that Act nor its successor the Summary Jurisdiction (Scotland) Act, 1954 (2 & 3 Eliz. II, c.48), defines civil or criminal procedure, although both are concerned mainly with criminal procedure.

The later acts do, however, define the term 'offence', and follow the 1864 Act in laying stress on the treatment of the offender. An offence is 'an act, attempt or omission punishable by law' (1908 Act, s.2; 1954 Act, s.77). This definition does not indicate the

type of punishment envisaged, and does not specifically require the possibility of imprisonment desiderated in 1864. This may be because the number of offences normally dealt with by fining the offender has greatly increased since 1864, or may be merely because every fine now carries with it the possibility of imprisonment in default of payment (1954 Act, s.48, re-enacting s.47 of the 1908 Act).

There are difficulties in regarding the possibility of imprisonment as the decisive factor. The requirement, specifically made in 1864, that the imprisonment must be for a fixed period, would serve to distinguish criminal imprisonment from civil imprisonment for contempt of court; but there does not seem to be anything contradictory in the idea of a crime for which the offender cannot be imprisoned, or, indeed, punished at all in the ordinary sense of the word. Many convictions are not in fact followed by punishment, but by other forms of treatment, such as absolute discharge, or probation (Criminal Justice (Scotland) Act, 1949, 12, 13 & 14 Geo. VI, c. 94, Part I; cf. T.B. Smith, p. 703). These methods of treatment can, it is true, follow only on conviction for behaviour which is punishable in the conventional ways, but if a class of criminal acts, such as sexual offences, or all first offences, were to cease to be punishable and come always to involve some other form of treatment, they would not therefore cease to be crimes. If they were dealt with in the criminal courts, by the processes of criminal law, they would still be regarded as crimes. It seems therefore that 'crime' must be defined independently of the manner in which the offender is dealt with; but that the definition will probably have to take into account the procedure by which he is

dealt with.

A definition of criminal law as the subject matter of criminal procedure, or in terms of the jurisdiction of criminal courts, is not wholly satisfactory. Its apparent circularity is not of great importance; criminal procedure and the criminal courts can be defined without reference to their subject matter. The memoes, offices, and proceedings of the High Court of Justiciary can be defined more or less ostensibly - they can be shown to anyone who wishes to see them, and the same is true of the Sheriff Court although the differences between civil and criminal courts and procedure are not so obvious there. The difficulty is caused by certain anomalous matters which are not criminal, but are dealt with by the criminal courts. Appeals from the Small Debt Court, for example, are heard by judges of the High Court, wearing criminal robes, sitting in criminal courtrooms, aided by the permanent officials of the Justiciary Office, although they are governed by a peculiar procedure (Small Debt (Scotland) Act, 1837, 7 Will. IV & 1 Vict., c.41, s.31). Appeals against imprisonment for contempt of a civil court may be dealt with by the High Court, perhaps because of the analogy with criminal imprisonment, though such imprisonment is not a criminal matter (cf. Graham v. Robert Younger, Ltd., 1955 J.C. 28). The jurisdiction of summary courts to deal with statutory penalties and certain orders ad factum praestandum has also created difficulty (1954 Act, s.1 cf. Renton & Brown, 173-4). (The case of James Dunlop & Co. Ltd. v. Calder, 1943 S.C. 49 is an example of an anomaly created by the interaction of various statutory enactments and repeals as a result of which

the only appeal from the order by a court of summary jurisdiction removing a checker from his position in a coal mine is by the criminal procedure of a stated case, though the procedure for removal 'is more analogous to civil than criminal proceedings' at p. 58).

The distinguishing feature of criminal law is often said to be the interest taken by the State in crime. The State has, of course, an increasing interest in many forms of civil litigation such as actions to recover taxes. But if we combine the interest of the State with the use of criminal procedure it is possible to arrive at a definition which, while it is by no means perfect, is sufficient for most purposes. The state as prosecutor in a criminal trial is normally distinguishable from the State as pursuer in a civil action. Definition in terms of the State as prosecutor is made easy in Scotland by the extreme rarity of private prosecutions, though these remain anomalous. Almost all prosecutions in Scotland are at the instance of the State, either in the person of the Lord Advocate, the official public prosecutor at common law and in many statutory offences, or of his deputies, or in the person of a 'prosecutor in the public interest' (1954 Act, s.77) such as a factory inspector or an official of the Customs and Excise Department (cf. Renton & Brown, p. 199). The criminal law is probably, therefore, sufficiently defined as that branch of the law which deals with those acts, attempts, and omissions, of which the State may take cognisance by prosecution in the criminal courts (cf. Hall & Glueck, p. 46).

The formal nature of crime.

The definition offered makes no reference to the content of the criminal law, or to the factors which determine which acts are made crimes. It is a purely formal definition applying only to the criminal law as it is, without reference to what it should be, or to why it is as it is. It embodies the view that murder and selling drinks outside licensing hours are both crimes for the same reason - they are forbidden by the criminal law. 'The criminal law is the formal cause of crime. Without a criminal code there would be no crime...questions involved in the formulation or amendment of a criminal code can be stated as what crimes do we wish to cause' (J. Michael and M. Adler, Crime, Law and Social Science, p. 2). There is no criminal code in Scotland, and the criminal law may still be capable of extension by judicial decision (see infra, pp. 17 ff) but the declaration as criminal by a Court of an act not formerly so characterised is not in this regard different from the enactment by a legislature of an addition to the criminal code. Both Court and legislature will be influenced by various moral and social considerations, but the act once made criminal will be criminal because it has been so made by Court or legislature and not because it is immoral or antisocial, or because of whatever other reason moved the Court or legislature to make it criminal. 'Acts are criminal not because they are harmful, but because they are deemed harmful by those who make or interpret the law' (M.R. Cohen, Reason and Law, p. 25). The criminal law is amoral in itself, however immoral or moral any of its provisions may be. 'The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with

penal consequences. Morality and criminality are far from coextensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality - unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle' (Proprietary Articles Trade Association v. A-G for Canada, [1931] A.C. 310, Lord Atkin at p. 324).

Crimes and offences.

The definition offered makes no distinction within the class of acts which the State may prosecute. Scots law has two common terms for criminal acts: 'crime' and 'offence'. But the terms are not clearly distinguished, and indeed are often used interchangeably (cf. T.B. Smith, p. 702), and even statutory uses and definitions are unhelpful.

The Interpretation Act of 1889 (52 & 53 Vict., c.63, s.28) tried to use them to translate into Scots legal language the rigid English distinction between felonies and misdemeanours, but did so very confusedly. 'Felony' was defined as 'high crime and offence' and misdemeanour as 'offence'.

The Prevention of Crimes Act, 1871 (34 & 35 Vict., c.112) designated certain types of conduct as 'crimes' and defined an 'offence' as 'any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction' (s.20). Section 7 of the Act makes it punishable for certain persons to be found in certain places 'about to commit ...any offence punishable on indictment...'. In Strathern v. Padden (1926 J.C. 9) the accused was charged under section 7 with being found about to commit one of the acts designated as crime. It was held that the term 'offence' in section 7 included acts defined by the Act

as crimes. Lord Sands said that the term 'offence' had been intended by the legislature for 'something which was not so serious as crime but which could be punished on indictment or summary conviction... Every crime is an offence, but every offence is not a crime' (at p. 14). The word 'offence' is used in this way in ordinary, and often in legal, language, but there is no rule for using the two terms, and no list of crimes or offences.

The two terms are not even consistently used to denote greater and lesser breaches of the criminal law. 'Crime' is defined by the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict., c.35, s.1), in a fashion more poetic than precise, as including 'high crime and offence, felony, crime and offence, offence and misdemeanour'. The Summary Jurisdiction Act of 1954 (2 & 3 Eliz. II, c.48, s.4) has a section headed 'Certain crimes not to be tried in inferior courts of summary jurisdiction', which goes on to list 'the following offences:- (a) murder, culpable homicide, robbery, rape ...' (s.4(2)(a)).

The reason for this confusion is just that the two terms do not have any effective difference in meaning; the general rules of the criminal law apply to all breaches of criminal law, whether they are described as crimes or as offences.

Mala in se and mala prohibita

The view that all breaches of the criminal law are formally equal is not held by the only modern Scottish textbook on the subject (Macdonald, p. 1). Macdonald restricts himself, as he is entitled to do, to crimes punishable by death, or by imprisonment without the option

of a fine. But he goes on to say of the offences thus excluded that 'Many such offences are not truly crimes, being made punishable to secure the health or comfort of the community' (Macdonald, p. 1). The criminal law is regarded as divisible into two sections; one deals with 'true' crimes, like murder, robbery, and rape, while the other is concerned with what are commonly called public welfare offences. These latter are offences created by statute and designed, not directly to preserve life or property, or even public order, but to ensure, for example, that only clean food will be sold to the public, or that there will be an equal distribution of certain commodities in times of scarcity. The 'true' crime is thought of as something evil in itself - malum in se, while the public welfare offences are not thought of as evil or immoral, but as being at best only technically crimes, punishable because they are forbidden by statute - mala prohibita.

The legal validity of the distinction.

The division of crimes into these two classes is a very old one in the history of criminal theory and must be considered in any study of criminal law, although it has been condemned by modern writers as untenable and unfortunate in its effect (see Hall, pp. 292-8), and has been described as 'unscientific and fallacious' (Kenny, para. 17); and the outlook it represents is more the concern of the sociologist than of the lawyer.

Mala in se and natural law. The distinction is not of importance to the lawyer because its terms are so vague as to be unusable. The idea of malum in se is not a legal idea at all, but a moral one. It belongs to the era of natural law theories when certain rights and duties were regarded as absolute, and a necessary part of any valid system of law. (cf. W. Friedmann, Legal Theory, 3rd Edn. Pt. 2). Certain

acts were thought of as being absolutely and immutably bad, since they were contrary to the 'law of nature'. These acts, it was thought, must be proscribed by any society, and might therefore be treated by any society as punishable, even if there were no specific law against them. This view has not merely become outdated because of the great growth in the number and scope of statutory offences; it is untenable in itself. There is probably no act which is absolutely and universally bad. 'Deliberate killing is not always murder; sexual intercourse by force and without the victim's consent is not always rape; the taking of another's property without his consent is not always theft; as witness the legally justifiable killing of a condemned criminal by an executioner, the exposure of Australian aboriginal women to sexual attack for violation of the sexual code, or the seizure of an allegedly immoral book by a customs officer' (A. Morris, 'The Concept of Crime' in *Criminology*, ed. Vedder, Koenig and Clark, p. 22). Such acts, are however, fairly generally agreed to be criminal, unless there are special circumstances removing their criminality. Once we pass from such basic crimes we find that ideas of what acts are wrong vary from society to society, and from time to time. Hume pointed out that the 'general spirit' of the criminal law 'will always in some measure, be bent and accommodated to the temper and exigencies of the times; directing its severity against those crimes which the manners of the age breed a direct abhorrence of, or which the present condition of the people renders peculiarly hurtful, in their consequences to private or public peace' (Hume, i. 2).

It must also be remembered that there may be acts which are abhorred by a society, and yet, for one reason or another, are not made crimes. The criminal law does

not include even all the local and contemporary mala in se of any time and place. It is not a crime in Scotland to refuse to pay your debts, or to trade as a prostitute, or to commit adultery (though this was once criminal).

Common law crimes and statutory crimes. The use of the phrase mala prohibita to describe crimes not mala in se suggests that the distinction is between crimes made illegal by statute and crimes recognised as wrong by the common law. But the suggestion that all common law crimes are mala in se, and all statutory ones not mala in se, will not bear even cursory examination. The moral attitudes to incest are not dissimilar in Scotland and in England, and indeed incest is considered wrong in almost every society. The Scots act of 1567 (c.15) which makes incest criminal may be regarded as merely declaratory, especially as it incorporates the 18th chapter of Leviticus. But incest was not a crime in England until 1909 (Punishment of Incest Act, 1908, 8 Edw. VII, c.45). Moreover, incest between bastard relations is not criminal in Scotland where incest is almost a common law crime (Alison, i. 565), but is criminal in England where the crime is statutory (Sexual Offences Act, 1956, 4 & 5 Eliz. II, c.69, ss. 10-11 re-enacting the Punishment of Incest Act, s.3).

'True' crimes and public welfare offences.

The distinction between crimes mala in se and crimes only mala prohibita cannot be dismissed summarily simply by pointing out its inconsistencies. It has persisted because it forms a convenient way of focussing a widespread and persistent attitude. This attitude is shown in an insistence that certain types of conduct punished by the law do not deserve to be called crimes,

and that those who behave in such a way do not deserve to be classed as criminals. The first meaning of 'crime' given in the New English Dictionary is 'An act punishable by law, as being forbidden by statute or injurious to public welfare. (Properly including all offences punishable by law, but commonly used only of grave offences)'. It is the common usage which is important here, and it approximates more closely to the dictionary's second definition, 'More generally: an evil or injurious act; an offence, a sin; esp. of a grave character'. The typical crime is a dastardly act causing hurt to someone in his person or his property, perpetrated by a rogue or a ruffian. In the words of the old Scots indictments a crime is something which 'by the laws of this and of every other well-governed realm' note the suggestion of malum in se 'is of an heinous nature, and severely punishable'.

The problem of the trivial offence. This usage breaks down when faced with the modern law. The words 'crime' and 'criminal' seem out of all proportion excessive when applied to petty statutory offences like parking one's car on the wrong side of the street. Common usage revolts at saying even that 'it is, for purposes of technical classification, no less a crime to be without an ashbin of the pattern prescribed by the County Council than to blow up the Houses of Parliament' (C.K. Allen, Legal Duties, p. 240). The law itself recognises this problem. 'There is a particular reluctance to use the expressions "crime" and "criminal" with reference to summary offences. This is because of the strongly emotive nature of those words which makes them unsuitable for minor transgressions. Statutes creating summary offences use the less condemnatory term "offence".' (Glanville Williams, 'On the Definition of Crime' in (1955) Current Legal Problems, p. 107, at p. 111). Someone who commits a crime is a criminal,

but someone who commits an offence is only an offender, which is much less reprehensible. Most people today are prepared to admit that they might be, or even have been, offenders, but would be indignant at the suggestion that they were criminals.

The problem of the respectable offender. The matter is more serious than one of linguistic hyperbole, of using the steamroller word 'crime' to crush the peanut of the parking offence. A man who steals sixpence may be regarded as a true criminal, and a man who cheats the income tax of £100 as perfectly respectable. The attitude represented by the distinction between the two types of crimes is important because it resents public welfare offences being treated as crimes. In this context 'public welfare offences' covers all offences which it is still considered respectable to commit. Though the denotation of the term will vary with the person using it, it would fairly generally be thought of as including, for example, smuggling, failing to pay one's national insurance contributions, dealing in at any rate certain types of black market, driving a motor car without a licence. The crux of the matter is a breakdown in rapport between public opinion and the law. It is not so much a question of the seriousness or triviality of the respectable offences as of their being somehow different in kind from the basic, 'old-fashioned' crimes. And the result of this difference is that they are committed by respectable people. So long as respectable people can do a thing without thereby losing their respectability, it will be difficult to regard that thing as a 'crime'. This attitude may even affect offences which would be considered 'true' crimes if committed in non-respectable circumstances by what a past generation might have described as 'members of

the criminal classes'. The law itself allows much greater carelessness on the part of motorists without charging them with culpable homicide than it does on the part of housebreakers, or than it did in the 19th century on the part of engine-drivers (cf. Paton, 1936 J.C.19; Wm. Paton and Richd. M'Nab, (1845) 2 Broun 525; see infra Ch.14). And even when charges of culpable homicide are brought against motorists convictions are difficult to obtain. Juries feel in such cases that 'There, but for the grace of God, go we'; and they also feel, as defending counsel emphasise, that it would be unfair to convict the careless motorist of culpable homicide, because to do so is to brand him as a 'killer', albeit only as a killer by negligence. The legislature has recently recognised this state of affairs and has created the statutory offence of killing someone by careless driving (Road Traffic Act, 1956, 4&5 Eliz. II, c.67, s.8), in the hope that juries who are unwilling to convict of the common law crime will be prepared to convict of the statutory offence, an offence which carries with it a maximum penalty as high as that normally awarded when juries do convict motorists of culpable homicide.

Culpable homicide has special features, but in the public welfare offences generally, the difficulty is that they are crimes which the community as a whole does not consider 'criminal'. There will perhaps always be groups of people who do not consider it reprehensible to commit certain crimes, who even consider it laudable to do so. For example, at one time the Mormons committed bigamy as a religious duty (cf. Reynolds v. U.S., (1878) 98 U.S. 145), and many religious and political groups have considered it laudable to break laws discriminating against them; on a lower moral level groups like soldiers or

dockworkers (see H. Mannheim, *Group Problems in Crime and Punishment*, ch. 2) may consider certain forms of dishonesty as permissible, or even as something in which they are entitled to engage. But the public welfare offences present us with the problem of a group of many heterogeneous offences which are not considered reprehensible by the bulk of the community, including those people who are looked on as 'pillars of respectability'.

The moral attitude to crimes.

The main reason for the distinction between the true crimes and the respectable offences is, it is submitted, that the latter are too different in content from the former to attract the same moral disapproval. Murder, robbery, rape, and the like, present simple and easily appreciated moral situations. We are all glad of protection against marauders, we all disapprove of rape, we all sympathise with the old lady who has her bag snatched by a young hooligan. As Hume the philosopher pointed out, sympathy with the victim is to a large extent the basis of our moral disapproval of the criminal and his misdeeds (cf. Hume, *Treatise on Human Nature*, III, iii, 2). The origin of such sympathy is an imaginative identification with the victim; in Shelley's phrase, 'the great instrument of moral good is the imagination'. We disapprove of assault because we know what it would be like to be assaulted, and can imagine the victim's pain. This imaginative identification becomes very difficult when the victim is not an individual, and where it is difficult to see where the pain or loss is being suffered. The typical 'true' crimes are crimes against individuals, their persons, property, or even honour. Imaginative

sympathy with the needs of the State, or of a bank, is difficult, and it is almost impossible to feel this sympathy with a town plan or with the purpose of an export control order, especially as these may deprive particular individuals in whom we are interested of their property or livelihood. Instead there can only be a reasoned view, arrived at after an intellectual appreciation of the situation, that the law is worthy of approval. (I am not concerned here with the problem of the morally bad law, but with a law which is ex hypothesi worthy of approval.) Many people are not capable of making this appreciation, and even those who are, are not affected by it as strongly as by their instinctive feelings about the simple crimes. And the longer the chain of reasoning, the weaker the final reaction.

We are used to the idea of stealing from a bank, but this is sufficiently like stealing from an individual for us to be able to carry over our disapproval of stealing to stealing from a bank. When we apply our minds to the similarities between stealing from a bank and from an individual we feel that stealing from a bank is a 'true' crime. But if we consider instead that the thief may be in dire need of the money, that the bank will not notice an odd few hundred pounds, that the bank will be insured against theft, and that it can always print new notes anyway, this clarity is somewhat dimmed. And if the bank is defrauded and not robbed, the initial analogy will lose some of its force - cheating is not on the whole considered to be as bad as stealing, just because it is more complicated and less brutal.

(The tendency to concentrate on the individualistic nature of crime is illustrated by the case of Foster

- 1932 J.C. 75 - where it was held that a wife who forged her husband's name on a cheque had committed a crime against him, in the same way as if she had stolen money from his pocket. The Court seized on this idea of individual loss in order to invoke the rule allowing a husband to give evidence against his wife if she is charged with a crime against him, and not even defending counsel seems to have taken the point that the crime was really one against the bank which would presumably be liable to credit the husband's account with the amount of the forged cheque.)

People who would neither rob nor cheat a bank will cheerfully cheat the Inland Revenue, or the Customs and Excise Department. (Cf. on this aspect of the matter, E.H. Sutherland, 'White Collar Crime', in 'Criminology', ed. Vedder, Koenig, and Clark, p. 172.) This is at least partly because, as Hume pointed out, 'the imagination is more affected by what is particular than what is general...we sympathise more with persons contiguous to us, than with persons remote from us' (Hume, op. cit. III, iii, 1). We are moved more by the sight of one beggar on our doorstep than by the thought of the starving millions of India.

The gap need not be spatial, it can also be consequential, as is illustrated by our attitude to Revenue offences. People who regularly give crumbs to birds may not regard themselves as criminals if, in days of rationing, they manage to persuade their grocer to give them more than their ration of butter; grocers who would not hurt a fly may sell unhygienic food without feeling that they are criminals; people who pay their debts punctiliously may bask in the approval of their equally punctilious friends as they tell how they smuggled watches through the Customs to give to their daughters for Christmas. Such

people view their acts in isolation, and do not consider their consequences on society in general, or what would happen if everyone behaved as they do - if indeed they consider their acts at all from the moral point of view.

This failure in public response to parts of the criminal law is not something new, brought into being by modern public welfare regulations. It seems in one form or other to be inherent in any complex society, which suggests that, at any rate in the modern world, the existence of public welfare offences may be almost as universal and necessary as that of 'true' crimes. Beccaria, writing in 1775, said of smuggling, 'This crime being a theft of what belongs to the prince, and consequently, to the nation, why is it not attended with infamy? I answer, that crimes, which men consider as productive of no bad consequences to themselves, do not interest them sufficiently to excite their indignation. The generality of mankind, upon whom remote consequences make no impression, do not see the evil that may result from the practice of smuggling, especially if they reap from it any present advantage' (Beccaria, pp. 133-4).

It is because public welfare offences do not excite moral indignation that they do not bring social disgrace to those who commit them. These people do not consider themselves criminals; if anything, they consider the law itself to be 'criminal', and indignation is directed against the law which makes the crime, and not against the crime. And when they seek a basis for their attitude the offenders may turn to the distinction between malum in se and malum prohibitum. This distinction does not reflect a difference in legal

quality but in public attitudes, and as such it is one which the legislator must bear in mind. To create a large number of offences which do not excite moral indignation may weaken general respect for the law and weaken the feeling, based in part on the coincidence of the basic crimes with moral prohibitions, that it is morally wrong to disobey the criminal law. The absence of public indignation may also make it inexpedient to punish public welfare offences in the same way as other crimes are punished, even if it is necessary to make them offences. For 'By inflicting infamous punishment, for crimes that are not reputed so, we destroy that idea where it might be useful' (Beccaria, p. 139), and courts may moderate their sentences accordingly.

On the other hand, punishing public welfare offences in the same way as other crimes may not lead to the other crimes being thought less infamous, but, on the contrary, lead the public to regard the public welfare offences as serious matters, and to feel indignant about them. Such a change in attitudes may presently be taking place with regard to certain road traffic offences such as reckless or drunken driving. These matters, however, are the concern of the legislator, the sociologist, and the penologist, rather than of the legal theorist.

The declaratory power of the High Court.

In Scotland, however, the legal theorist cannot ignore questions of criminal legislation altogether. For the High Court of Justiciary still retains a power to create new crimes, or at least to extend the scope

of old crimes, and so long as it does so, the way in which this power is exercised must be considered. The power was described by Hume as 'an inherent power... to punish...every act which is obviously of a criminal nature' (Hume, i. 12), and its continued existence has been specifically re-asserted in comparatively recent times (Sugden, 1934 J.C. 105, Lord Justice-Clerk Aitchison at p. 109; cf. T.B. Smith, pp. 700-1, 704-7).

General objections to the exercise of the declaratory power.

There are a number of objections to any exercise of such a power. These objections have greater practical force when directed against the creation of public welfare offences than when directed against the creation or extension of crimes thought of as mala in se and generally regarded with moral disapproval.

(i) The principle of legality - nulla poena sine lege. The main objection is that the exercise of the power infringes on the principle that no-one should be punished for an act which was not legally proscribed at the time he did it. It is not necessary that the accused should have known the act was criminal if in fact it was recognised by the law as criminal, so that the accused could have known it had he enquired - from this point of view the principle of legality is a corollary of the maxim ignorantia juris neminem excusat. The principle probably also requires that each crime should be capable of fairly precise definition, so that its application to any particular set of facts can be seen clearly. A man contemplating a course of action is entitled to due notice of the fact that it is criminal; otherwise it is unfair to punish him for having broken the law. The fiction that the Courts merely discover what has always been the law is here disregarded

in favour of the reality of judicial legislation; and indeed the fiction does not seem to have been called in aid by the Court to justify its exercise of the power. The principle of legality requires that penal legislation should not be retrospective, but the decisions of Courts are always retrospective.

The principle of legality has great force when applied to administrative offences, social regulations, and the like. It has much less cogency when applied to acts which arouse wide and strong disapproval. A good part of the strength of the principle rests on the assumption that had the accused known his act was criminal, he would not have acted as he did; that he acted in the belief that he was not breaking the law, or at least in ignorance of the fact that he was. This may be said plausibly of a crime like celebrating a clandestine marriage which involves 'no injurious consequences to person or property, and constitutes no distinct or palpable violation of public morals' (John Ballantyne, (1859) 3 Irv. 352, Lord Inglis at p. 360), and which is not 'so grossly immoral and mischievous on the face of it, that no man can fairly be ignorant of its nature, or ... settled by a course of experience, and become notorious, that such is its nature' (Bernard Greenhuff, (1838) 2 Sw. 236, Lord Mackenzie at p. 268). But the argument rings a little hollow when advanced by a man charged with violating the chastity of a sleeping woman, or with bribery. There might be legal systems in which these acts are not criminal, but an accused person can hardly be heard to say he thought there was nothing wrong with them; he should at least have enquired before committing them. The weakness, and indeed the danger, of the principle of nulla poena can be seen when it is used, as it has been,

to attack the propriety of the conviction of Nazi leaders for acts condemned as utterly evil by all civilised societies, and indeed characterised as 'crimes against humanity'.

(ii) The danger of turning the law into a political instrument. There is a fear that if the Courts have wide powers to declare criminal acts which are 'materially dangerous to public welfare', the law may become an arbitrary instrument of political power. If it were the law that any act thought by the Court to be contrary to public welfare was ipso facto criminal, the position would not be very different from that in totalitarian countries where Courts may declare an act unlawful if it is 'socially dangerous' (Russian Penal Code, 1926, referred to in Hall, p. 42) or contrary to the 'Gesundes Volksempfindung' (German Act of June, 28, 1935, see Hall, p. 42). This fear is perhaps not of practical importance in a parliamentary democracy with an independent judiciary. It is seldom expressed because it is hardly felt, but it underlies the almost instinctive dislike of a system which disregards the principle of legality. And it is perhaps worth remembering that the High Court declared combinations of workmen to be illegal in 1813 (Arthur Ferrier, 16, March, 1813, Hume, i. 496) after a series of differences of judicial opinion, only thirteen years before Parliament declared them legal (6 Geo. IV., c.129 s.4; cf. Hume, i. 496-7).

(iii) The usurpation of the function of Parliament. Where there is a parliamentary democracy the main objection to the power is that it constitutes a usurpation by the Court of the functions of Parliament. The common law today has evolved sufficiently to include all the major crimes, the graviora delicta (cf. T.B. Smith, p. 705),

and complex matters of social control are better dealt with by a Parliament guided by a Government with access to relevant information not available to the Courts, and with the right of an elected sovereign body to impose restrictions on the citizen's activities. Conversely, even where acts are generally recognised as wrong and worthy of public disapproval and punishment there may be reasons for not making them crimes. 'If Parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection' (Report of Royal Commission on the Draft Code, 1879, p. 10).

The legal position of the declaratory power.

The present position of the power of the High Court to declare acts to be criminal is not altogether clear. The best academic opinion is that it is confined to the condemnation of any new way that may be discovered of committing a recognised crime (see T.B. Smith, p. 701; W.A. Elliott, 'Nulla Poena sine Lege', (1956), Jur. Rev. 22). An example of this might be the commission of murder by hypnotising someone to throw himself into a river, or of theft by housebreaking by the use of electronic devices to open the house and extract the property. Judicial dicta however tend to assert the continued existence of the power in the form described by Hume (e.g. Sugden, supra), and to punish acts which have a 'tendency to corrupt public morals, and injure the interests of society' (Greenhuff, supra, Lord Justice-Clerk Boyle at p. 261; cf. Martin, 1956 J.C.1).

The difference between recognising a new mode of committing an old crime, and creating a new crime, is often largely one of degree, but some modern examples of the exercise of the declaratory power have important affinities with creation. Where the old crime is something specific and easily defined, like theft by housebreaking, there is little difficulty in deducing that a particular set of facts constitutes a form of committing it, without seeming to create a new crime. To decide that it is not housebreaking to enter by using a key found in the lock, but that it is housebreaking to use a false key (see Macdonald, pp. 26-9) requires nothing more revolutionary than the exercise of logical deduction. This is merely interpretation of the meaning of 'housebreaking'. But where the 'old' crime is described in very general terms as, for example, 'shamelessly indecent conduct' (M'Laughlan v. Boyd, 1934 J.C.19), the decision that a certain type of conduct falls under the definition is not so much a question of logic as of public policy, or of the moral attitude of the members of the High Court.

The present position of the declaratory power can best be evaluated by way of a consideration of the leading cases on the topic, from 1838 to 1956.

The case of Greenhuff. The classic case on the declaratory power is that of Bernard Greenhuff, decided in 1838 (2 Sw. 236). The charge was of keeping a public gaming house, and the High Court held, by a majority, Lord Cockburn dissenting, that this was a crime, as being something 'tending to corrupt public morals and injure society' (Lord Justice-Clerk Boyle at p. 261), and as an example of an act 'mala in se by the laws of God and morality' (Lord Meadowbank at p. 262).

The most interesting and important judgement is that of Lord Cockburn, and his dissent has been regarded as expressing the modern law (T. B. Smith, loc.cit.). Not the least important thing about it is that it was given at all. That the High Court should solamnly condemn as criminal, immoral, socially injurious, and malum in se, an act which one of their own number did not think should be a crime, clearly showed the danger of the declaratory power. This division of opinion, following as it did on the legalisation by Parliament of workmen's combinations which the High Court had declared illegal (cf, supra,) must have brought the exercise of the declaratory power into some disrepute, and made the Court very chary of using it in future. Workmen's combinations at least had conjured up the spectre of Jacobinism, but it is difficult to believe that people who had lived in Regency Edinburgh Society regarded gambling with any great moral indignation: nor was it clear why public gambling should be malum in se and private gambling innocuous.

Greenhuff was an example of social regulation by a majority of the Judges of the High Court, interfering with the business and pleasure of the people in the name of God and morality. As the body of Parliamentary legislation grew, so did the force of Lord Cockburn's view that the Court should confine the exercise of the declaratory power to facts falling 'within the spirit of a previous decision or within an established general principle' (at p. 274). Although the general principles invoked have sometimes been rather wide the Courts have in the main followed this course. In a parliamentary system like the British there is little scope for judicial regulation of social conditions of the kind which has affected American racial and labour

laws (cf, W.A. Elliot, op.cit.). Exercises of the declaratory power have been wider in the 20th century than in the 19th century after Greenhuff, but they have not, with the possible exception of the case of M'Laughlan v. Boyd (1934 J.C. 19), been concerned with general social issues.

The 19th century cases. The most important post-Greenhuff case is that of Wm. Fraser in 1847 (Ark. 280), in which the accused contrived to have sexual intercourse with a woman by pretending to be her husband. He was charged with 'Rape; as also Assault with intent to ravish; as also Fraudulently and Deceitfully Obtaining Access to and having Carnal Knowledge of a married Woman by pretending to be her husband'. All the judges were satisfied that this act though 'hitherto ..unknown in the annals of this Court' (Lord Medwyn at p. 307), was a crime. The only difference of opinion was whether it was rape or fraud, and the majority of the Court held that it was fraud. The circumstances are more like rape than fraud, (Parliament later declared them to be rape - Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, s.4) and one would expect them to be treated either as a way of committing rape or as a new crime. The Court, however, were in a dilemma. They were unwilling to characterise the accused's actings as rape because rape was then, at any rate technically, a capital crime, and they were unwilling to extend the scope of the death penalty. But they did not want to create a new crime, because they accepted Lord Cockburn's view that 'we are not entitled to create, or to aggravate, crimes, by fanciful analogies or speculative expediency' (at p. 307). The

analogy between Fraser's actings and fraud may be thought to be more fanciful than that with rape, but the Court relied on the principle that, 'Any deceit that injures and violates the rights of another, is clearly punishable' (Lord Cockburn at p. 312). In the result, Fraser was convicted of what was at least a new species of fraud, and was sentenced to twenty years' imprisonment (Ark. 329). In this way the difficulties were reconciled - no new crime was created, no extension was made of the scope of the death penalty, and Fraser received his just deserts.

The case shows the Court's reluctance to declare an act criminal just because of its immorality, even where the honour of an individual has been injured in a way clearly accepted by society as malum in se, as a proper case for punishment. The Court chose fraud rather than rape as the crime, not because fraud is a less specific crime, nor because to declare something a type of fraud is less like creating a new crime than to declare it a type of rape, but because they did not wish to convict Fraser of a capital offence.

A similar problem arose in the case of Chas. Sweeney in 1858 (3 Irv. 109) where the charge was of rape or of 'wickedly and feloniously having carnal knowledge of a woman when asleep and without her consent'. This is now called 'clandestine injury to women' (Macdonald, p. 120; Grainger and Rae, 1932 J.C. 40,41), but this crime was not created in Sweeney. For the same reasons as applied in Fraser (supra) the majority of the Court refused to regard the facts as amounting to rape. They did not, however, say that they formed a new crime; they said instead that they were a way of committing an old one, although they were not over-happy about which old one, and safeguarded themselves

by saying that the facts could be brought within the scope of more than one known crime (Lord Deas at p. 146, Lord Justice-General M'Neill at p. 154). On the whole, the Court seemed to think it was a form of indecent assault (Lord Justice-Clerk at p. 138, Lord Justice-General at p. 154), but did not consider the argument that an indecent assault involving penetration was rape.

In two other cases the Court took the view that the declaratory power was exerciseable only where there was shown to be injury to person or property. In John Ballantyne, in 1859 (3 Irv. 352), they refused to regard the celebrating of a clandestine marriage as a common law crime, since it involved no such injury. In Geo. Holmes and Edmund Lockyer ((1869)1 Coup. 221) it was held to be a common law crime to 'open, intercept or detain' a letter in the post. This decision may be debateable, but it proceeded on the view that the crime was 'a breach of the law of property', as well as of a 'law of society requiring that [Post Office communications] should be sacred in the name of delivery' (at p. 237). Language like 'the protection of communications entrusted to the Post Office is of the highest importance to society' (ib.) does, however, foreshadow the broader approach of some of the more modern cases.

The 20th century cases. The continued existence of the declaratory power has been asserted in recent times (Sugden, 1934 J.C. 105, Lord Justice-Clerk Aitchison at p. 109; Martin and Ors., 1956 J.C.1), but the power has not been used explicitly to create new crimes or extend old ones. On the contrary, there are cases in which the Court expressly refused to exercise the power. In Semple (1937 J.C. 41) the Court refused to create the crime of administering abortifacients

to a non-pregnant woman with intent to cause an abortion holding that to declare even such obviously immoral conduct to be criminal would be to usurp the function of the legislature. In Quinn v. Cunningham (1956 J.C. 22) the Lord Justice-General observed that it was for Parliament and not the Courts to make it a crime to ride a pedal cycle recklessly (at p. 25 - Parliament did make it criminal in the Road Traffic Act, 1956, 4 & 5 Eliz. II, c. 67, s.11). Finally, in Martin and Ors. (1956 J.C. 1), Lord Cameron explicitly stated that in treating an attempt to defeat the ends of justice by arranging the escape of a prisoner from a working-party outside the prison walls as criminal, he was not exercising the declaratory power.

Despite this strong body of authority there are a number of cases in which what was done was tantamount to an exercise of the power, although technically the power was not exercised (most of the cases started as summary complaints), and no explicit reference was made to it. Apart from the cases of Strathern v. Seaforth (1926 J.C. 100) and M'Laughlan v. Boyd (1934 J.C. 19), the cases concern offences against the administration of justice, and the Courts have dealt with the conduct brought before them by treating it as a form of the crime of hindering the course of justice, although there are suggestions in some of the cases that the crime of which the conduct was an example was an even vaguer one - something like the crime of acting contrary to the public interest. It is submitted that hindering the administration of justice is not a crime, but a quality of certain acts which may make them criminal, and that accordingly in

declaring conduct to be criminal because it possesses this quality the Court are in effect creating new crimes. To declare acts criminal merely because they are contrary to the public interest would, of course, go much further than this, and would clearly constitute an interference with the function of the legislature; it would also go much further than the ratio of Greenhuff (supra) which requires the conduct to be clearly immoral, and would give the High Court power to declare acts mala prohibita which were not even alleged by the Court to be mala in se.

Strathern v. Seaforth. This case (1926 J.C. 100) is the clearest example of the exercise of the power in this century although the power was not referred to by any of the Judges in the case. (The case was referred to by Lord Aitchison in Sugden - 1934 J.C. 105, 109 - as an exercise of the power.) The accused had taken another person's motor car away clandestinely and in the knowledge that the owner would not have permitted him to do so, but with the intention of returning it after a short while - i.e. without any intention of stealing it. Defence counsel argued that the facts constituted furtum usus, a recognised type of conduct which was not criminal by the law of Scotland (cf. T.B. Smith, p. 746), but the Court did not rely on the analogy with furtum usus and did not decide whether furtum usus was a crime in Scotland. The decision that the facts constituted a crime did not depend on their being a species of theft at all, but simply on the necessity of stopping people from behaving as the accused had done - i.e. very nearly on the ground that such actings were contrary to the

public interest, or at any rate the interest of car owners! As Lord Alness said, 'In these days when one is familiar with the circumstances in which motor cars are openly parked in the public street, the result [of holding that the facts did not constitute a crime] would be not only lamentable but also absurd. I am satisfied that our common law is not so powerless as to be unable to afford a remedy in circumstances such as these' (at p. 102). This decision anticipated section 28 of the Road Traffic Act, 1930 (20 and 21 Geo. V, c.43), a fact which may be regarded as a justification of the decision, or as an indication that the Courts were usurping the function of Parliament. It is true that the offence was one against property, but the facts can hardly be said to constitute a new way of committing an old offence - if it was not a crime to borrow a horse and cart without the owner's permission, and no authority was produced in Strathern to suggest that it was, to make it a crime to borrow a car without permission was to create a new crime. No doubt the car-borrowing involved stealing the petrol used on the 'joy-ride' (cf. Lord Hunter at p. 102) but that was not made part of the charge.

M'Laughlan v. Boyd. In this case (1934 J.C. 19) there were two groups of charges, both arising out of homosexual conduct. The first consisted of charges of indecent assault, and as to these there is no dispute - indecent assault is clearly a crime, or rather a recognised aggravation of assault. The second group consisted of charges of using 'lewd, indecent and libidinous practices' by 'seizing' the other man's hand and 'placing it' on the accused's private parts. The language even of this second

group is suggestive of assault, as is that of the Lord Justice-General, Lord Clyde, in denying that it is the law that 'indecent conduct committed by one person upon another only constitutes a crime when the victim...is below the age of puberty' (at p. 22). But the decision that the charges in the second group were relevant and constituted common law crimes was reached by adopting a statement in Macdonald that 'all shamelessly indecent conduct is criminal' (Lord Justice-General at p. 22. The passage appears in the first - 1867 - edition of Macdonald, so that it can be said that M'Laughlan did nothing new. But Macdonald gave no authority for the statement). Although the facts constituted an offence under the Criminal Law Amendment Act, 1885 (48 & 49 Vict, c.69, s.11), this was not regarded as evidence of their criminality; on the contrary, it was argued that the creation of the statutory offence showed that the behaviour was not criminal at common law. The existence of the statutory offence may, however, have made it easier for the Courts to regard the accused's behaviour as criminally indecent.

The only other reference to authority was to Hume's 'broad definition of crime - a doleful or wilful offence against society in the matter of "violence, dishonesty, falsehood, indecency, irreligion"' (Lord Clyde at p. 23; Hume, i. 22), which is no more than a description of the characteristics of the specific acts which are (or, rather, were in Hume's day) regarded as criminal. It does not follow from the fact that all crimes are offences against society in one of the ways listed (assuming that this is the case) that any offence against society in one of these ways is a crime.

M'Laughlan is open to the objections that it is a usurpation of the function of Parliament, and that its ratio is so wide as to infringe the principle of legality. It is true that indecent conduct arouses moral indignation, but it is notorious that there is no general agreement on what forms of sexual behaviour are indecent. Nor is it clear what 'shamelessly' means; the question of the publicity or privacy of the behaviour was not considered in M'Laughlan, and 'shamelessly' can only be considered as an opprobrious epithet: it means no more than that the conduct shocks the Judges so much that they will not tolerate it. 'Shamelessly indecent conduct' is 'conduct which is so indecent that the High Court will not tolerate it'. But it is impossible to know just what conduct the High Court will tolerate. There has, for example, been no recorded prosecution for lesbianism, and such behaviour is not thought to be criminal, but it could be described as shamelessly indecent: it was described in 1811 as being 'a crime so infamous that it never before was heard of in this country' (Woods & Pirie v. Gordon, 1811, Moncrieff Papers - a slander action).

A recent Royal Commission has recommended that conduct such as that in M'Laughlan when occurring privately between consenting adults should not be punishable (Report of Royal Commission on Homosexual Offences and Prostitution, 1957. Cmd 247, para. 355(i)). This recommendation was made after prolonged investigation and consideration; M'Laughlan was decided after a short debate in which none of the wider issues was discussed. This indicates the unsuitability of dealing with such matters by means of judicial

decision. If the recommendation becomes law what will be the effect on M'Laughlan? If, as is not impossible, Parliament merely repeals section 11 of the 1885 Act without any specific reference to the common law, will conduct which Parliament considers should not be punishable remain a crime at common law because three Judges thought it was shamelessly indecent?

Offences against the administration of justice.

In Logue (1932 J.C. 3) it was held that to bribe a member of a licensing Court was to commit the crime of bribing judicial officials. It hardly needed the declaratory power to do this, since all that was necessary was to show that a licensing Court was a judicial body, but the Lord Justice-General described the crime as 'an offence against the course of public justice', a very wide description, which sets the tone for the later cases.

In Dalton (1951 J.C. 76) the accused tried to persuade someone to refrain from giving the police certain information which would have incriminated the accused. The charge was brought as one of attempting to pervert the course of justice, and the Court had no doubt that the facts - an attempt to eliminate or destroy evidence - amounted to this crime. 'Perverting the course of justice' is not so vague as 'acting contrary to the public interest', but it is vaguer than 'bribing a judge': it is not so much a specific crime as the name of a group of crimes of which bribery of a judge, and suppression of evidence, are particular examples. The commonest crime in this class is subornation of perjury, and the facts in Dalton can be regarded as a form of subornation.

They represent a considerable extension of that crime however, from persuading someone to give false evidence on oath to persuading someone to refrain from giving information to the police. This extension may, it is submitted, be an over-simplification, if only because there is a distinction between giving false evidence, and not giving evidence at all - omissions are always less clearly punishable than acts.

Dalton was at least an example of an attempt to pervert justice, and it can hardly be doubted that it is proper for the Courts to punish all such endeavours. Two other modern cases, it is submitted, go much further than Dalton, and shift the emphasis from the perversion of justice to the vaguer idea of acting contrary to the public interest, although still in connection with statements to the police. In neither, nor in Dalton, was any explicit reference made by the Court to the declaratory power.

In Kerr v. Hill (1936 J.C. 75) the accused was charged that he falsely represented to the police officers that a 'bus belonging to a particular company had knocked someone down, and 'did cause officers...maintained at the public expense for the public benefit to devote their time and services in the investigation of said false story...and did temporarily deprive the public of the services of said officers and did render the lieges and particularly drivers [of the company in question] liable to suspicion and accusations of driving recklessly'. Lords Morison and Fleming treated the case as an example of the established crime of making false accusations, although no individual was named by the informer, and

no information was given that any crime had been committed, merely that someone had been knocked down by a 'bus. Lord Clyde proceeded on a wider ground. He said, 'Great injury and damage may be caused to the public interest, which is mainly to be regarded, by a false accusation'(at p. 75). The essence of the crime was said to be 'that the criminal authorities were deliberately set in motion by a malicious person by means of an invented story'(at p. 76).

The presence of malice cannot be regarded as crucial; lawful actings, however malicious, are not criminal. In Gray v. Morrison (1954 J.C. 31) there was no malice, and indeed there can hardly have been a less heinous offence in the history of the common law. Gray was visiting a friend, and to save the friend the trouble of driving him home said falsely that he had a cycle with him which he had left outside. His friend insisted on accompanying him to the cycle, and on discovering its absence suggested that they should report the matter to the police. Gray was caught in his own toils, and agreed to report it. He accused no one, and said he did not wish any action to be taken or investigations made. As a result of his social faux pas Gray was charged that he did 'cause officers...maintained at the public expense for the public benefit, to devote their time and service in the investigation of the said false story told by you and did temporarily deprive the public of the services of said officers and did render the lieges liable to suspicion and to accusations of theft'. Gray pleaded guilty and appealed only against his sentence of fourteen days' imprisonment which was reduced to a fine. In disposing of the appeal, Lord Cooper, the

Lord Justice-General, said, 'I have no doubt that... an offence within the sense of Kerr v. Hill was committed'. He also explained that 'the gravamen of the charge is... the deliberate setting in motion of the police authorities by an invented story' (at p. 34). The form of the indictments in Gray and Kerr with all their bureaucratic pomposity suggests that in the eyes of the authorities the gravamen of the crime was wasting the time of public officials, and Gray opens the door to making that a crime, not as a statutory offence, but as a common law crime. More importantly, the dicta in Kerr and in Gray suggest that the High Court is prepared to declare acts criminal on the vague ground that they are contrary to the public interest.

The distinction between creation and extension can be illustrated by reference to the case of Martin and Ors. (1956 J.C. 1). The charge was of absconding from lawful custody and attempting to defeat the ends of justice, the facts that the three accused formed a plan to effect the escape of one of them who was undergoing a prison sentence, while he was in a working-party outside the prison walls. This could have been dealt with as an extension of the recognised crime of prison-breaking by interpreting 'prison' as including any place where a prisoner was under lawful custody (cf. Prisons (Scotland) Act, 1952, 15 & 16 Geo. VI, and 1 Eliz. II, c.61, s.12(b)), but Lord Cameron rejected this approach. He pointed out that prison breaking was not libelled, and that Hume and Alison both deal with prison-breaking as a species of the genus of offences against the course of justice (cf. Hume, i. 401, Alison, i. 555). He quoted Alison's statement that prison-breaking is 'a violation of the order and course of justice, and a direct infringement of regulations essential to the peace and well-being

of society' (Alison, loc.cit.), and went on to say, 'What is libelled in this indictment is very plainly an attempt to hinder the course of justice and frustrate its ends by seeking to assist a sentenced criminal to escape or evade the penalty of his crime. That is an offence against public order and against the course of justice...what is libelled here is but one species of a well-recognised and undoubted genus of crime' (at pp. 2-3).

To treat an act as a species of a genus of crime is not, it is submitted, the same as to treat it as a new way of committing an old crime. Hypnotising someone to drown himself would be a crime because it would be a new way of committing murder, not because it would be a species of the genus of crimes against the person: it is a sub-division of murder, not an independent species of crime like rape, or assault. It is submitted that the correct approach in Martin would have been by way of the crime of prison-breaking which Alison regards as an independent crime and not just as a way of committing the crime of infringing the well-being of society (Alison, i. ch. xxvii), and that Lord Cameron's argument jumps a vital logical step in passing directly from offences against public order to the particular facts libelled. This step is hinted at in the indictment which talks of 'defeating the ends of justice by escaping from legal custody', and was made more explicit in the earlier case of Turnbull (1953 J.C. 59) which charged the accused with effecting an escape from lawful custody to the hindrance of the course of justice. (The accused pleaded guilty so that the question here considered was not discussed.)

Conclusion. It is submitted that to declare something criminal because it is an 'infringement of regulations essential to the well-being of society' and at the same time to deny that one is exercising the declaratory power of 'innovation or extension' (Martin, supra, at p. 4) is contradictory. To treat the infringement of such regulations as a crime is to commit a type-fallacy - it is not a crime, it is rather a quality of actions which makes them proper subjects of punishment. Alison recognised this when, immediately after the passage quoted by Lord Cameron he added, 'It has, accordingly, always been regarded as a point of ditty by our common law' (Alison, i. 555). In other words prison-breaking is a crime because it infringes the order of society, it is not an example of the crime of infringing the order of society. In declaring any behaviour to be criminal because it infringes this order, the Court is acting in the same way as a legislature which declares such behaviour criminal for the same reason; it is doing much more than extend the meaning of a known crime by means of interpretation.

It is true that in doing so the Courts are restricting themselves to cases 'within an already recognised principle' (T. B. Smith, p. 701), but the principle, it is submitted, is one of politics or sociology, rather than of law. If danger to public order is enough to make an act criminal, there is no need for the body of law exemplified by Fraser (1847) Ark. 280)) and Sweenie ((1858) 3 Irv. 109), which is concerned to discover if the facts of a case fall under the head of one specific crime or another, if indeed there is any need to have specific crimes at all. The attitude suggested by Martin is wider than that of

Hume who says the Courts may punish 'acts obviously of a criminal nature' (Hume, i. 12). This may be circular, but 'obviously criminal' does suggest restriction to crimes similar to the basic crimes against person or property. So does the later 19th century attitude which is summed up by Lord M'Laren's observation in Coutts ((1899) 3 Adam, 50, 59) that 'By a new crime is meant...a crime consisting in some mode (hitherto unknown) of dealing unlawfully with the person or property of another'.

It must be added that there is in fact no sign of any dangerous setting up by the Court of itself as the guardian of public interest; its bark in this matter is worse than its bite, and even its bark is not very explicit. But the practice of exercising the declaratory power while not appearing to do so, - and indeed disclaiming the intention of doing so - by confusing specific crimes with the groups to which they belong, or with the reasons for their being made crimes, is logically objectionable and contains in itself the seeds of abuse, seeds which will of course remain infertile so long as this reasoning is restricted to cases like Martin which do not call for use of the power at all.

Chapter 2: Responsibility in General

This chapter deals in a general way with the more important of the concepts which are employed in discussions of criminal responsibility. It does not present a philosophy of responsibility, nor does it discuss all the difficulties involved in the use of words like 'responsible', 'voluntary', and so on. It is only a brief and rather superficial introduction in order to clear the ground for the analysis of the law which follows. It is important that lawyers should appreciate the philosophical and linguistic difficulties and backgrounds of the words they use, and this chapter is an attempt to sketch these in.

Legal and moral responsibility

The ascription of responsibility.

The concept of responsibility, as used in the law, is not a simple characteristic of persons as, for example, are whiteness, and height, or even drunkenness. Its use in sentences like 'He is a responsible person', 'He is a man in a position of responsibility', or 'The judgment of responsible men', is, for our purposes, a secondary one. When a man is referred to as responsible in that way, he is being pointed out as the sort of man who is capable of weighing up the various factors in a situation, of sizing up alternatives, of acting dispassionately and with a proper appreciation of all the complexities and consequences of the situation. In this sense, 'responsible' is a word of praise, and refers to a quality of character. A responsible man

is one who is not irresponsible, flighty, prejudiced, or mad. This use is clearly distinct from the use of the word in sentences like, 'Who is responsible for this accident?' Being a responsible person in the secondary sense is like being wise, or careful, or angry, it involves having a particular disposition, being a certain type of man; being responsible for an accident is something quite different.

The responsibility of A for a situation S, can only be decided by a consideration of the characteristics of S - which may include A's actions and state of mind - and is quite independent of his responsibility for S1, unless S and S1 are causally connected. The man who is responsible for setting a house on fire may be responsible therefore for the consequent death of its inhabitants, but this responsibility is quite separate from his responsibility for, say, a motor theft committed by him some years earlier. Responsibility refers to a particular situation. 'In this situation, seeing that the car was going too quickly, and the lorry was on the wrong side of the road, both drivers are responsible for the accident', is a typical responsibility statement.

Responsibility for an accident is not, however, a characteristic of the situation in the same way as is driving at 40 miles an hour, or failing to keep a proper look-out. Two observers can agree about all the factual characteristics of a situation, including the state of mind of the actors, and can agree that their review of the facts is exhaustive, and yet disagree about the responsibility for the situation, without either feeling that he is contradicting himself (cf. A. J. Ayer, 'On the Analysis of Moral Judgments' in *Philosophical Essays*, p. 231). For responsibility is something

additional to the facts of the situation; it is not one of them, nor is it something logically deducible from them. To say 'A is responsible for S' is not to describe A or S, or any part of S; it is to ascribe to A responsibility for S. This ascription is made after reviewing the facts of S in the light of certain principles of responsibility, but A's responsibility is not one of the facts of S.

The amorality of legal responsibility.

The principles of responsibility may be such that responsibility for a given situation can be decided in advance. If a teacher singles out one boy in his class, and says 'I am going out of the room and I shall hold you responsible for any noise there may be in my absence', he is making known his decision to ascribe responsibility to that boy for any noise, whatever the circumstances of the noisy situation, and however little that boy had to do with it, or however unable he was to prevent it. It is not meaningless or contradictory to say to someone, 'I know you are in no way to blame for this situation, but I am going to hold you responsible for it none the less', however morally reprehensible such an attitude may be. And a person can himself assume responsibility in advance, as Judah did for the safety of Benjamin (Gen. 43, 8-9). Such arbitrary ascriptions of responsibility can be made into rules. The rules of a school may say that in any disturbance the senior boy present will be held responsible, the rules of an army may say that a particular officer is responsible for the cleanliness of a particular barrack room. If then, there is a disturbance, or if the barrack room is dirty, the headmaster, or commanding officer, may mete out the appropriate punishment to the person declared by

the rules to be responsible, however lacking that person may have been in moral blame for the situation.

Legal responsibility rests in the last resort on the same basis as that of the senior boy or the officer in charge of the barrack room in the above examples. Whether or not it is a good thing for a legal system to hold a man responsible for his wife's debts, his partner's contracts, or his servant's carelessness, there is no logical objection to its doing so. Statements of responsibility are not statements of fact, and are not true or false.

'The senior boy in any class is responsible for all noise made by the class' is a statement of intention, of the rule-maker's intention to hold the senior boy responsible for any noisy situation. Particular applications of the rule such as 'A is responsible for the noise made last Tuesday', are only true or false in the sense that if A was the senior boy in the class which made the noise the rule is being properly applied, while if he was not, it is being improperly applied. What is true is that the school rules make the senior boy responsible, and we cannot go on to ask if he is 'truly responsible'. He may not be legally or morally responsible, but he will be responsible under the school rules. In the same way a person will be legally responsible for a particular situation if the appropriate legal rule properly applied to the situation results in his being regarded as responsible, and this will be so whether or not the rules of morality, or religion, or any other principles or rules, also regard him as responsible in the given situation.

Responsibility and liability. Despite the above it remains true that 'responsibility' is often used to mean moral responsibility, and also that legal responsibility often coincides with moral responsibility. In view of this it would probably be advantageous not to use the term 'responsibility' at all in a legal context, but to talk instead of liability or amenability to law, or of punishability, or to use some other concept which does not possess the moral overtones of 'responsibility'. The most suitable word is 'liability', so that 'criminal responsibility' would be replaced by 'liability to legal punishment'. Such a usage would clarify the discussion of certain problems, such as those of the relationship between insanity and criminal responsibility, and of the problem of responsibility for certain statutory offences which may be committed quite independently of any moral culpability.

There are, however, two reasons for not adopting the proposed usage, and for continuing to talk of responsibility in legal contexts. The first is that 'responsibility' is syntactically more convenient than 'liability'. A person who is 'liable' must always be liable to something, such as a penalty. We can say that 'A is responsible for S', but we cannot say that 'A is liable for S' without adding to what it is that he is liable. 'Responsible' is a shorthand way of saying 'liable to be called to account' (N.E.D.). There is also a sense in which 'liability' can be used to mean something secondary to 'responsibility'. If A kills X out of premeditated malice, and B kills Y as the result of gross provocation, each is responsible for the death of his victim, but A is liable to more

severe punishment than B. This usage may or may not be logically impeccable, but again, it is syntactically convenient.

The second reason is simply a matter of convention. There is no fixed usage, but 'responsibility' seems more common, especially among Judges, and it is enshrined in the phrase 'diminished responsibility' although an abnormality of mind resulting in mitigation of punishment would be more accurately described as 'diminished liability to punishment'. (Mr. J.W.C. Turner talks of 'responsibility' in his 1958 edition of Russell on Crimes, and of 'liability' in his 1958 edition of Kenny's Outlines of Criminal Law. Glanville Williams talks of 'legal responsibility' - Gl. Williams, para. 10 - and both he and Professor T. B. Smith talk of 'vicarious responsibility' - Gl. Williams, ch. 8; T. B. Smith, p. 708 - so that, on the whole, 'responsibility' seems more common. The Homicide Act of 1957 - 5 and 6 Eliz. II, c.11, s.2 - adopts the term as well as the concept 'diminished responsibility' and talks also of 'mental responsibility'.)

Accordingly, while emphasising that the ascription of responsibility by the criminal law is logically independent of moral responsibility, or blameworthiness, I shall use the word 'responsible' instead of 'liable to punishment' or 'liable to be called to account by the criminal law', though I shall try to avoid using the word at all, so far as possible.

The moral nature of the criminal law. The rules regarding responsibility in the common law of crimes rest in fact almost entirely on moral ideas of praise and blame. The general rule in criminal law is that the person who is legally responsible for any situation is the person who is to blame for it. Thus while at common law the civil law ascribes responsibility

to an employer for all his servant's actings in the course of his employment, even if they are criminal, unknown to the employer, and contrary to his interest (e.g. Lloyd v. Grace, Smith & Co., [1912] A.C. 716), the criminal law only makes the employer responsible at common law where he can be said to be morally responsible, for example, because of his failure to deal with a situation whose dangerous potentiality was known to him (cf. Paton and M'Nab, (1845) 2 Broun 525, 534). 'Penal law is concerned with social harms which include moral culpability as an essential element whereas torts deal with individual damage which need not have been effected by morally culpable conduct' (Hall, p. 213). Accordingly, at common law, 'Who was criminally responsible?' usually means 'Who was to blame?': there is 'no idea of a crime without guilt in the mind of the criminal' (John Grant and Ors., (1848) J. Shaw, 17, Lord Cockburn at p. 111).

The moral nature of the common law of crimes is not a matter of logical necessity or of the definition of crime, but is a matter of fact, and of social policy. The common law has this moral quality because one of its functions is to represent the moral outlook of the community, and to inflict punishment where that moral outlook considers punishment to be appropriate. This does not mean that the law cannot create crimes and ascribe criminal responsibility quite independently of moral guilt; such ascriptions are often made in statutory crimes, and are sometimes made by the common law itself. But because of the close connection between the common law of crime and ordinary moral judgments it is justifiable to ask in such cases, not, of course, whether the person held responsible is

'truly' so, or has 'really' been guilty of a crime, but whether the criminal law ought to depart from ordinary moral standards; and it is also justifiable to criticise any rule of the criminal law from the standpoint of ordinary morality in order to determine if the rule is good, while conceding that it is in fact a rule of law.

Voluntary actions

The minimum requirement of moral responsibility is that a man can be held responsible for a situation only where it has been caused or contributed to by his acts or omissions: a man cannot be blamed for something he did not do. This is not a sufficient requirement, but without it there can be no question of moral responsibility at all. A man is responsible only for his own acts or omissions, but he is not responsible for all of them; in particular he is only responsible for such of them as are voluntary.

Voluntariness is best treated as a negative quality, involving the absence of whatever factors are regarded as preventing an act from being regarded as voluntary. The person who claims that a particular act is voluntary does not have to prove that it was; it is for the person who says that the act was involuntary to point to the presence of one of the factors which exclude voluntariness. 'To say that a man acted voluntarily is in effect to say that he did something when he was not in one of the conditions specified in the list of conditions which preclude responsibility' (Nowell Smith, *Ethics*, p. 292). These conditions have usually, since the time of Aristotle, been treated under two headings: compulsion and ignorance.

Compulsion.

Whether or not compulsion is present to such an extent as to exclude voluntariness is a question of degree in every case. Clearly if A's hand is gripped by a person much stronger than he, and placed on a trigger and so moved as to fire a gun, and A is unable to resist the compulsion, the shooting is not A's voluntary actions, and he is not morally responsible for any resultant injuries. The shooting is not in any important sense the act of A at all, it is the act of the person who placed A's finger on the trigger - A is only an innocent agent, no more involved in the crime than is a postman who delivers a parcel containing poison or a time bomb. But if someone signs a discharge or opens a safe because there is a gun in his back and he is afraid for his life, the position is not so clear. His act is not perhaps indisputably voluntary, but he does choose to sign the deed or open the safe, in a way that A cannot be said to choose to fire the gun.

This difficulty was recognised clearly by Aristotle in his treatment of compulsion. He said,

'An act, it is thought, is done under compulsion when it originates in some external cause of such a nature that the agent or person subject to the compulsion contributes nothing to it. Such a situation is created, for example, when a sea captain is carried out of his course by a contrary wind or by men who have got him in their power. But the case is not always so clear. One might have to consider an action performed for some fine end or through fear of something worse to follow. For example, a tyrant who had a man's parents or children in his power might order him to do something dishonourable on condition that, if the man did it, their lives would be spared; otherwise not. In such cases it might be hard to say whether the actions are

voluntary or not....Such actions partake of both qualities, though they look more like voluntary than involuntary acts. For at the time they are performed they are the result of a deliberate choice between alternatives.' (Nich. Ethics, III, 1, pp. 77-8).

Aristotle reaches the tentative conclusion that 'an action is compulsory only when it is caused by something external to itself which is not influenced by anything contributed by the person under compulsion' (ib. pp. 79-80). This restricts the sphere of compulsion to cases like that of the woman physically compelled to squeeze the child she is carrying, because of an assault made on her (cf. Hugh Mitchell, (1856) 2 Irv. 488), or the careful driver who loses control of his car because of the sudden attack of a swarm of bees. (cf. Hill v. Baxter, [1958] 1 Q.B. 277, 283). Such cases are extreme, and it is possible to speak of them as cases where the compelled person does not act at all. In one case, for example, it was held that a van driver whose van was blown by the wind into a lamp-post was not guilty of accidentally damaging the lamp-post, because the damage had not been caused by his actings at all. (Hogg v. Macpherson, 1928 J.C.15).

This sort of compulsion need not be physical, but may be mental, though cases of the latter are even rarer than cases of the former, and usually involve states akin to insanity such as the automatic action of the subject of an epileptic fugue. Compulsion in such a case would probably have to be so great as to deprive the subject of the power to form the intention of doing the act which constituted or caused the crime, and it is difficult to conceive of such a situation short of unconsciousness on the part of the subject

of the compulsion. In the case of State v. Nargashian ((1904) 26 R.I. 299, Hall & Glueck, p. 368) an attempt was made on behalf of an accused charged with murder to show that such a state might be created by fear. The Court held that while such a situation was conceivable in a case of general panic, there was no compulsion so long as the subject of the alleged compulsion had 'sufficient power of mental action to put his own chances of safety against the life of an innocent third person' (Hall and Glueck, p. 371, per Stiness, C.J.).

Choice of alternatives. It is clear from what Aristotle says, and from the observations quoted from the case of Nargashian (supra), that in practice the important problem raised by the relation of compulsion and voluntary action is that of 'deliberate choice of alternatives'. Attempts have been made to deal with this problem by distinguishing between acts which are 'merely voluntary' and acts which are the result of free choice, and regarding only the latter as voluntary actions for the purpose of ascribing responsibility. 'A man who is threatened acts "voluntarily" in the sense that he chooses to do what he does; but he does not act "freely"; on the contrary the man with the gun obliges him' (Nowell Smith, op.cit. p. 209). But many actions done under obligation are regarded as free actions. Orestes was 'obliged' to kill his mother by his sense of honour and duty, but his act was surely a free one. Any motive can be spoken of as obliging the agent if it is strong enough, but the fact that an action is motivated does not mean that it is unfree, unless we are to say that no actions are free, in which case the whole discussion becomes meaningless. Even the man who acts under threat of

death acts as the result of choice, and the choice is free in the sense that he could have chosen otherwise - he could have chosen to die. Some systems of law consider this choice sufficiently free to entitle them to punish a man who chooses to kill another rather than die himself, and it cannot be said that there is anything illogical about their attitude, whatever its social or humanitarian value.

What is important in such situations is not the strength of the compulsion, but the relative value of the alternatives. The solution is not found by way of considering the mental state of the agent, but by considering the objective situation, and deciding whether the objective action in this situation is to be regarded as something wrong at all. The agent is regarded as having a free choice, and his duty is to choose the lesser of the two evils before him, and so to preserve the greater value. There may be opposing values involved and the agent must then make a rough calculation and choose that course of action which preserves the greater value - the standard and measure of value being taken as that employed by the person to whom the agent is accountable. The question is not 'Was the agent responsible for what he did?' but 'Was what he did wrong?'.

This is a very difficult question to answer. Theoretically perhaps the law could lay down a calculus which would enable us to discover which was the greatest value capable of being preserved in any situation, but the law does not in fact do so, and leaves us more or less to rely on ordinary moral ideas. There are some cases where the moral answer is clear - life is more valuable than banknotes, a leg more valuable than a toe - but there is no generally accepted hierarchy of values. Relative values change from time to time,

and place to place. It is difficult, for example, to accept unquestioningly today the assumption of Isabella in Measure for Measure that her chastity was more valuable than her brother's life. Values are often incommensurate - how are we to measure the policeman's duty to keep order against his life: or equal - one man's life against another's. There is no mathematical solution to these problems, and in practice the answer is not found by calculating values. Rather, some principle is regarded as of overriding value in difficult situations, though it may not be regarded as so where the choice is easy. The principle may be a legal one, like that of not taking the law into one's own hands, or it may be a religious one, like that of self-sacrifice, or resignation to the will of God. Such a principle will be applied, for example, to decide what is the right action in a situation where a man's only chance of survival is to kill someone else; but it is not likely to be regarded as overriding where the choice before the agent is between committing perjury and sacrificing the life of his child, or stealing a fire-extinguisher and seeing his house go up in flames.

The principle of self-sacrifice is of special importance when it is used to decide which of two lives is to be saved. It means that from the point of view of the agent his own life is always of less value than anyone else's, though to a third party both lives may be of equal value. A person therefore is never justified in killing another in order to save himself, though he may be justified in killing him to save a third party.

Another point of general importance is that the carrying out of a prior obligation, legal or moral,

may be itself an important value. If robbers enter a bank and ask a customer to help them, and threaten to kill him if he refuses, the customer need only weigh the relative value of his own life and the bank's property (the general duty to obey the law can be discounted here since it applies to everyone). But a bank servant or a policeman in such a situation would also have to consider the value involved in carrying out his duty to his employer or his special duty to maintain the law as a policeman. It is submitted that the distinction between the customer and the bank servant or policeman is a significant and important one; and it is an indication of the advantage of the 'choice of value' approach to the problem that it brings out the distinction which would be lost if the only question at issue were the physical or psychological effectiveness of the compulsion involved.

Ignorance.

There is a sense in which a man who is ignorant of what he is doing can be said to be acting involuntarily: certainly his choice of action is not relevant to the true situation. The man who kills his maidservant believing her to be a burglar has not chosen to kill her; the man who pulls the trigger of a gun he did not know was loaded has not chosen to fire the gun. Whether or not these acts are called voluntary is a linguistic question, but their blameworthiness is affected in an important way by the element of ignorance - they are unintentional. Indeed, they may not even be negligent, unless the agent's ignorance is in itself the result of negligence. The postman who delivers a parcel containing poisoned shortbread has not done so intentionally if he knows nothing

of the poison; and he has not done so negligently unless it is part of his job to examine all parcels he delivers. Whether it is reasonable to say that though he delivered the parcel voluntarily he did not deliver its poisoned contents voluntarily, is a question of usage. What is important is that anyone making a moral judgment on his responsibility for delivering the poison cannot ignore the fact of his ignorance.

Intention and motive

Intention

The objective approach. Intention is normally thought of as a state of mind. A intends to do X when he sets before his mind the idea of X not merely in order to contemplate it, but as a first step in the process of bringing it into effect. But, apart from confessions, the only way we can discover another man's intentions is by observing what he in fact does. If his actions make sense when regarded as directed towards a particular result, we say that he intended that result, and that all the actions directed thereto were intentional. Actions which do not appear to form part of a series leading up to a particular result do not appear to be intentional: accidents are not led up to. 'Dressing carefully "makes sense" as a preliminary to going to the City, but not as a preliminary to being knocked over by a bicycle'. (J.A. Passmore, 'Intentions' in Proceedings of the Aristotelian Society, (1955) Supp. Vol. xxix, p. 132. I owe the arguments set out in this paragraph to Mr. Passmore's article). On this view, 'A intends to do X' means only that if A's actions are observed, they will be seen to form a coherent series leading up to X. All that

can be seen of A's intentions is this series. In the same way 'A played that game of chess cleverly' can be said to mean only that his moves were the moves which might have been expected to lead to victory (cf. G. Ryle, *The Concept of Mind*, passim). We do not see a series of brain-motions which are A intending, or A thinking intelligently about the game of chess.

On this view the statement that a man is presumed to intend the natural consequences of his actions is hardly more than a tautology. It is not an arbitrary rule about what people are to be deemed to intend, or what will be regarded as evidence of their intentions. It does not rest on the ground that the best evidence of a man's intentions is to be found in his behaviour, or even that that is the only evidence; but on the ground that there is no meaningful description of intention except in terms of external behaviour. Accordingly it would be self-contradictory to say 'A's actions necessarily led up to x but A did not intend x'.

The subjective approach. The extreme objective view has serious difficulties. It suggests that a man knows less about his own intentions than do the people who watch his actions. It means that no credence can ever be given to a confession which indicates that the confessor's intentions were other than the intentions spelled out from observation of his actions. In fact, however, we do pay attention to confessions, though we use objective behaviour as a test of the credibility of a confession. On the objective view the confession is irrelevant; on the subjective view it is the best, if not the only, way of discovering a man's intentions. But there is a trap lurking

here of a kind which occurs in a number of places in the criminal law. It is no use recognising the subjective nature of intention, and the value of confessions, if at the same time we refuse to believe any confession whose content conflicts with the result we have obtained by objective observation. Listening to confessions and examining objective behaviour are two different, one might almost say contradictory, ways of discovering a man's intentions, and once it is allowed that a confession can provide the best evidence of intention even where it conflicts with the inferences drawn from objective behaviour, the objective test cannot be used as a final test of the truth of the confession. We cannot say 'This is an honest man, I would be prepared to believe anything he says; but I am not prepared to act on that belief because what he says contradicts the inferences I have drawn from observing his behaviour'. The confessor's objective behaviour is certainly a factor to be taken into account in judging of the credibility of his confession - but if the man convinces us that he is telling the truth this conviction must prevail over any inconsistencies we may feel exist between the confession and the objective behaviour. Otherwise there would be no point in listening to the confession at all, and the possibility of accurate introspection would be denied.

Subjective and objective right.

Utilitarianism and deontology. One of the basic conflicts in moral philosophy is that between those who consider that the rightness of an action is to be determined by reference to its consequences, so that a man's

duty is to produce the greatest possible good in a given situation; and those who consider that the rightness of an action is to be determined by reference to the motive of the agent, to whether it is done out of a sense of duty, or from some other good motive, or from a bad motive. Philosophers who hold the first view are often called Utilitarians, and those who hold the second, Deontologists. The two views are also sometimes referred to as Effolgsethik and Gesinnungsethik respectively, i.e. as ethics depending on results, and ethics depending on the agent's intentions (cf. D.M. MacKinnon, A Study in Ethical Theory, passim).

The law, which is concerned with the ordering of society, is naturally mainly utilitarian in outlook. It is more interested in the results of an action than in the motives which prompted it. The man who pays his debts out of a fear of the consequences has performed his legal duty just as much as the man who pays them out of a belief that it is right to do so. And it follows that to fail in one's intentions is to fail in one's duty. If I have a legal duty to return a book to a friend this duty is not fulfilled merely by my posting the book, if in fact it does not arrive at my friend's house. If a carelessly despatched book arrives there is no duty to send another, but if a carefully despatched book fails to arrive, there may still be a duty to provide a replacement (cf. W.D. Ross, The Right and the Good, ch.2, esp. pp. 45-6).

But though the law is generally utilitarian, the criminal law is so closely bound up with ordinary morality that it contains many deontological features which also exist in ordinary moral thinking. The criminal law is concerned in apportioning blame and

inflicting punishment, and in doing this ordinary people look not only to the results of actions but also to their motives. The man who has done his best, it is felt, should not be blamed because his efforts have been frustrated; and the man who meant no ill is not to be blamed because his actions turned out badly. For the deontologist it is the road to Heaven, and not to Hell, which is paved with good intentions. This emphasis on motive leads to the view that actions performed from a good motive are of greater value than actions performed from a bad one, even though the results are the same. To do 'the right act for the wrong reason' (T. S. Eliot, *Murder in the Cathedral*, Part I) is not, on this view, to have done one's duty; but, and this is more important, to do the wrong deed for the right reason may be regarded as something praiseworthy because it exemplifies the good motive involved.

This is, of course, a gross over-simplification of the deontological position, but it shows up the important difference between Erfolgsethik and Gesinnungsethik, and the subjective bias of deontology. (see Ross op. cit., and H.A. Prichard, *Moral Obligation*, esp. ch. 2). The utilitarian and deontological attitudes stem respectively from Greek and Hebrew thought, and the conflict between them underlies most European moral thinking.

Subjective and objective right. To treat motive as all-important leads to very peculiar results. It can lead to the view that the fanatic who puts his children through the fire to Moloch not from a desire to hurt them but because he considers it his religious duty to do so, is a morally good man, who has performed an unpleasant

act conscientiously, and therefore cannot be treated as blameworthy or punishable, however wrong the action may be when judged objectively. The objectively right act is that act which the omniscient observer would judge to be right. It cannot, however, be a man's duty to do what is objectively right, because, since he is not omniscient, he cannot know what is objectively right. And it is axiomatic that there is no duty to do the impossible. Therefore, it is argued, a man's duty is merely to do what is subjectively right, what he thinks right; and so long as he does that, he cannot be blamed.

The strength of this argument lies in the fact that conscientiousness is admittedly regarded as a virtue. We admire the faithful adherent of a religion in which we ourselves do not believe. To do what you think right is generally to acquit yourself well; other people may feel they would have done otherwise, but will not blame you for what you did. 'He acted properly, according to his lights' is a judgment of praise. Despite this, the argument leads to such gross paradoxes that it must be rejected, at least in the mundane sphere of the criminal law. For it involves saying that the concentration-camp guards, the medieval heresy-hunters, the ancient Moloch worshippers, are praiseworthy if they performed their abominations in the sane belief that it was right to do so. It is much more likely that one's judgment on such people will be that their belief that they were doing right makes them more and not less evil than those who did the same things out of fear of the consequences of refusing to do them.

Errors of fact and of morals. The paradoxes are at least partly the result of a failure to distinguish between the factual and moral elements in a situation. If this distinction is made it can be said that a man's duty is to do what would be objectively right if the situation were as he believed it to be. If a man cuts off another's head in the belief that it is a block of wood, he is not to be blamed for killing him. In the same way, a man who mistakenly believes that he is being attacked is entitled to retaliate in self-defence. (cf. Owens, 1946 J.C. 119). The act of retaliation would remain objectively wrong, and so the victim would be entitled to defend himself against it in turn. What the retaliator does is wrong and unjustified, but he is excusable and not blameable for doing it - see infra, 450.) But a mistake regarding moral values is irrelevant. If a man believes that it is right to kill all redheaded women, it is still his duty not to kill them, and he will be blameworthy if he does kill any of them. The man who acts under an error of fact cannot be blamed for the results of his error, unless, of course the mistake is itself blameworthy, for his act was done in error, and therefore unintentionally. But the man who deliberately does what is wrong is blameworthy, even if he thought he was doing right, because he intended to do what he did. 'If a man does something because he does not think it wrong he cannot plead that he did not choose to do it, and it is for choosing to do what is in fact wrong, whether he knows it or not, that a man is blamed' (Nowell Smith, op.cit., p. 294).

Whether or not this argument is conclusive in the field of moral philosophy, it is submitted that it is one the law must recognise as sound for its own purposes.

It is clear that,

'... obligations of social morality need not depend on the agent's thought about the situation...

... the obligation arises, not from any completely "objective" facts, i.e. facts which need not be cognised by anyone, but from the thoughts of society, i.e. of most people in the society concerned...

...If I told a creditor that his moral claim to have his bill paid was overborne because, in my opinion, my child's claim to a new coat was stronger, he would not agree that my judgment determined the status of his claim' (D.D. Raphael, Moral Judgment, pp. 135-9).

Any other attitude would lead to anarchy, to a state in which every man was his own lawmaker, who could disobey any law he thought wrong, and do any illegal act he thought right.

In Reynolds v. U.S. ((1878) 98 U.S. 145) a Mormon who was charged with bigamy pleaded in defence that it was his religious duty to marry more than one wife. In rejecting the plea Waite, C.J. said,

If the defendant, under the influence of a religious belief that it was right, deliberately married a second time, having a first wife living, the want of consciousness of evil intent - the want of understanding on his part that he was committing a crime - did not excuse him (at p. 162)...

Every act necessary to constitute the crime was knowingly done and the crime was therefore knowingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of law. The only defence of the accused in this case is his belief that the law ought not to have been enacted.' (at p. 167).

Intention and Motive

Motive as a form of intention. It follows from the above that the law disregards motive in considering whether or not a particular agent is guilty of a crime; so long as there is present an intention to do the act prohibited by the law, it does not matter with what motive it was done. It is a crime, for example, to send threatening letters to someone, even if it was all meant as a joke, so long as the letters were sent intentionally, i.e. with the intention of sending them, though there was no intention to cause any fear, or do any harm at all (Eliz. Edmiston, (1866) 5 Irv. 219, 222).

I have used the word 'intention' and not 'motive' with reference to the doing harm in order to show the difficulty of distinguishing between motive and intention. A motive can often be described in terms of intention, and for some jurists motive is just a special sort of intention. Salmond divides intention into what he calls 'immediate' and 'ulterior' intent, the former relating to the act itself, and the latter to the object for which the act was done, e.g. to alarm, or for a joke, and he calls the ulterior intent motive (Salmond, para. 137). In this way the objects of intention and the object of motive are seen as parts of a sequence of the means-end type; a man intends the means which lead to the end chosen by his motive.

The application and the difficulties of Salmond's view can be seen by considering the following sequence. A buys a bottle of poison and a bottle of port; he puts the poison into the port, takes the poisoned port to his aunt's house, pours her a glass of it which she drinks, and kills her; A inherits a fortune and retires

to a house in Majorca on which he has long set his heart. If in considering this sequence we stop at the purchase of the poison, we can say that A's intention was to purchase the poison, and his motive to kill his aunt, inherit her fortune, and retire to Majorca. If A is tried simply for buying poison, assuming that to be in itself a crime, the relevant intention would be to buy poison, and the later 'intentions' be regarded as motive, and so as irrelevant. If it is a crime to buy poison, it is a crime to do so whether one does it to kill an aunt or to improve one's complexion. But if A is tried for killing his aunt, his intention will be taken to be that of killing her, and only the desire to inherit her money and retire to Majorca will be regarded as motive. Motive so defined is any intention which succeeds in time of proposed realisation the intention to commit the crime charged. It is, so to speak, the post-ultimate intention, and is irrelevant.

A similar analysis can be made in the case of crimes requiring a special intention. In a charge of 'buying poison with intent to kill' the last relevant intention would be the intention to kill, and all subsequent intentions would be classed as irrelevant motives.

Motive as something other than intention. Salmond's analysis of motive makes the concept unnecessary and deprives it of any independent meaning. On his view motive is just a word used for certain intentions in given situations: and the use varies from situation to situation, so that what is motive in situation S - a charge of buying poison - may not be motive in situation S1 - a charge of murder. Moreover the variation is

subjective in the sense that it depends on the standpoint from which the sequence of events is viewed.

But there is a meaning of motive which is not satisfactorily translatable into terms of intention. Motive, in this sense, is a compelling, or at any rate, a propelling, psychological factor. A man who sacrifices his child from religious motives need not have any ulterior intention, need not wish to bring about any state of affairs following the sacrifice of the child. Psychological motives can sometimes be translated into intentions, but the translations are rarely satisfactory. 'His motive was greed' does not mean quite the same as 'His intention was to inherit money'; 'His motive was jealousy' is only tortuously translatable into 'His purpose was to achieve that peace of mind which he could obtain only by the death of his rival'. To regard all motives as being so translatable is to ignore the possibility that an act may be done intentionally without any regard to consequences whatever. The atheist materialist who fulfils an unimportant promise made to a dead friend does so from a motive - the desire to keep his promise, or affection and respect for his friend - but he does not do so with any ulterior intention. Motive in this sense is something different from intention. It is not something connected with a particular action making it intentional in the sense of providing a goal to which it can be seen to be directed. It is a psychological state which explains a man's actions, and his intentions, by reference to their source and not to their purpose. It is something more fundamental than ulterior intention, and indeed we ask of a man's ulterior intention, 'Why did he want that?', and answer in terms of his psychological

make-up. We can ask 'Why did he want a house in Majorca anyway?', and answer in terms of his pleasure-loving character.

A system which does not accept that bad means may be justified by being directed to good ends can ignore motive in the sense of ulterior intention. But if motive is thought of as the psychological origin of action and ulterior intention alike, it cannot be ignored, except by a wholly utilitarian ethic. And motive in this sense is taken into account in our everyday judgments, and also, to some extent, in the law. Responsibility for an action in the sense of legal guilt is independent of motive, but the treatment of the convicted person may be influenced by the view taken of his motive. A good motive, or even the absence of a bad one, may be regarded as a mitigating factor, although it can never exculpate the wrongdoer from responsibility for his intentional act. It is for this reason, for example, that euthanasia is regarded as culpable homicide and not as murder (R.C. Evid. of Lord Cooper, Q. 5428).

Acts and consequences.

Intentional and unintentional acts.

Intention, as Bentham observed, may regard either an act itself or its consequences. He went on to say,

'The act may very easily be intentional without the consequences; and often is so ... But the consequences of an act cannot be intentional, without the act's being itself intentional in at least the first stage. If the act be not intentional in the first stage, it is no act of yours: there is accordingly no intention on your part to produce the consequences; that is to say, the individual consequences. All there can have been on your part is a distant intention to produce other consequences, of the same

nature, by some act of yours at a future time: or else, without any intention, a bare wish to see such an event take place.' (Bentham, VII, 2-5).

This is clear and fairly simple. I may intend to kill A, but if B kills him before I can do anything, then his death is not intentional on my part, because it is not connected with any intentional act of mine. I have not killed him intentionally, because I have not killed him at all.

All that is involved in saying that an act is intentional is that it is deliberate and conscious, and not something done unthinkingly. (Cf. S. Hampshire and H.L.A. Hart, 'Decision, Intention and Certainty', in *Mind*, (1958) Vol. 67, p. 1, where they say, 'In any ordinary narrative describing ordinary actions done in normal circumstances it would be pointless to say that a person did these things intentionally; for normally there is a fulfilled presumption that if a person does something he does it intentionally' - at pp. 6-7). If A deliberately presses a switch meaning to put on an electric fire, and forgets that because of the state of the wiring, this will fuse all the lights in the house, he has intentionally pressed the switch, but has not intentionally fused the lights. On the other hand if he reaches up to a shelf to take down a book and accidentally brushes against the switch and puts it on, he has neither put on the switch nor fused the lights intentionally; all he has done intentionally is to stretch up to the shelf.

Whether he is responsible in either case for fusing the lights depends on the rules for responsibility for the unintended results of one's actions, - but whatever these rules, their application to the above situations

must have reference to the intentional act in each situation, and may therefore lead to different results in each situation. The relevant series of events must always start with the intentional act, since responsibility for the consequences, if any, will depend on their being the consequences of an intentional act. (This idea is expressed in the American Law Institute's Model Penal Code, s.2.01 of Art 2 of which is as follows: 'A person is not guilty of an offence unless his liability is based on conduct which includes a voluntary act or the omission to perform an act which it was physically possible to perform.' - see S. Prevezer, 'English Criminal Law Reform and the American Penal Code', (1958) Current Legal Problems, p. 58, at p. 73.)

The distinction between an act and its consequences is not a definite one. The sphere of the act may be confined to the very minimum - a motion, or more commonly a group of related motions, of a part or parts of the body, but this is so trivial as to be useless. Once the sphere of the act is extended beyond this, however, there is no definite point at which the act can be said to end and its consequences begin. For example; A raises his hand, lifts a gun, places his finger on the trigger, points the gun, fires it, kills a woman, and enables her heir to inherit a fortune, her husband to remarry, and her creditors to obtain payment of their debts. Is the firing of the gun act or consequence? Is the killing act or consequence? The similarity to the problems of immediate and ulterior intent is obvious; any point in the series may be regarded as the consequence of what went before, although there does come a point at which what happens is so far removed from the original bodily motion that

it will not be treated as act at all, but only as consequence.

Abstract discussions of the distinction between act and consequence, either in general, or in the context of particular examples, are fruitless exercises in logic-chopping. From the point of view of responsibility the most important thing is to know where the consequences of an action end, so that we may know how far responsibility for the consequences of the act extends; it is not usually so important to know where the consequences begin. The important points are the point at which the series of intentional acts ends, and the point at which the relevant series of consequences ends (cf. infra, 113ff).

Causality.

Causality and responsibility. The delimitation of the extent of the consequences of an act seems prima facie to be a scientific exercise in causality. But the question of responsibility for what follows on an intentional action cannot be decided by a purely causal enquiry. The decision whether or not Y is to be regarded as a consequence of X depends on whether the person who did X is to be treated as responsible for Y; and not vice versa. 'The object of a civil enquiry into cause and consequence is to fix liability on some responsible person..The trial of an action for damages is not a scientific inquest into a mixed sequence of phenomena..It is a practical enquiry' (Weld-Blundell v. Stephen, [1920] A.C. 956, Lord Sumner at p. 986); the same is true of a criminal trial.

There is a multitude of causes for any given event and a multitude of effects follows on any given cause. 'One is but repeating a commonplace if one repeats

that many causes have some place in the sequence of events which lead to a result or follows Lord Shaw in saying that "causation is not a chain but a net" (Leyland Shipping Co. v. Norwich Union Fire Insurance Ltd. [1918] A.C. 350, 369). The question always is how far back one is justified in going or how wide a net one must envisage' (Stapley v. Gypsum Mines Ltd. [1953] A.C. 663, Lord Porter at p. 676).

Moreover, events exist on different planes, and can be regarded from different points of view, in different 'universes of discourse'. Choice of the relevant cause or effect depends on the purposes of the person making the choice: different people give different causes for the same effect. An engineer may ascribe a collision at sea to a fault in the Ship's engine structure, a Board of Trade official to a failure to make the proper routine inspection, a meteorologist to bad weather, a metallurgist to metal fatigue, an astrologer to the star under which the captain was born, and so on. There is a strong tendency for people to ascribe effects to causes in which they have a special interest, and this is important from the point of view of responsibility, because it often results in the ascription of events to causes constituted by actions forbidden by the ascriber. Such situations are common in everyday life. For example: a father lends his son the family car to go to a party; but stipulates that the son will return home directly and not drive any girls home first. The boy disobeys this stipulation and takes a girl home. On his own ultimate return homewards he is involved in a collision which is not due to his fault. The father may well insist that the accident was due to the boy's disobedience of his orders. If the boy points out

the illogicality of this, it will be easy enough for the father to show that this was a cause of the accident, since if the son had come straight home he would not have been at the place of the accident when it happened, and so it would not have happened - and the father may consider this sufficient to enable him to hold the boy responsible for the accident as a consequence of his disobedience.

If the father is a lawyer he may try to reinforce his argument by saying that the boy's wrongful act of disobedience was a sine qua non of the accident. And so it was; but so also were many other factors in the situation as, for example, that the father lent the boy the car, or indeed that the father ever begot his son, and so on in a regression which if not infinite can at least be taken back to the bounds of living memory. The father stops at the son's disobedience not because this has any special causal status, but because he is interested in enforcing his prohibition against the boy taking girls home in the car, and he hopes to do so and to prevent the infringement of any similar future prohibition by pointing to the accident, and by whatever disciplinary measures he may take against the boy for getting involved in the accident 'as a result of his disobedience'. (If anyone were to take the view that this example is childish, and the father's attitude too stupid to merit consideration, I would be in full agreement. But the father's attitude is fundamentally that of the law of Scotland regarding certain forms of culpable homicide - see infra, ch. 14).

The special position of human causes. Another important common tendency in the ascription of causes, and one which often leads to results similar to those reached by picking out prohibited acts, is the tendency to ascribe an event to a cause we are able to influence. As Professor Collingwood pointed out, the cause is 'the thing I can put right', and giving the following example:-

'If my car "conks out" on a hill...If I had been a person who could flatten out hills by stamping on them, [a] passer-by would have been right to call my attention to the hill as the cause of the stoppage; not because the hill is a hill, but because I can flatten it out...If I find that I can get a result by certain means, I may be pretty sure that I should not be getting it unless a great many conditions were fulfilled; but so long as I get it I do not mind what these conditions are...For any given person, the cause of a given thing is that one of its conditions which he is able to produce or prevent' (R. G. Collingwood, 'On the so-called Idea of Causation', Proceedings of Aristotelian Society, 1937-8, p. 85, at pp. 91-2).

Since the purpose of the criminal law, or of any system of punishment, is to influence human beings, human causes are naturally of particular importance to it - they are what it can put right, or at any rate what it is supposed to be able to put right. Human actions are also of special importance as causal factors because they are regarded as themselves uncaused. This is a necessary inference from the doctrine of freewill; and without some form of that doctrine, however restricted, there can be no moral responsibility in the sense of praise or blame. 'In the commonsense notion of causation a deliberate human

action has a special status as a cause and is not regarded in its turn as something which is caused' (Hart and Honore, 'Causation in the Law', (1956) 72 L.Q.R. 58,77), and Courts often insist that the law is not concerned with metaphysical ideas of causation but only with commonsense views (see, e.g., Stapley v. Gypsum Mines Ltd., [1953] A.C. 663, Lord Reid at p.681

There is, therefore, a tendency to ignore remoter agencies, human or not, and to take the cause as being the human agency nearest the event in question. Human actions are regarded as breaking any chain of causation, and as starting a new series, 'caused' by the human intervention. An example of this within very small compass is the typical case of a motor-car knocking down a careless pedestrian who then sues the motorist for causing her injury. In M'Lean v. Bell (1932 S.C. (H.L.) 21), which was such a case, it was said that,

'In one sense, but for the negligence of the pursuer (if she was negligent) in attempting to cross the road, she would not have been struck; and, as matter simply of causation, her acts formed a necessary element in the final result, since without them no accident could have occurred. The decision, however, of the case, must turn not simply on causation, but on responsibility. The pursuer's negligence may be what is often called a causa sine qua non, yet, as regards responsibility, it becomes merely evidential or matter of narrative, if the defender acting reasonably could and ought to have avoided the collision' (Lord Macmillan at p.29).

The key phrase is 'could and ought to have avoided'. It is because he ought to have avoided the accident that the search for a cause can stop at the driver - we have found someone who ought to have done otherwise

than he did, and who, had he done otherwise, could have prevented the accident: we have found someone to blame, someone responsible.

Consequences and foresight.

The extent of the consequences of a given action for which the agent will be responsible may be limited in four different ways. A man may be blamed (1) only for the intended results of his action; or (2) only for results he foresaw; or (3) for results which were foreseeable, i.e. which the average man would have foreseen; or (4) for all the consequences directly or naturally following on his act. The criteria of foresight and of foreseeability are each capable of being subdivided into foresight and foreseeability of a result as possible, or as probable.

There is probably no moral theory or criminal law which holds a man responsible for all the natural consequences of his acts, but a man is not regarded as responsible for something which happens after his act, even if it was intended, unless it was at least a natural consequence. If a savage sticks pins into the effigy of his enemy with the intention of killing him, and his enemy dies soon afterwards, no system which disbelieved in sympathetic magic would hold the savage responsible for the death. (cf. Bentham, VIII, 2-5, supra).

Foresight and foreseeability are both independent of intention. A driver in a hurry may see the likelihood of a collision, but at the same time have no intention of causing one, and desire to do all he can to avoid one. Foresight and foreseeability can be distinguished as being subjective and objective criteria respectively; but the distinction is not so simple

as that between subjective and objective intention. For there is a difference between foreseeability, and something which can be described as objective foresight. Subjective foresight, what the agent actually foresaw, can only be certainly known by means of a credible confession from the agent himself; but we may objectively, by regarding what a man does, come to a conclusion as to what he actually foresaw. And this may not be the same as what we regard as foreseeable. There is nothing very unusual in saying that people do not always foresee the obvious results of their actions; but the obvious results would be regarded as foreseeable. We may therefore conclude from an examination of his actions that a man did not in fact foresee a particular consequence which was foreseeable - and this conclusion may or may not accord with what the man himself says he foresaw.

Foreseeability is a general concept, independent of the particular agent involved in any situation. It may be defined by reference to the statistically probable, or to what an independent observer thinks he would have foreseen, or to what a judge thinks the agent ought to have foreseen. On any of these views, what the agent foresaw, whether this is discovered objectively or subjectively, is irrelevant. The criterion of foresight means that a man is responsible for what he in fact foresaw, or for what he is deemed to have foreseen. The criterion of foreseeability means that he is held responsible for what he could and ought to have foreseen. For the only way in which a moral system like the common law can blame a man for something he did not do, is by showing that he had a duty to do it; and so failure to foresee, and to take

the precautions such foresight would have shown to be necessary, is only blameworthy where there is a duty to foresee.

Punishment and responsibility

Theories of Punishment.

Theories of punishment fall into two main groups - retributive, and the rest - corresponding to the deontological and utilitarian groups of moral theories. The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation. Its 'object all sublime... is to make the punishment fit the crime'. The other theories, reformative, preventive, and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment. If it will do no good to punish someone, then on utilitarian principles, there is neither right nor duty to punish him, however terrible his crimes.

Utilitarian theories. The weakness of utilitarian theories lies in their failure to distinguish punishment from any other example of the infliction of pain. If the only justification for punishment is future good, then the lunatic who is put in an asylum is being punished as much as the prisoner in gaol, and his punishment is more justifiable than that of the prisoner, since the consequent good is probably greater, and is certainly more apparent. Again, on the deterrent theory, which is the most important Utilitarian theory of punishment, the important thing is to punish the apparently guilty, because it is punishment of the apparently guilty which deters others from committing crimes. It would be proper to punish an innocent man

who appeared to be guilty since failure to punish the apparently guilty has a deleterious effect on a policy of deterrence, since it makes it look as if crimes can be committed with impunity.

'The Utilitarian theory, taken alone, requires us to say, with Samuel Butler's Erewhonians, that sickness is a crime which deserves the punishment of medicine. It also requires us to say when "it is expedient that one man should die for the people", that he deserves this as a punishment' (D. D. Raphael, Moral Judgment, p. 70). It was this disregard for the right of the individual against the community that led to Kant's vehement opposition to any form of utilitarian theory of punishment. 'Juridical punishment', he said, 'can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another.' (Kant, Philosophy of Right, trans. W. Hastie, p. 195).

The retributive theory. The retributive theory also faces serious difficulties. Punishment involves the infliction of pain, and pain, in itself, is evil. Its infliction requires justification, and to justify it solely by reference to a prior infliction of evil by the person punished, is rather like trying to make a white out of two blacks. What good, it may be asked, does it do to hang a murderer? It only leaves you two dead men instead of one. 'The suffering caused by the punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some

preponderating good' (Macaulay, p. 455); and it is very difficult to see what good is provided on the retributive theory. There is perhaps one positive good so provided - this is that punishment expresses and canalises the moral indignation of the community; and that it thus operates as a re-assertion of the law that has been broken. To leave an act unpunished may be regarded as equivalent to condoning it, for the connection between crime and punishment is a very close and fundamental one in the ordinary conscience. It is just because the utilitarian theories ignore this, and so ignore the factor of desert, that they are unsatisfactory. And it is because it clings so strongly to the concept of desert that the retributive theory retains its strength and its popular appeal in spite of its futility.

A compromise theory. It is possible to adopt a theory which stands midway between retribution and utility, and combines the best features of both. We can accept the view that a man 'must first be found guilty and punishable before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens' (Kant, loc. cit.) and at the same time decline to punish him unless some good will result. Thus, punishment of someone who has done no wrong can never be justified, and the connection between punishment and desert is maintained; but punishment of someone who deserves punishment can only be justified on the utilitarian ground that some good will come of the punishment, and the form of punishment must therefore be chosen by reference to the possible production of good. (See W.G. Maclagan, 'Punishment

and Retribution', in *Philosophy*, Vol. XIV (1939) p. 281).

The law tends to combine retribution and deterrence. It takes the view that wrongdoers 'ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming' as the old indictments used to say, and it assumes that punishment has this effect; but it only punishes people whom it regards as guilty of a crime, and it moderates its punishment when there are factors present which diminish the criminal's guilt. (cf. Kirkwood, 1939 J.C. 36; M'Lean, (1876), 3 Coup. 334). Even where the purpose of legal punishment is preventive rather than deterrent, as in preventive detention, or reformative, as in corrective training, the law still requires the commission of a criminal act as a necessary preliminary to punishment. It requires, indeed, for preventive detention, not merely a criminal act on the occasion of the punishment, but a series of prior convictions followed by more usual forms of punishment. It is true that a man may be sentenced to eight years' preventive detention for stealing a bundle of laundry, but he must have stolen the bundle, and, in addition, he must have been previously convicted on the statutory number of occasions (e.g. Churchill, 1952, J.C. 6 - the accused in fact had forty previous convictions).

Punishment and freewill.

So long as punishment is considered retributive to any extent, so long as it is bound up with the concept of desert, it can only be inflicted for an act freely done; desert presupposes freedom. In the classic

Kantian phrase, 'I ought implies I can'; a man cannot be blamed for something he could not help doing, or for failing to do the impossible.

The problem of freewill is probably insoluble on the metaphysical level, and its application in everyday judgments involves many paradoxes. Thus, a man is punished only when he could have done otherwise than he in fact did, when his action stemmed from his free choice; but we punish him in the hope that by so doing we can influence his future actions and those of other free agents. Fortunately the legal problem is simpler than this. 'The ethical question is not the metaphysical one, whether the human will as such is or is not absolutely uncaused, but rather how to discriminate properly between those who should and those who should not be held accountable for legally prohibited acts. And here the prevailing ethical conscience today seems to recognise a common sense distinction between voluntary and involuntary acts, and generally holds that no one should be punished for any act in which his will did not enter' (M.R. Cohen, Reason and Law, p. 29).

The question, of course, is what acts do we recognise as voluntary, as 'free'. 'Freedom' is a vague word and can mean free from anything, but for legal purposes we can say that it means free from any influence which cannot be affected by punishment. The thief who steals from greed acts freely because his tendency to give way to the influence of his greed can be countered by the threat of punishment which will provide him with a motive of fear to set against his greed. But the kleptomaniac who steals because he is diseased does not act freely, since punishment cannot affect the mania which causes him to steal. Whatever the metaphysical or even ethical

difficulties, it seems that the law can and indeed must accept Nowell-Smith's view that 'A man is not punishable because he is guilty; he is guilty because he is punishable, that is to say, because some useful result is supposed to accrue from punishing him' ('Freewill and Responsibility' in *Mind*, Vol. 57, (1948), pp. 45, at p. 58), provided, of course, that we remember that he must also be guilty in the sense of having committed a criminal act. The result is that punishment can only be inflicted for a free and blameworthy act, but that an act is only considered to be free and blameworthy if it is capable of being affected by punishment.

Self-determinism. This view of guilt and freedom must be considered in the light of the theory of self-determinism. This is the theory that a man's actions are all ultimately determined by his character and are therefore not free. A man is not responsible for his character, it is argued, because it is something with which he is born, or at any rate which depends on hereditary, environmental, and other factors beyond his control. A man acts as he does because he is the sort of person he is, and he cannot help being the sort of person he is. It may be that some facets of his character are corrigible while others are not, but the very corrigibility of any facet depends itself on the sort of man he is - some people are so made that they can be cured of a tendency to steal or drink, others are so made that they cannot be cured of such tendencies. And of course the man who is constitutionally incapable of being cured of a vicious tendency does not act freely when he succumbs to the promptings of that vice. (The theory is fully expounded in

W. D. Ross, the Foundations of Ethics, ch. 10).

This theory cannot, it is submitted, be adopted, though it emphasises an important aspect of certain problems, particularly that of addiction which will be dealt with shortly (infra, §2). It depends on a peculiar use of language, which distinguishes between a man and his 'character' which is sometimes referred to as his 'universe of desires' because it is the result of a balance of all his inborn desires. It sees men spending their lives fighting a hopeless battle with their desires. The man born with only a weak desire to do his duty or to be kind, and a strong desire to be selfish or cruel, will always choose to perform the more selfish or cruel of two possible actions: and since he cannot help being selfish or cruel he cannot be blamed for his choice. But this dichotomy between a person and his character is a surprising one, and contrary to ordinary usage. For a man is his character, the sum of his conflicting desires, and when we judge the man, it is his character that we are judging. It may sound meaningful to say 'Is a man to be blamed for his dispositions?', but this apparent meaningfulness beings to disappear if we ask 'Can he be blamed for his desires?', and disappears completely when we ask 'Can he be blamed for his character, for being himself?'. We do in fact praise a man for being kind, blame him for being selfish. It is just when an action is 'in character' that we feel happiest about judging it. Where an action is 'out of character' we do not hail it as an example of free choice, we try to see what external circumstances caused the man to act in such an

uncharacteristic way.

But though it does not make sense to say 'Twas not Hamlet wronged you, but his character', it does make sense to say 'Twas not Hamlet wronged you, but his madness' (cf. Hamlet, V. 2). This is because of the distinction between moral and non-moral characteristics, which is the distinction between what is corrigible and punishable, and what is not; and it is a distinction which ultimately the self-determinist cannot make. The stupid are not blamed, the wicked are; punishment may curb wickedness, it will not increase knowledge. 'We might therefore say that moral traits of character are just those traits that are known to be amenable to praise or blame; and this would explain why we punish idle boys but not stupid ones, thieves but not kleptomaniacs, the sane but not the insane' (Nowell Smith, Ethics, p. 304).

The problem of addiction. Actions which spring from a diseased state of mind would thus be regarded as punishable only if (a) the agent could be considered responsible for his condition - the requirement of desert; and (b) the disease was amenable to punishment - the requirement of utility. These are probably two sides of the same coin - we should not attribute an action to disease if we thought the agent responsible. But the phenomenon of addiction presents awkward problems from whatever side of the question it is approached. The addict is, by definition, unable to control his craving, and so might be said not to be responsible for anything he does as a result of the craving, or of the effects of any drug for which he craves. Nor will punishment cure his addiction.

But his condition may be the result of his own earlier actings, so that he can be said to have made himself an addict. His addiction was at one stage a habit, and it may be said that persons are responsible for their habits. Aristotle defined the good man as a man addicted to goodness. 'Moral goodness' he said, 'is the child of habit..the moral virtues we acquire by first exercising them..we become just by performing just actions, temperate by performing temperate actions, brave by performing brave actions... We find legislators seeking to make good men of their fellows by making good behaviour habitual with them' (Nich. Ethics, II, I, p. 155). So the habit of doing good acts is something praiseworthy and to be encouraged, the habit of doing evil something to be blamed and discouraged. But there comes a stage, at any rate in the case of the drug addict, when punishment is unable to discourage the habit. At that stage there are two ways of judging the situation. On the one hand the addict can be thought of as being himself to blame for his addiction. 'There was a time when he need not have been ill: but once he let himself go the opportunity was lost' (*ib.* III, 5, p. 91). He is therefore to blame for his addiction, and punishable, if only in order to deter others from allowing themselves to degenerate into a comparable state. But on the other hand, once a person has become an addict, he is no longer capable of controlling his addiction; he is not to blame for taking the drink or drugs he now takes because he cannot help taking them. And punishment will not help or deter him or anyone else in his kind of state. 'Addiction to opium is a vice, as is also any bad

habit that a man cannot break however hard he tries. But these are not culpable states simply because, whatever may have been the case in the past, he cannot now avoid them' (Nowell Smith, op.cit. p. 265). To punish him now for those earlier indulgences from which he could have refrained seems futile, and suggests a failure to cope with or recognise the true situation. Another objection to punishing the fifty-year old alcoholic for the drinks he took at the age of thirty is that when he drank at thirty he had no intention of becoming an alcoholic, and probably did not foresee the possibility of his becoming one. It is very difficult to find the occasions when he was not yet an alcoholic but should have realised that unless he stopped drinking he would soon become one. The nearer he comes to the stage of addiction, the clearer it is that he may become one - and the more difficult for him to stop the habit.

Addiction is the type case for those situations in which a man voluntarily puts himself into a condition in which he is incapable of free action, and then does something criminal. The problem is always, can the subsequent crime be punished because the agent himself created the situation in which he lost his freedom, because he was, so to speak, responsible for his own irresponsibility, or is he to be treated as the irresponsible person he has become? If punishment is only to be directed to the original free act which made him irresponsible, we must ask the further question whether he can be treated as responsible for the later act as a consequence of his free act, and the answer to this depends, of course, on the causal criterion adopted, on whether, for example, he foresaw that

drinking cheap red wine might make him so violent
that he would hit someone with a bottle.

Chapter 3: The Criminal Act

The actus reus

It is axiomatic that before there can be a conviction for crime there must have been created a situation forbidden by the criminal law - and for each crime there is an appropriate forbidden situation. The forbidden situation is known as the actus reus, which has been defined as 'such result of human conduct as the law seeks to prevent' (J.W.C. Turner, 'The Mental Element in Crimes at Common Law', in *Modern Approach*, p. 195 at p. 196). What constitutes the actus reus of any particular crime can only be discovered by reference to the definition of that crime. A criminal charge must set out facts which amount to a situation forbidden by law, and if it fails to do so because of the omission of an essential factor, it is funditus null, since it lacks the minimum requirement for conviction. However wicked a man's intentions may be he is guilty of no crime if he has brought about no actus reus. A soldier who aims at his sergeant and kills an enemy instead has not committed murder, the man who intends to steal an umbrella from a cloakroom and takes his own by mistake has not committed theft (cf. Gl. Williams, para. 7).

The concept of the actus reus

The actus reus of any crime can be positively defined, at least to some extent. There must, for

example, be the killing of a human being before there can be homicide. This positive definition may include certain attendant circumstances, so that the crime is the production of S in circumstances C, and not merely the production of S. For example, the infliction of 'cruel and barbarous usages' is not per se a crime (Watt v. Kerr, (1868) 1 Coup. 123); nor is it a crime merely to make threats (Kenny, 1951 J.C. 104); but in the appropriate circumstances these things may be an essential part of an actus reus.

The case of M'Kenzie v. Whyte ((1864) 4 Irv. 570) is an example of an act neutral in itself, which may or may not be criminal, depending on circumstances. The charge was that the accused 'did wickedly and feloniously expose their persons in an indecent and unbecoming manner, and did take off their clothes and expose themselves....in a state of nudity, to the annoyance of the lieges' without further specification of circumstances, and it was held to be a bad charge. Lord Neaves pointed out that 'A woman may be suckling her child by the roadside under circumstances which to some may constitute indecent exposure of her person. A female at a ball or in a ballet may be so dressed as to fall under a similar imputation' (at p. 573), but in these cases there is no crime. Indecent exposure in itself may be 'for laudable and innocent objects' (Lord Justice-Clerk Inglis at p. 576), and is only criminal if it happens in circumstances calculated to outrage public decency. This circumstance is therefore part of the positive definition of the actus reus of indecent exposure.

The concept of actus reus is also a 'defeasible' one. (On defeasible concepts see H.L.A. Hart, 'The

Ascription of Responsibility and Rights', Proceedings of Aristotelian Society, =1948-9, p. 171). That is to say, the actus reus of a crime may be described by a sentence of the kind 'bringing about a situation S unless in circumstances C1 or C2 or ...'. The situation prohibited by law must be brought about in the absence of circumstances which would constitute a legal excuse. The killing of a human being is the 'Type-situation' for homicide (see G.L. Radbruch, 'Jurisprudence in the Criminal Law', (1936) 18 J. Comp. Leg. and Int. Law, p. 212, at p. 221), but killing a human being is not homicide if done in certain privileged circumstances, such as those surrounding a judicial execution, or those of self-defence. The difference between a 'defeating' circumstance like this and a positive requirement such as one that indecent exposure to be criminal must occur in circumstances calculated to outrage decency, is this - indecent exposure is not criminal if certain other circumstances are absent; killing a human being is criminal unless certain other circumstances are present. For an indictment to be good it must set forth an actus reus, i.e. a prima facie crime. It is irrelevant merely to libel exposure because this is not a prima facie crime, and it is necessary to libel also the circumstances which make it criminal. It is relevant to libel the killing of a human being, since this is prima facie a crime, and it is unnecessary to set out the absence of any 'defeating' circumstance.

Actus reus and mens rea. The most important 'defeating' circumstance is the absence of a criminal state of mind, of mens rea (for the concept of mens rea see infra ch.6): the maxim actus non sit reus nisi

mens sit rea is proverbial. Taken literally it means that it is improper to call any situation an actus reus unless it was created with mens rea; but it is possible and convenient to treat the lack of mens rea as different from the presence of any other 'defeating' factor. The term 'actus reus' can then be used for situations which would be criminal were they accompanied by mens rea; a term is necessary for all the objective or external ingredients of a crime, and 'actus reus' is the obvious one to use.

Although the absence of mens rea will normally prevent the conviction of the creator of the actus reus, it does not prevent the objective act or situation being regarded as criminal for other purposes; it may still be a crime, albeit an 'unenforceable crime' so far as the person who lacks mens rea is concerned. A man who forces someone else to perform a criminal act cannot plead in answer to a charge of instigating the other to commit the crime or of assisting him in the crime, that no crime was committed, because the act was done under duress, and that therefore he must be acquitted. (R. v. Bourne, (1952) 36 Cr. App. Rep. 125). (There seems no reason to suggest that a different result would have been arrived at in Scotland. The facts were that the accused forced his wife to have intercourse with a dog).

There are some crimes which have a mental element as part of their positive definition. The best example of such a crime is theft, which is the 'felonious taking of the property of another for lucre' (Hume, i, 57; Alison, i. 250). If the taking is not felonious there is no theft, just as there is no theft if there is no taking. 'Felonious' is not, however, a helpful word, and it obscures the distinction between crimes

like theft which require a specific intention, and other common law crimes which require only a more general criminal state of mind. If theft is treated as a crime requiring a specific intention, if it is defined as 'taking the property of another for lucre' or 'taking the property of another with the intention of retaining it', then where a lunatic or a child of seven takes with that intention there will be an actus reus, and anyone receiving the property in the knowledge of how it was taken, will be guilty of resetting stolen property. But if a sane, or an insane, person takes goods with the intention of returning them after use, there is no theft at all. Whenever a crime is defined by reference to a special intention, that intention can be regarded as part of the actus reus, and not of the mens rea.

Criminal conduct

The need for a voluntary act.

The actus reus must be brought about by some form of conduct on the part of the accused, whether an act or an omission to act. There is involved in the concept of conduct a certain minimal mental element. The act must be voluntary in the sense that it must proceed from the independent volition of the accused who must be an active participant in the creation of the actus reus: he must be an agent, and not a mere passive instrument. Attempts to analyse the concept of an act are as futile as are attempts to distinguish an act from its consequences. It is sufficient to refer to part of the argument in the famous case of Hales v. Petit ((1562) 1 Plow. 253, quoted in R.E. Megarry, Miscellany-at-Law, p. 231) which inspired the grave-

digger's exposition of the law of suicide in Hamlet. It is as follows:

'The act consists of three parts. The first is the imagination, which is a reflection or mediation of the mind, whether or no it is convenient for him to destroy himself, and what way it can be done. The second is the resolution, which is a determination of the mind to destroy himself, and to do it in this or that particular way. The third is the perfection, which is the execution of what the mind has resolved to do. And this perfection consists of two parts, viz., the beginning and the end. The beginning is the doing of the act which causes the death, and the end is the death, which is only a sequel to the act.'

In other words, the actus reus must be preceded by an act, the criminal conduct, and the act must include a consideration of the proposed course of action and a resolution to carry it out.

Somnambulistic acts. The requirement of a resolution to carry out the criminal conduct means that unconscious actings cannot constitute criminal conduct - whether or not they can be called acts in a general sense, they are not acts for the purposes of the criminal law. 'Such as commit any crime, whilst they sleep, are compared to infants, and therefore they are not punished' (Mackenzie, I, 6). This is almost certainly still the law of Scotland, but the only case on the subject, that of Simon Fraser in 1878 (4 Coup. 70), is very unsatisfactory. Fraser killed his daughter while in a state of somnambulism in which he believed her to be a wild beast attacking him. The case is thus complicated by the presence of a delusion, but no case of mistake was put forward by the defence, and the possible defence of insanity

was side-stepped by Lord Moncrieff, the Lord Justice-Clerk, who said to the jury,

'The question whether a state of somnambulism such as this is to be considered a state of insanity or not is a matter with which I think you should not trouble yourselves. It is a question on which medical authority is not agreed.'

His Lordship went on to tell the jury that their best course would be to

'find that the panel killed his child, but that he was in a state in which he was unconscious of the act which he was committing by reason of the condition of somnambulism, and that he was not responsible' (pp. 75-6).

The jury found as directed and the case was adjourned. Fraser then gave an undertaking to sleep alone in future, and at the resumed diet the case was dealt with by the following interlocutor:

'In respect the Counsel for the Crown does not move for sentence, and in respect that the panel has come under certain obligations satisfactory to Crown Counsel, the Court deserted the diet simpliciter against the panel and dismissed him from the Bar'.

The terms of this interlocutor suggest that Fraser was convicted and was guilty, but that, as an act of administrative discretion, the Crown accepted his undertaking and declined to move for sentence. Yet the jury held that he was not responsible, and it is difficult to see how their verdict can be read as anything other than as an acquittal, or how the Crown could have had any locus to move for sentence at all. The verdict and interlocutor between them make it impossible to say on precisely what grounds the case was decided.

The simplest interpretation of Fraser is that he was not guilty, and that the reason for his lack of responsibility was that the death of his daughter was not the result of any act of his, since what he did he did unconsciously. The question of insanity did not arise because his unconsciousness, unlike that of, for example, persons in epileptic fugues, was not the result of mental disease, but of sleep, and because his delusion was not an insane delusion but a bad dream. If Fraser is to be said to have acted at all, it must be conceded that he acted involuntarily, and there is no reason to refuse to accept in Scotland Stephen's view that 'no involuntary action, whatever effects it may produce, amounts to a crime...I do not know indeed that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder' (Stephen, 2 H.C.L. p. 100).

A comparable situation arose in South Africa in the case of R. v. Dhlamini ([1955(1)] S.A.L.R. 120) where the accused had been dreaming that he was defending himself from an assault when he half-awoke, and mechanically, without volition or intention, stabbed a man kneeling beside him with a knife. He was acquitted by a simple verdict of not guilty.

Hypnotic acts. The same arguments apply to persons acting under hypnosis, at any rate where they have not voluntarily submitted themselves to the hypnosis. Glanville Williams takes the view that because a hypnotised person is not unconscious, the hypnosis cannot affect his responsibility, though

it may be a relevant fact to be considered in mitigation of sentence. (Gl. Williams, para. 5). But the crux of the matter is whether the act in question is voluntary, or merely automatic, and the act of the hypnotised person is automatic - he may be regarded as simply the instrument of the hypnotiser. His position can be perhaps compared to that of a mentally weak person who is 'coerced' into taking part in a crime by someone having influence over him. (Cf. Wm. Ross and Robt. Robertson, (1836) 1 Sw. 195). He is less than an innocent agent, and more like a robot controlled by the hypnotist. Whether or not a person can in fact be hypnotised into doing something repugnant to his ordinary nature is a question of medical fact, but even the person generally not averse from killing cannot be said to kill voluntarily if in a particular instance he was completely under the hypnotist's control.

There is no law on the subject in Scotland. It would, however, be reasonable to adopt the view that where 'the patient was entirely deprived of control over his actions it would seem consonant with principle to hold that the acts done by him were the acts rather of the hypnotiser than of himself' (W.T.S. Stallybrass, 'A Comparison of the General Principles of Criminal Law in England with the "Progetto Definitivo di un Nuovo Codice Penale" of Alfred Rocco' in *Modern Approach*, p. 390, at p. 403); and this view is in fact taken by French law (cf. Donnedieu de Vabres, p. 202).

The type of act necessary.

There is no precise limitation on the type of act necessary or sufficient to constitute criminal conduct - any conscious human action may be enough

in the particular circumstances of a given case. Perhaps the only general requirement is that there must be a fairly specific act, or course of action. Such a requirement is necessary because the actus reus must be seen to be causally connected with the conduct, and to have been caused by an act of the accused. For this reason 'we...leave unpunished those various modes of unkindness, ingratitude, treachery, and oppression, by which, in too many instances, the heart and health are broken, and the sufferer is conducted to the grave, by a longer and more painful passage' (Hume, i. 189). But any type of act is sufficient, provided it is sufficiently specific. Words, for example, are as much acts as are deeds, and indeed some crimes, like fraud or blackmail, are usually committed almost entirely by the medium of words. To kill a person with a weak heart by deliberately sending him a telegram containing the false news of a dreadful occurrence would surely be murder if the shock in fact killed him. Hume (ib. 190-1) and Macdonald (pp. 92-3) both consider that it is murder to give material perjured evidence which lead to conviction and execution for a capital crime, although both stress the difficulty of proving such a charge. There seems no reason why this should not be so, although there is English authority to the contrary (see Kenny, para. 13); indeed Biblical law specifically makes such conduct criminal (Deut. 19, 16-20). In such cases intention, act, and causal connection with the actus reus are all present; the intervening actors such as the judge, jury, and hangman, are merely innocent agents of the perjurer.

Omissions.

Crimes of omission and crimes of commission by omission. It is necessary to distinguish at the outset between crimes of omission on the one hand, and crimes of commission committed by means of omission, on the other. (The distinction is known in French law as that between délits d'omission and délits de commission par omission - Donnedieu de Vabres, p. 70, and in German as that between true (echt) and false (unecht) omissions - Schönke-Schröder, p, 26).

The first class covers all those crimes which consist of a failure to do something, such as failing to register the birth of a child, or failing to switch on one's car lights at lighting-up time. Here the omission is a crime in itself, and there are no difficulties of principle.

In the second group it is not the omission but its consequence which is criminal, and the consequence is a crime of commission. To commit homicide by refraining from feeding a child is to commit a crime of commission by means of, so to speak, an 'act of omission', and not to commit a crime of omission. It is only in certain cases that the failure to do something involves guilt of a crime of commission.

Omissions and negative acts. The special problems of omissions only arise where the criminal consequence is not intended. Where it is intended the omission is really an act, a negative act, and is in the same position as any other act. The doing of A can almost always be described as the failure to do not-A, and vice versa. To starve someone is to refrain from giving him food, but the omission to feed, if done with the intention of causing death, is as much an act as firing a gun. To fail to give a diabetic

his insulin because one is too lazy to do so, or because one does not think it is one's business to do so is just an omission, but to fail to give him it because one wishes to kill him, is an act. So, for example, all the following are acts, and not omissions:- to place a man in a cell with a homicidal lunatic in order that he should be killed; to expose a child with the intention of leaving him to die of exposure (Hume, i. 190); to put one's wife into a closet and keep her there without food until she dies (Geo. Fay, (1847) Ark 397).

Negligent conduct also falls into this category. To do something carelessly by reason of a failure to carry out the appropriate precautions is to commit a careless act, rather than an omission, and such situations belong to the category of negligent behaviour rather than to that of omissions.

Pure omissions. It is important to distinguish the above cases from cases of 'pure' omission, because it is only in certain restricted circumstances that a 'pure' omission is regarded as criminal conduct. 'Not to prevent an event, which it is obligatory to prevent, is equivalent to causing it' (W.T.S. Stallybrass, op.cit., at p. 392), but where there is no such obligation, there is no criminal responsibility for failure to prevent the event. This is tautological - there is only a duty to prevent something if there is an obligation to prevent it. And the law can only have regard to legal obligations - it does not enforce the obligations of morality unless these have been adopted as legal obligations. In law, a man is not his brother's keeper, and is not obliged to act like the good Samaritan. (It is not

clear how far this sort of criminal responsibility for omissions goes, but in theory it should be commensurate with liability under the civil law. The criminal law duty to prevent cannot be based on the criminal law, but it must be based on a legal duty; accordingly it must be co-extensive with the duties imposed by the civil law. Where therefore there is a civil law duty to do something, any failure in that duty which results in the creation of an actus reus should be treated as if it were an act.)

There is not even, it is submitted, a legal duty to prevent the commission of a crime, and to stand by and watch one's friends committing a theft, is neither in itself theft, nor a separate crime of omission. In Geo. Kerr and Ors. ((1871) 2 Coup. 335), a number of men were engaged in the rape of a woman; one of their friends stood by and watched the crime but took no part in it; he was acquitted. Lord Ardmillan declined to 'attempt to decide the general question... whether a man is particeps criminis who sees a crime committed and passes by or looks on without doing anything' (at p. 337), but the law seems to be that he is not, and that he is not guilty of a separate crime of his own either. Kerr is supported by the older case of Taylor and Smith (2 Feb. 1807, Burnett, p. 270), where a surgeon's apprentice who watched his friend kill a child, and then himself took the body to his master, was acquitted of killing the child. If watching one's friends commit a crime is not criminal, it must follow that merely to pass by strangers who are committing a crime is not criminal either.

There are four types of situation in which there may be a legal duty to prevent an event, so that failure

to do so is equivalent to bringing about that event by an act. Generally speaking the 'omitter' will only be guilty of a crime of negligence since he did not intend to bring about the actus reus, but there may be circumstances in which the omission is so blatant that he will be treated as if he had intended it, and so where death is involved may be guilty of murder and not merely of culpable homicide.

The four types of situation are:

(1) Where the omission follows on a prior dangerous act. It is probably the law of Scotland that where a person by his actings has created a situation of danger, he has a duty to do what he can to avert the danger he has created. (Cf. Schönke-Schröder, p. 29 - Wer durch seine Tätigkeit die Gefahr des Eintritts des Erfolges herbeigeführt hat, ist verpflichtet, den Erfolg zu verhindern). Once a surgeon has started to operate upon a patient he cannot just stop halfway leaving the patient open on the table - if he does so and the patient dies as a result, the surgeon will be responsible for the death. This will be so whether the operation was conducted in pursuance of a contract, or out of mere benevolence, since in either case the surgeon has started something which it is dangerous to leave unfinished, and has in fact left it unfinished. (cf. Gl. Williams, para 2; Holmes, Common Law, p. 278).

There is very little Scots authority on this matter, but two cases do bear on the question. The first is that of Peter M'Manimy and Peter Higgins ((1947) Ark. 321), where a lodging house keeper discovered that one of his guests had typhoid. In order to prevent the spread of infection, the keeper and a friend carried the invalid out of the house

without his consent, took him to Glasgow, and left him in the street where he lay until a policeman took him to hospital where he died. In these circumstances the accused were charged with culpable homicide. They were charged specifically as persons entrusted with the custody of the accused, but it is submitted that this qualification was unnecessary, since even if the principal accused had not been the deceased's landlord it would have been a crime for him to remove the accused from his room to the street. To put someone in the street and leave him there is quite different from refusing to render aid to someone you happen to pass by while he is lying ill in the street.

To treat the fact that the deceased was a lodger with the accused as the ratio decidendi is either too narrow or too wide. It is too narrow if it means that only a lodging-house keeper is guilty of a crime if he removes a sick person from a sheltered to an exposed place and leaves him there; it is too wide if it means that a landlord has a duty to look after the health of his lodgers. It is submitted that it is not the law that a hotel manager who allows a sick guest to linger in his room and die is guilty of homicide because of his failure to provide the deceased with medical assistance, or even to enquire as to his health. (The charge of culpable homicide was dropped in M'Manimy because it was thought that the deceased would have died of the typhoid anyway and that the accused had therefore not caused his death; and the accused pleaded guilty to removing him from his bed and to cruelly treating and deserting him.) It is true that in passing sentence Lord Hope,

the Lord Justice-Clerk, referred to the fact that the principal accused was in the business of keeping a lodging-house for profit, but however relevant that may have been to the accused's moral duty, or to the question of sentence, it was, it is submitted, irrelevant to his legal responsibility.

The other case is that of M'Phee (1935 J.C. 46) where the accused was charged with punching and kicking a woman, and thereafter exposing her 'while in an injured and unconscious condition to the clemency of the weather'. This was held to be a relevant charge of murder, but the accused was convicted of culpable homicide because he had no deliberate intention of killing her by exposure. Again, the exposure was criminal, because it was the creation by the accused of a situation of danger, followed by a 'washing of his hands' of the consequences. The accused was responsible for the death, not just because it was a consequence of his initial assault, but because having assaulted the accused he left her in a dangerous condition, a condition he had himself created.

(In both these cases the accused's prior dangerous act was a criminal one, but, as the example of the surgeon shows, this is not necessary; it is enough that it should be dangerous. A recent South African civil case is of interest in this connection. A fishing boat broke down, and after drifting for some days, foundered, and the crew were killed. The widow of one of the fishermen sued the owner of the boat who was the owner of a fishing fleet - for damages for the death of her husband, and she succeeded

in her action. One of the grounds of judgment was that in providing the fishermen with a boat for fishing the owner had engaged in an activity which was potentially noxious to others, and that accordingly he had a duty to try to prevent the danger which occurred by taking steps to rescue the crew, so that his omission to initiate rescue operations amounted to an act of negligence - Silous Fishing Corporation (Pty) Ltd. v. Mawesa, [1957(2)] S.A.L.R. 256. The case is complicated by the fact that although the plaintiff was not employed by the owners he was regarded by the Court as engaged on a joint enterprise with them, but it does seem to provide authority for the view that the creator of a danger is liable for omitting to take precautions to prevent it.)

(2) Where there is a personal relationship involved. The most obvious example of such a duty is that of a parent towards his children. A father who stands by and watches someone kill his children may be guilty of their homicide because of his failure to prevent their death, while a stranger who stood by would be free of guilt. In the Australian case of R.v. Russell ((1955) 39 Argos Law Reps. 76) it was alleged that a father had pushed his wife and children into a pond and murdered them. The accused said that after a quarrel with him his wife had thrown the children and herself into the water. A direction by the trial Judge that the father could be convicted of the manslaughter of the children even if he had not in any way encouraged his wife to kill them, but had merely stood by, was upheld by the Appeal Court. The father was also convicted of killing his wife, but this conviction was sustained on the ground that the jury were entitled to find that he had actively participated

in his wife's death, and the majority of the Court distinguished between the position with regard to the wife and that with regard to the children in this connection.

The essence of the matter in this type of omission is the legal relationship between the accused and the deceased. As the Commission appointed to consider English Criminal law in 1839 said, '... where death has been occasioned by the omission to discharge the legal obligation imposed by some civil relation existing between the deceased and some other person... the particulars of the civil rights and liabilities of parties so circumstanced becomes absolutely essential to the determination of the criminal responsibility of the accused' (Fourth Report of Her Majesty's Commissioners on Criminal Law, Parl. Papers, 1839, xix, p. 235, p. vii). The importance of the legal relationship was stressed in the American case of People v. Beardsley ((1907) 150 Mich. 206, Hall and Glueck, p. 159) where a man was charged with killing his mistress by allowing her to take poison tablets when he was in a position to stop her doing so by taking the tablets away from her. It was said there that 'Seeking for a proper determination of the case... by the application of the legal principles involved, we must eliminate from the case all consideration of meremoral obligation, and discover whether respondent was under a legal duty towards [the deceased] at the time of her death...which required him to make all reasonable and proper effort to save her; the omission to perform which duty would make him responsible for her death' (Hall and Glueck, at p. 164). In the absence of any such duty the prisoner's conviction was quashed. Beardsley suggests that there

would have been a 'duty of care' had the parties been married, while Russell suggests that the duty does not extend to spouses; but this is only a difference as to the civil rights involved, and not a difference in approach to the problem of criminal liability for omissions.

(3) Where there is an express contract. The position in such cases is that, in the words of the English Draft Code of 1879, 'Every one who undertakes to do any act the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty' (Report of Royal Commission on Draft Code, 1879, Draft Code, s.164). This section of the Code is concerned with homicide, and most of the cases deal with homicide, but there is no reason in principle to confine the law of omissions to homicide. The passive acquiescence by a nurse in the theft of a child in her charge might in certain circumstances amount to theft on her part, as it might make her art and part with the thieves. The obvious case of a breach of contract which would be regarded as criminal is the failure by persons in charge of the sick to fulfil their duties. A surgeon cannot be convicted of homicide for refusing to operate on someone, but a surgeon who enters into a contract to perform a necessary operation and then fails to do so, may be guilty of homicide if the patient dies as a result of his failure (cf. Macaulay, p. 494).

The contractual obligation may arise either from

a contract with the victim, or from a contract with a third party, such as a sick person's relation, or a charitable organisation, or the State itself. Macaulay gives the following example of an 'official' duty failure to perform which may be criminal:

'A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a person stationed by authority to warn travellers from attempting to ford the river. It is not murder if A is a person on whom Z has no other claim than that of Humanity' (*ib.* p. 495).
(Cf. R. v. Smith (1869) 11 Cox C.C. 210;
R. v. Pittwood, (1902) 19 T.L.R. 37).

Cases of this kind are rare in Scotland, but there are at least two examples. In the case of Thos. Mitchell (Dec. 15 and 26 1698, Hume, i. 397) a magistrate who declined to assist a messenger-at-arms who had been attacked by a crowd and deprived of his prisoner, was convicted of being art and part in the crowd's deforcement of the messenger. Hume points out that 'this sort of tacit encouragement would not, however, be reputed an accession in the case of any ordinary person', and cites the case of Francis Duguid (Dec. 1, 1673, *ib.*) in which a charge of deforcement against a father who did not stop his sons rescuing his son-in-law from a messenger was held to be irrelevant.

A somewhat more modern example is the case of Wm. Hardie ((1847) Ark. 247). The accused was an Inspector of Poor who was charged with the culpable homicide of a woman whose application for poor relief he had ignored, and who had died of want as a result. The charge was held relevant, but was not proceeded with. (A similar question arose in the case of Wm. Gray, (1836) 1 Sw. 328, but was not dealt with.

Gray was an engine driver who was charged with culpable homicide because of the death of someone he had allowed, contrary to the regulations of the company, to travel on the tender of his engine. The indictment was challenged because it omitted to charge any act committed by the accused. It was also argued that as railway employees were allowed to travel on the tender, what the accused had allowed was not dangerous, and that his duty to members of the public was the same as that to his fellow-employees. The case was dropped by the Crown before the Court gave judgment on relevancy.)

(4) Duties arising from the imposition of a legal obligation. In certain circumstances - other than those where there is a permanent legal relationship such as that of parent and child - the law imposes an obligation because of the relationship of the accused to the victim. The classic example of this is the English case of R. v. Instan ([1893] 1 Q.B. 450). There the accused lived alone with her bedridden aunt; for ten days she gave her aunt no food and called for no medical attention; the aunt died as a result. The accused was convicted of manslaughter. Lord Coleridge, C.J. purported to decide the case on the ground that the accused had failed in a moral duty to take care of her aunt, and said that 'A legal common law duty is nothing else than enforcing by law of that which is a moral obligation without legal enforcement' (at p. 453). This, however, is unnecessarily wide, and confuses law and morality. (Or else it is tautologous and only says that any moral duty which has been made a legal duty as well, is a legal duty.) A better ratio for Instan is that where people related as were the accused and the deceased live in the

circumstances in which they lived, the law imposes an obligation - perhaps because it implies an undertaking - on the healthy person to look after the invalid.

Hall, who is a staunch upholder of the moral nature of the criminal law, points out that Lord Coleridge's equation of law and morality does not represent the law properly. Hall says,

'Although this hypothesis is persuasive, it is also evident that it is not a sufficient explanation of the case-law. For example, an expert swimmer might be the only person to see a child drowning. He would thus know that he was the only one who could rescue the child and he should certainly feel obliged to save him. How can such a situation be differentiated from one identical with it - except that the by-stander is the child's father?....The essential difference, it is suggested, inheres not in the moral obligation, but in the mores, in the public attitudes regarding the respective parties; and these, in turn, are influenced by the relationship of the parties respectively to the child'. (Hall, p. 275).

The reference to public mores may seem at first sight to be out of place in a discussion of legal and not of moral obligation. But once it is conceded that the obligation may be implied from, or imposed in, the circumstances of the case, we must ask, 'In what circumstances does the law impose such a duty?! and this may depend on public attitudes, since the decision whether or not to impose a duty in any given case will be influenced by the normal reaction of society to the circumstances of the case.

The answer to the question is by no means clear, but it can be said with some confidence that the criminal law does not recognise a duty to take steps to prevent harm to anyone 'who is in law my neighbour', in the ~~same~~ sense that he is 'so closely affected by my

act that I ought reasonably to have him in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'

(Donoghue v. Stevenson, 1932 S.C. (H.L.) 31, Lord Atkin at p. 44). Of course, the civil law does

not go as far as this either - it is not e.g.

an actionable wrong to fail to render assistance to a stranger in need. As Hall puts it, 'We have not yet reached the point of believing that everyone is morally obliged to be his brother's keeper; or, at least, that is not believed sufficiently to be given implementation by the criminal law' (Hall, p. 275).

The law, as it stands, is generally regarded as unsatisfactory, since it refuses to punish people who are morally guilty of great callousness. There is much to be said for Bentham's view that, 'The limits of the law on this head seem, however, to be capable of being extended a good deal farther than they seem ever to have been extended hitherto' (Bentham, XVII, 9). This contention gains force from the examples Bentham gives, which are as follows:

'A woman's head-dress catches fire: water is at hand: a man, instead of assisting to quench the fire looks on, and laughs at it. A drunken man, falling with his face downwards into a puddle, is in danger of suffocation: lifting his head a little on one side would save him: another man sees this and lets him lie. A quantity of gunpowder lies scattered about a room: a man is going into it with a lighted candle: another, knowing this, lets him go in without warning. Who is there that in any of these cases would think punishment misapplied?' (ib.).

On the other hand, there is difficulty in extending the law, firstly, because of the principle that the criminal law should be construed narrowly, and secondly,

because of the difficulty of setting limits to the duty to protect others. Bentham suggests that 'where the person is in danger' it should be 'made the Duty of every man to save another from mischief, when it can be done without prejudicing himself' (ib.). His examples concern cases where the victim can be saved easily, without exertion by, or danger to, the rescuer, and where it is clear that a slight intervention will be sufficient. And any extension of the criminal law would probably have to be limited by these considerations: 'La loi pénale n'impose pas l'héroïsme' (Donnedieu de Vabres, p. 74). But in fact the law has not even gone the length of constructing a system of obligations restricted by these requirements - indeed there seems to be no law at all on the matter in Scotland, although Instan (supra) would probably be followed. It seems clear that the duty would be restricted to situations in which only two persons were involved - i.e. to cases where the accused should have saved the victim from some natural danger - and would not extend to cases of preventing someone else from harming the victim. But even so, the law would be very vague, and it would be an objection to it that it would be very difficult for the potential rescuer to know whether or not his failure to rescue would lay him open to a charge of homicide. This would be very hard on him, and it would be unfair to ask him to weigh up the situation and decide on his legal duty under the same penalty for failure as is imposed on an assailant for the-fore-seeable consequences of his assault - conviction for culpable homicide. The result of this argument is that in order to achieve certainty the law may have to forbear from punishment in certain cases, such as those quoted by Bentham, in which punishment would be unexceptionable. The position is summed^{up} by Macaulay,

who apologises in his Notes on the Indian Penal Code for the leniency of the law, and explains,

'We do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet is a bad man, a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice?...

The distinction between a legal and an illegal omission is perfectly plain and intelligible; but the distinction between a large and a small sum of money is very far from being so, not to say that a sum which is small to one man is large to another' (Macaulay, p. 496).

Instan (supra) suggests that the law is prepared to go farther than Macaulay, but it is doubtful if it will go much farther; it should also be remembered that the position in Instan was very like that between nurse and patient, and that the actual relationship of aunt and niece made the accused's conduct appear even more heinous than if it had been that of nurse and patient.

(Some European codes have adopted a compromise solution which allows them to take into account situations like those posited by Bentham without relaxing their attitude to crimes of commission by omission. They do this by creating a new crime of omission - the crime of failing to render help or prevent a crime where this can be done 'par action immédiate, sans risque pour lui ou pour les siens' - C.P. Art. 63,

Ordonnance de 25 Juin 1945. This applies both to the prevention of crime and to the giving assistance to someone in danger caused other than by criminal conduct - it would apply, for example, to a doctor refusing to treat a dangerously sick man - Donnedieu de Vabres, p. 73. Art. 330c of the German Penal Code imposes a similar duty - see Schönke-Schröder, pp. 1113-7. Failure to obtemper these provisions is not by itself equivalent to an act of commission should the person in danger die.)

The problem of causation

Whether the accused's conduct takes the form of an act or of an omission it must, of course, be shown to have caused the actus reus in question. A discussion of causation is thus inevitable, although such discussions are rarely fruitful. Questions of legal causations are closely linked to questions of legal responsibility, but it is possible to examine the difficulties of legal causation in terms of causal factors as well as, if not rather than, in terms of responsibility, and I propose to attempt such an examination.

The causal series

The objective standpoint: direct causation. From the objective point of view everything that follows from a given act is caused by that act. Other causes, of course, will also operate - there is no such thing as the cause of any event - but the act taken as the beginning of the series is a cause of all that follows from it. Starting from a given act there can be traced a sequence that is never broken; it may gather into itself factors which themselves can be traced back to

an act outside the series, but it is not broken by these factors, it is merely joined by them. The intervening factors are merely additional links in the final series, a series which is not something subsisting from all time, but something which is continually coming into being and expanding as it meets and joins other series, rather like a tributary running into a river and then being joined by later tributaries. (Metaphors are of course inexact and misleading, but they are inevitable if this question is to be discussed in language and not in mathematical symbols.) The series can be described only insofar as it has been completed at the time of description, and when so described it can always be described as unbroken.

The only distinction which can be made objectively is that between direct and indirect consequences of the given act. Anything which can be traced back to an act may be said to be a consequence of it, but it may not be a direct consequence. Where the consequences of an act are sought, and there enters the sequence something not itself traceable to that act, later events in the series may be described as indirect consequences of the act. If a man receives a wound which becomes septic, and leads to blood poisoning of which he dies, his death is a direct consequence of the wound. (Of course, it could be said that even in the simplest and shortest series external factors enter the sequence, but for legal purposes it is possible and indeed necessary to deal in rather broad terms) But if, while in hospital being treated for the wound, he catches typhoid from his neighbour and dies, his death is not a direct consequence of his wound. It is a consequence of it - what caused him to catch the typhoid was being in hospital, inter alia, and that was a direct consequence, because the typhoid was not caused by the

wound, but entered the sequence, so to speak, from the outside, with a causal history independent of the wound. This, again, is by no means logically impeccable - the existence of the hospital itself is an outside factor - but there is a rough distinction and it is a distinction which is used in legal reasoning about direct and indirect causation.

The subjective standpoint: foreseeable consequences.

From the standpoint of the person who performed the original act the series of consequences may be regarded as breakable. It is broken when what in fact occurs contains elements absent from the ideal sequence in the mind of the agent. Objectively there is no broken sequence if a football player kicks a ball which is deflected into the grandstand by hitting a goalpost: there is a simple sequence of events - kick, flight of ball, contact with goalpost, and subsequent deflection, all in accordance with the laws of dynamics. And if this was what the player expected to happen there is no break in the subjective series either. But if the player expected the ball to move in a way unaffected by the post, he can say that the contact with the post broke the causal series. Where the subjective or 'ideal' series is taken as that intended by the agent, any unintended event will break it; where it is taken as that foreseen by the agent, or as that which was foreseeable, any foreseen or foreseeable event, respectively, will break the sequence, - and so on.

Causality in the criminal law.

The first condition that must be satisfied before A can be held legally responsible for an actus reus, R, is that A must have caused R, in whatever sense the law uses the word 'cause'. The problem usually offers

itself in the form - is R a legally relevant consequence of A's act? This is a causal question and should be answered by reference to causal criteria; it is logically prior to the question - is A to be punished by the law for having caused R? There is clearly nothing inconsistent in saying that R was the consequence of A's act, in the legal sense of the word 'consequence', but that A should not be punished for having caused R - there may be any number of factors present which operate to relieve A of criminal responsibility for R, he may have acted justifiably, or in error, or insane, and so on. In fact, however, the law regards 'A caused R' and 'A is legally responsible for R' as equivalent, provided no 'defeating' factors are present in the case: 'A caused R' is equivalent to 'A is prima facie responsible for R'. As a result R will not be regarded as a legally relevant consequence of A's act unless A is to be held legally responsible for R; and if A is to be held responsible for R, he will be held to have caused R.

The law makes use of a number of causal criteria of which the most important are directness, foreseeability, and remoteness. These criteria may produce different results in the same case, and the choice of criterion may therefore be decisive of the result. Unfortunately there are no general rules governing the choice of criterion in any case or class of cases. In fact what often happens is that the choice of criterion is preceded and governed by a decision as to whether or not A is to be made responsible for R. There must of course be an initial judgment that R is in some sense a consequence of A's act, but once that has been made, the decision whether or not it is to be regarded as a legally relevant consequence will probably be determined

by the decision whether or not A is to be punished for R. Once the responsibility decision has been made, the criterion which will lead to the equivalent causal result is chosen, so that it can be shown that R was indeed a legally relevant consequence of A's act. Whether or not A is legally responsible for R cannot be logically decided before it is decided that R is a legally relevant consequence of A's act, and this must be determined by causal criteria - but the particular criterion used to make this decision is chosen by reference to A's moral responsibility, or perhaps to an instinctive decision about his legal responsibility, which is later rationalised by using the appropriate causal criterion so as to make it appear that the verdict was reached by means of causal reasoning, and not by the Judge's views as to the fittingness of punishing A. (Cf. O.C. Jensen, *The Nature of Legal Thinking*, Part II, passim.)

Before dealing with particular cases it may be useful to say something about the criteria used by the criminal law in making causal judgments or in providing causal explanations for its judgments, and about the factors which influence the way in which these criteria are used.

(i) Directness. The application of this criterion means that A is regarded as having caused R, and so as being legally responsible for R, if R is a direct consequence of A's conduct. In order, therefore, to escape responsibility for any given consequence of his actings, A must show that they are only indirect consequences of what he has done. That is to say, he must show that another causal factor intervened in the causal series between his act and R, of such a nature as to render R only an indirect consequence of his act.

It is in determining whether a given event is such a factor that there is room for rationalisation - whether or not a given factor is regarded as 'breaking' the causal chain may well depend on whether or not it is desired to punish A for R. Where the intervening factor is a voluntary human action it is called a novus actus interveniens, but events other than voluntary human actions may also operate to interrupt the sequence of direct causation.

In dealing with the situation created by an apparent novus actus interveniens or other apparently interruptive factor the law makes use of the criterion of foreseeability, so as to make A responsible in some circumstances for the indirect consequences of his actings. The intrusion of the criterion of foreseeability is dictated by moral considerations and the criterion itself is essentially a moral one, depending as it does on the view that A can only be blamed for what he ought to have foreseen. If then, the intervening event is one that he ought to have foreseen it will not be regarded as interrupting the causal sequence; on the contrary it will be regarded as itself something for which A is responsible since he ought to have foreseen it, and so subsequent events, even if attributable to the intervening factor, rather than to A's act, will be laid to A's door. In Steel v. Glasgow Iron and Steel Co. (1944 S.C. 237) the defenders negligently allowed one of their wagons to run down a slope; S, one of their employees, saw the wagon and tried to stop it; in doing so he was injured. He sued the defenders who pleaded that his intervention constituted a novus actus interveniens, but the Court held that Steel's action was foreseeable, and that his injuries had been caused by the defender's negligence in

allowing the wagon to run away. Again, in Haynes v. Harwood ([1935] 1 K.B. 146), a policeman who ran out of a police station into the street in order to stop a runaway horse-van and was injured by the van, recovered damages from the person responsible for the horse's bolting; and in State v. Glover ((1952) 330 Mo. 709, Hall and Glueck, p. 104) a man who set fire to his property in order to defraud his insurers was convicted of the homicide of a fireman who was killed while trying to put out the fire. In all these cases, a voluntary human act, something prima facie likely to constitute a novus actus interveniens, and to set up a new independent causal series of its own, so to speak, was regarded as foreseeable and as 'caused' by the defender, because the act of the intervener was not blameworthy but indeed commendable, and because the situation as a whole, and so the ultimate result, could be traced back to a wrongful act by the defender.

What is in issue in this use of foreseeability need not be the foreseeability of R as a result of A's act, but only the foreseeability of the intervention. If A shoots B through the head it is foreseeable that death will result, but if B is in fact killed by a bomb explosion on his way to hospital, his death will probably not be regarded as a legally relevant consequence of the shooting. In such a situation A is morally responsible for B's death, and B's death is a consequence of A's act, but the law may adopt the view that B was in fact killed by the bomb and not by A, and if the bomb explosion was unforeseeable, the result would be A's acquittal (cf. H.L.A. Hart and A.M. Honore, 'Causation in the Law', (1956) 72 L.Q.R. 58, 404; D.9.2.15(1); F.B. Smith, p. 1097; Hogan v. Bentinck Collieries, [1949] 1 All E.R. 588, Lord Macdermott at p. 601; infra, 128).

(ii) Foreseeability. The criterion of foreseeability may be used as an exclusive criterion, as well as being used in connection with the criterion of directness and the concept of the novus actus interveniens. If it is the only criterion applied, A will be legally responsible for only the foreseeable results of his actions; but difficult questions may arise as to whether he is responsible for foreseeable, or intended, results, which occur in an unforeseeable or unintended way, as where A inflicts a fatal wound on B, but B dies because someone else also inflicts a fatal wound on him soon afterwards, or because he is improperly treated by the doctors. Where R is itself foreseeable, and particularly where it is the result A intended, the Courts are reluctant to exclude A's responsibility because R actually occurred in an unforeseen way, but they may sometimes do so by applying the criterion of directness (see infra, 128).

When one reads legal textbooks, especially those dealing with civil negligence, one gets the impression that foreseeability is the legal criterion (see e.g. Glegg, *The Law of Reparation in Scotland*, 4th ed., pp. 37-45), but it is difficult to substantiate this feeling, at any rate so far as criminal law is concerned. The criterion is the one most in accord with moral feeling, and the law tends to its adoption, so to speak, but it does not in fact adopt it by any means universally.

(iii) Remoteness. This is at once the most difficult and the most 'useful' of the criteria, because it is the vaguest. It is accepted in Scots law that mere remoteness in time is irrelevant - the fact that the victim lingers for a long time before dying of the wound inflicted by the accused does not affect the latter's legal responsibility for his death (Hume, i. 185).

There must probably be a novus actus interveniens before responsibility is affected. The effect of remoteness is to make it easier to regard a subsequent event as a novus actus interveniens, since it can be said that the original act had spent its effect at the time of the intervention, so that the latter must be regarded as the substantial or effective cause of R.

Conversely, the idea of remoteness can be used to exclude what might otherwise be regarded as a novus actus interveniens on the ground that it occurred when the effect of the accused's act was still operative. In R. v. Smith ([1959] 2 W.L.R. 623) the accused assaulted a fellow-soldier; the doctor made a wrong diagnosis and applied an improper remedy, and the victim died. In upholding the accused's conviction for murder, and distinguishing the case from one in which improper treatment had followed on a stab wound from which the victim had recovered to a considerable extent at the time of the impropriety, and in which the accused had been acquitted (R. v. Jordan, (1956) 40 Cr. App. Rep. 152), Lord Parker said that

'...if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the wound...only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound' (Lord Parker, C.J. at p. 628).

Lord Parker's language is in the main untechnical, and his use of words like 'substantial' and 'overwhelming' suggests that in making causal judgments we do not apply

logical concepts at all, but 'weigh' the causes in some vague scale, and regard the 'heaviest' as the cause. This is probably what we in fact do when we judge untrammelled by such pseudo-logical or pseudo-legal concepts, as directness, novus actus interveniens and the rest. What we are after is just the 'most important' cause, and in such a search remoteness is of great importance. But remoteness in this sense means something other than place in a temporal sequence - if A shoots B and the operating surgeon's hand slips and causes B's death in the sense that B, who would probably have died anyway, dies immediately following the cut caused by the surgeon, it can be said that the important, or effective, or substantial, cause of death was A's act, and not the surgeon's 'trivial' error. This way of thinking, of course, may lead us to take the view that the substantial cause is the most violent act in the series, and so to require some 'overwhelming' intervention as a novus actus interveniens. This in itself is unsatisfactory: it might mean that if B was killed by a bomb explosion on the way to hospital A would be acquitted, but if he were killed in an accident caused by a slight error of judgment on the part of the ambulance driver, A would be convicted.

Finding someone to blame. In considering the influence of responsibility on causal judgments it is important to distinguish between cases where an act by A is followed by an act by B, and those where A's act is followed by an event other than a human action. In the first case the important question may well be whether A or B is to be blamed for the criminal result. In the second case, the only alternatives are to blame A or to blame no-one. If no-one is blamed, then the

actus reus goes unpunished, society is deprived of its victim, and the law loses an opportunity of pursuing its policy of deterrent punishment.

It is easier to acquit A if his criminal act is followed by the criminal act of B, than if it is followed by a non-criminal act of B, or by a non-human event.

Taking your victim as you find him. The most generally accepted rule in this part of the law is the rule that pre-existing factors in the condition of the victim are irrelevant - that an assailant must take his victim as he find him (Robertson and Donoghue, Edinburgh High Court, 28-30 Aug. 1945, unrepd., Judge's Charge, p. 17; Rutherford, 1947 J.C.1 - the rule is criticised infra, *ch. 14*). The state in which the victim is found is regarded as irrelevant, and the foreseeability that such might be his condition does not come into the matter at all. To take an example from civil law, if a dog bites a boy who is predisposed to meningitis so that the boy catches the disease from the bite, the death is regarded as having been caused by the bite (M'Donald v. Smellie, (1905) 5 F. 955).

This rule seems to be firmly entrenched in the law, and it owes its strong position to two factors. The first is that it seems reasonable to say that it is just as criminal to kill a weak old man as to kill a healthy young one. The law goes on from there to say that therefore it is as bad to kill a haemophilic by sticking a pin into him, as it is to kill a normal person by sticking a knife into him, even if the assailant was ignorant of the haemophilia. By this paralogism the law arrives at the conclusion that the physical condition of the victim is always irrelevant.

The second reason is that we tend to think of causal factors as set out in a temporal sequence, and to regard the last cause as the most important. The haemophilia precedes the pin prick, and is therefore disregarded as a cause of death, since it has been followed, or 'superseded' by the prick. This was once the view taken by the civil law which in seeking the cause of an accident discarded anything which had become a 'static factor' by the time the accident occurred. In the classic case of Davies v. Mann ((1842) 10 M. & W. 546) a carriage was carelessly driven into a donkey whose owner had carelessly left it in a dangerous place. The donkey owner's carelessness was discarded as a cause of the accident because the donkey was there first, and its presence had become a static feature of the situation by the time the carriage ran into it. The position is even stronger when the static condition, be it a brick wall or a predisposition to meningitis, is not itself the result of negligence. The civil law no longer approaches causal problems in this way and the rule that an accident is caused by the person with the 'last opportunity' of avoiding it has been described as 'a fallacious test, because the efficiency of causes does not depend on their proximity in point of time' (Davies v. Swan Motor Co. (Swansea) Ltd., [1949] 2 K.B. 291, Denning, L.J. at p. 321; cf. Owners of the 'Boy Andrew' v. Owners of the 'St. Rognvald', 1947 S.C. (H.L.) 70).

The solution adopted by the civil law is to apportion liability among the various persons who have by their negligence contributed to the accident (Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. VI, c.28, s.1), but this solution can hardly be used in criminal law: there is certainly no precedent for

apportioning guilt among persons who have contributed independently to the creation of an actus reus. A man is either guilty of killing another, or he is not, he cannot be half-guilty of killing him, or guilty of half-killing him. It may be, however, that if the punishment for murder were not fixed, such an apportionment would be possible, and at least it could be reflected in the sentences imposed. But it would represent a radical alteration in the attitude of Scots law, which does not even allow of the degrees of guilt represented in England by guilt as principal in first or second degree, guilt by accession, and guilt of aiding and abetting (cf. Kenny, ch. 5). The criminal law, it appears, must either hold that all those who have contributed to the crime by their criminal conduct are guilty of that crime, or must fix on one actor and treat him alone as guilty.

Because of this, temporal sequence remains important in criminal law, but it does not follow that unless the last assailant is guilty of homicide his act cannot be a novus actus interveniens. Suppose A wounds C so as to render him allergic to a particular drug, and the doctor who attends C prescribes this drug, and goes on prescribing it although he discovers or ought to have discovered C's allergy, and C dies because of the combined effect of the wound and the drug. The question whether the doctor is guilty of culpable homicide, and the question whether the doctor's behaviour constitutes a novus actus interveniens are two separate questions. The doctor's behaviour may be the 'legal cause' of C's death, operating as it did on C's static condition, and at the same time it may not be proper for the law to punish the doctor. In the same way, if A wounds C so as to render him

peculiarly susceptible to punches on the jaw, and B comes along and punches him on the jaw and kills him, the law could be altered so as to allow of B's acquittal on the ground that death was not a foreseeable result of his punch and that accordingly he lacked the necessary mens rea for culpable homicide, without abandoning the rule that B's act is a novus actus interveniens which prevents C's death being regarded as a direct consequence of A's act, and so exonerates A from guilt of homicide. It is contended therefore that it is not inconsistent to object to the rule that an assailant takes his victim as he finds him when it operates to convict an assailant of homicide where death was not a foreseeable result of his actings, and at the same time to accept that the assailant caused the death, and that the assault is therefore a novus actus interveniens. This, of course, would involve a separation of causation and responsibility, while the law is prone to equate the two.

Can two people commit one murder? Assuming that Scots law accepts the rule that the last assailant is guilty of murder, the next question is, can an earlier assailant also be guilty of murder? Where the two assaults are simultaneous, or almost so, the answer is probably yes. If A and B simultaneously shoot at C and each bullet inflicts a fatal wound there is no way of distinguishing between A and B on causal grounds, and the only alternative to convicting both is to acquit both, a course as clearly unjust as it is just to convict both (cf. Hall, p. 263; F.H. Lawson, Negligence in the Civil Law, pp. 51-2).

Suppose, however, that A inflicts a fatal wound on C, and some time later, B comes along and inflicts a fatal wound on the dying C. B is clearly guilty of

homicide, since it is homicide to shorten a man's life, however near to death he may be (Hume, i. 183). Is A also guilty? This question can be conveniently approached by way of the American case of People v. Lewis ((1899) 124 Cal. 551, Sayre, p. 189), an example of an actual situation of this kind. The accused inflicted a fatal wound on the deceased who cut his own throat a few minutes later, and died after another five minutes. It was assumed that the deceased was guilty of suicide, and that his suicide was a voluntary act for which he was responsible, and the only question was whether the accused could be regarded as having also been responsible for the death. The defence, as stated by Temple, J., the trial Judge, was '... that this is a case where one languishing from a mortal wound is killed by an intervening cause, and therefore, the deceased was not killed by Lewis...He was as effectually prevented from killing as he would have been if some obstacle had turned aside the bullet from its course and left [him] unwounded' (Sayre, p. 190).

The Judge then rejected the argument that the suicide had been caused by the wound, saying, 'The wound induced the suicide, but the wound was not, in the usual course of things, the cause of the suicide'. He none the less took the view that Lewis was guilty of murder, and said,

'The test is - or at least one test - whether, when the death occurred, the wound inflicted by the defendant did contribute to the event. If it did, although other independent causes also contributed, the causal relation between the unlawful acts of the deceased and the death has been made out. Here, when the throat was cut, [the deceased] was not merely languishing from a mortal wound. He was actually dying - and after the throat was cut he continued

to languish from both wounds. If the throat cutting had been by a third party, unconnected with the defendant, he might be guilty, for, although a man cannot be killed twice, two persons, acting independently, may contribute to his death and each be guilty of a homicide' (ib. pp. 191-2).

In its approach to causality this decision is in line with the approach of the Court in R. v. Smith ([1959] 2 W.L.R. 623, supra, 119); so long as the original wound remains an operating and substantial cause, the person who inflicted it is guilty of homicide - although the English Courts might have regarded the deceased's suicide as an overwhelming event breaking the causal link. The core of Lewis is the general proposition contained in the last sentence quoted - that two persons, acting independently, may contribute to the death of one man, and both be guilty of homicide. (Where the two persons act in concert quite different considerations apply, since then the death is the act of the concert, so to speak, and the question is whether the accused were truly in the concert, or plot, to kill the deceased - see infra. ch. 4).

The decision in Lewis has been strongly criticised by Hall (Hall, pp. 261-6) and his arguments are applicable to Scots law. Indeed, there is an explicit dictum in Scotland that two people acting independently cannot be guilty of the same crime, but the dictum appears in a case in which the only question was whether if a woman had pleaded guilty to fraud, her husband could later be charged with the same fraud on an indictment that did not allege that he had acted in concert with her, and there was no discussion of general principles (Greig v. Muir,

1955 J.C. 20, Lord Justice-Clerk Thomson at p. 23).

The general principle is that A cannot be convicted of the murder of C unless A's act caused C's death (Hume, i. 181). Macdonald states in terms that, 'If, after the injury, some other person has done an act which causes death, the person who did the first injury cannot be held guilty of homicide. Thus, if A mortally stab B, but C administer poison to B and kill him, A cannot be found guilty of homicide, the direct cause of death being the poison' (Macdonald, p. 87). Macdonald's authorities are a passage from Hume which does not go quite as far as this, since it deals with the case where the initial wound is 'of that sort which either may or may not prove fatal' (Hume, i. 181), and a passage in More's Lectures which does support his view, but itself refers to no authority (John S. More, Lectures on the Law of Scotland, Vol. 2, p. 361).

The only Scots authority to the contrary, however, is the case of John Ross and Ors., ((1847) Ark. 258). Ross was a driver who had left his horse and cart unattended with a passenger in it; A and W, the two other accused, were also cart drivers, and together drove their carts recklessly into Ross's cart, whereupon Ross's horse bolted and his passenger was thrown out and killed. All three were charged with culpable homicide, and the indictment against Ross was held to be relevant. This is rather surprising, in view of the fact that Ross's horse was in the position of the donkey in Davies v. Mann ((1842) 10 M. & W. 546, supra, 122), and the case against Ross was later abandoned. There remains the question of the guilt of the other two accused, and it is not clear whether this rested on the fact

that they were acting in concert. It may be that their actings can be regarded as similar to those of two persons who simultaneously inflict fatal bullet wounds on a third. The case does not seem to have been followed, and is inconsistent with the views of More and of Macdonald, and the dictum in Greig v. Muir (supra). It is submitted that it can be disregarded as an authority.

The argument in favour of Macdonald's view is fairly clear. The mere fact that A intended to kill C cannot make him guilty of murder. Otherwise A would be guilty of murdering C if he stuck pins in C's effigy with the intention of causing his death in this way, and C was run over and killed by a lorry just after his effigy had been pierced. A must cause C's death. Now, the law accepts that an unforeseeable event operates as a novus actus interveniens and breaks the objective causal connection between two events which otherwise are directly connected with each other. This objective break occurs irrespectively of whether A intended to cause C's death by his actings, so that A is not guilty of killing C unless C died as a result of A's act. He must also die more or less in the way intended by A. If A 'intending to kill his victim, poisoned his food and the victim, while on the way to hospital for treatment, was struck by a falling tree and died, [A] would not presumably be convicted of murder although he intended the victim's death and it would not have occurred but for his act' (H.L.A. Hart and A.M. Honore, 'Causation in the Law', (1956) 72 L.Q.R. 58, 404; cf. D. 9.2.15(1); T.B. Smith, p. 1097; Schönke-Schröder, pp. 309-10). As Hall puts it, the law is concerned with what in fact happened, and not with what might have happened, and in fact A did

not kill C (Hall, p. 262).

If, then, A deliberately inflicts a fatal wound on C - and a fortiori if he inflicts the wound carelessly, or if the wound is not necessarily fatal but only foreseeably so - and B later does something which causes C's death, A should not be convicted of homicide. At the same time, A may well be morally responsible for C's death - there is no reason why A and B should not both be morally to blame for killing C, at any rate if one's moral attitudes are deontological in character - and this may on occasion influence the law to depart from the criterion of direct causation, and to seek to achieve the morally desirable result by way of the criterion of foreseeability. If A's act was not foreseeably fatal - if A ought not to have realised that it might cause C's death - the law will be more ready to regard B's intervention as unforeseeable by A, and so as a novus actus interveniens, particularly if B's behaviour is not particularly heinous. If, on the other hand, A's act was foreseeably fatal, the law will be inclined to regard B's intervention as foreseeable by A, or at least to say that a fatal result was foreseeable, in order to avoid treating B's intervention as a novus actus interveniens, and in order to convict A. The latter course is almost invariably adopted where A deliberately inflicts a serious injury on C and B is a doctor who is negligent, but not grossly or criminally so.

With these considerations in mind, I turn to consider three classes of cases which involve causal problems - those where A's act is followed by an act of a third party; those where it is followed by a natural event; and those where it is followed by an act of the victim.

Acts by a third party. Most of the cases in this group are concerned with the problem of malregimen, of the effect of negligent medical treatment on the wounds originally inflicted by the assailant, and the general rule is that reasonable medical treatment is considered to have been foreseeable, while grossly improper treatment is regarded as something which interrupts the causal series, and so prevents the victim's ultimate condition from being regarded as a consequence of the original injury.

The creation of a new injury. In the American case of Purchase v. Seelye ((1918) 231 Mass. 434; 8 A.L.R. 503) a railway employee was injured through the negligence of his employers. He was taken to hospital where he was operated on by a surgeon who mistook him for another patient, and instead of operating on his wound operated on the other side of his body. The question raised in the case was whether the employee was entitled to damages from his employers for the additional injuries caused by the surgeon. It was held that he was not. The Court pointed out that,

The question is whether the act of the [surgeon] in operating by mistake upon the ... left side was a natural and probable result of the negligence of the railroad company... The reason why a wrongdoer is held liable for the negligence of a physician whose unskilful treatment aggravates an injury is that such unskilful treatment is a result which reasonably ought to have been anticipated by him.

The railroad company could not be held liable because of the [surgeon's] mistaken belief... The fact that the mistake... might possibly occur is not enough to charge the railroad company with liability; the unskilful or improper treatment must have been legally

and constructively anticipated by the original wrongdoer as a rational and probable result of the first injury.' (8 A.L.R. 505-6, Crosby, J.)

Although the Court applied the criterion of foreseeability, it should be noted that the additional injuries were not merely unforeseeable, but would also have been regarded as breaking the chain of direct causation.

The only Scots case on this point is not altogether conclusive. It is the case of Hugh and Euphemia M'Millan ((1827) Syme 288). The accused threw acid at the victim; she received injuries to her face; as part of the medical treatment given her, she was subjected to blood-letting, and a cut was made in her arm for that purpose; this cut became inflamed and caused her death. In these circumstances the Lord Advocate dropped the charge of murder, and proceeded on a statutory capital charge of assault by acid-throwing, but in doing so he commented that it might be a nice question whether the accused were guilty of murder since bloodletting was the normal remedy for the deceased's injuries (at p. 293). It remains a nice question. The case seems to have proceeded on the criterion of direct causation; it is likely, however, that if a similar situation were to arise today, it would be decided by way of the criterion of foreseeability, in which case, since bloodletting is ex hypothesi the normal treatment, and so is to be regarded as foreseeable, the accused would be convicted of homicide.

Aggravation of the original injury. This is a more difficult case, but the approach in Scotland is probably fairly simple, although not altogether logical. The general rule is that negligent treatment

is irrelevant, since the accused must 'stand the peril of the consequences of his act' (Jas. Wilson, (1838) 2 Sw. 16, Lord Cockburn at p. 18). Where, however, 'it could be clearly proved that the wound would not naturally have led to a mortal issue, and that this result has been produced, not by the wound but by the bad treatment...it will be difficult to sustain a charge of murder' (John S. More, op. cit. p. 364). The position is left rather vague, but the balance is weighted somewhat against the accused. Where the wound is foreseeably fatal the law seems to be that its subsequent aggravation is irrelevant; and Judges are reluctant to say that where it is not foreseeably fatal subsequent aggravation by medical negligence is to be regarded as breaking the causal chain between the accused's act and the victim's death. In Jas. Williamson ((1866) 5 Irv. 326) Lord Inglis went only so far as to say that if the wound were not 'fatal in itself', and were followed by improper treatment, it would be possible to say that the accused had not caused death. Again, in Heinrich Heidmeisser ((1879) 17 S.L.R. 266) Lord Moncrieff said that where the wound was not foreseeably fatal it did not necessarily follow that the wound was to be regarded as the cause of death if improper treatment intervened between the wound and death (at p. 267).

There is authority that where the wound is foreseeably fatal, then although the victim might have recovered had the best attention been available, the absence of such attention does not prevent the wound being regarded as the cause of death (ib.), and that where it might have been cured by ordinary treatment but no treatment was given, the wound is the cause of death (John Macglashan, Bell's Notes, p. 69;

Margt. Shearer, (1851) J. Shaw 468). It does not, however, follow from this that where a foreseeably fatal wound is followed and aggravated by improper treatment the assailant must be regarded as having caused the death. There is a difference between the absence of treatment which means that the wound is left to take its course, or the presence of improper treatment of a kind which fails to prevent the wound taking its course, on the one hand, and improper treatment which itself operates on the wound to aggravate it and so to cause death, on the other hand. In the first cases it can be said that death was a direct consequence of the wound, in the second the improper treatment has been added to the causal series, and has in fact altered the 'natural' progress of the wound by aggravating its seriousness, so that it becomes necessary to ask if the introduction of this new causal factor is to be regarded as interrupting the causal series.

It is submitted that the foreseeability of the original wound being fatal is not a sufficient criterion (nor, indeed from the causal point of view, whatever the requirements of morality, is it a necessary condition, a fact which is recognised in the 'take your victim as you find him' cases); the wound must be shown to have caused death. Suppose A injures two people, X and Y; X's wound is foreseeably fatal, Y's is not. X and Y are taken to hospital in the same ambulance and are killed on the way because of the negligence of the ambulance driver. Is A guilty of killing X and not Y? This cannot be the case, but it is the result of concentrating on the likelihood of the original wound proving fatal. This concentration is explained by the fact that the more likely the original wound is to be fatal, the more likely was

serious injury intended, and the more wicked the accused must have been.

The proper causal approach is by way of the foreseeability, not of the fatality of the original wound, but of the subsequent events. Whether or not medical negligence operates as a novus actus interveniens should depend on the foreseeability of the particular intervention, of the particular mistake, or at any rate on the foreseeability of an intervention or mistake of that kind. If this approach is adopted it can be said that 'death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury', but that death resulting from abnormal treatment may be regarded as caused by the treatment (R. v. Jordan, (1956) 40 Cr. App. Rep. 152, 157). Abnormal treatment is usually grossly improper treatment, but this need not be so. A surgeon may use a new, unusual, experimental treatment without impropriety, but the treatment may be so unusual - and so risky - as to rank as a novus actus interveniens. The insistence on impropriety is the result of adopting, perhaps surreptitiously, the principle that what the doctor does can only operate as a novus actus interveniens if the doctor was to blame for it, so that he can be substituted for the accused as an object of punishment. It is also felt that the accused must not be allowed to 'get away' with what he has done by criticising the doctor - 'it will never do... to say that every criticism that can be made on the treatment of the patient... is to furnish a ground for acquitting the person who inflicted the wound' (Williamson, supra). No such suggestion is made; the argument is that what matters is whether

the accused caused the death; not whether he intended to cause it, or acted recklessly and wickedly in assaulting the victim. Nor is it a question of criticising the medical treatment, but of asking if it caused death, and if it was foreseeable.

Subsequent events. The cases under this head concern the incidence of disease supervening on an injury. The basic criterion is that of direct causation, allied to the idea of remoteness. So Hume says that if 'A person of a weakly habit receives a wound, of which, after some space of time, he is cured; but owing to the long confinement, he is taken ill of consumption, or some other malady incident to such a state of weakness; and of this he dies', the assailant is not responsible for the death since, 'Inferences of this kind are far too remote, and too uncertain, to serve as the grounds of judgment in human tribunals' (Hume, i. 182). (Hume also quotes a case in which the accused broke into a house in order to beat the owner, and their 'raging and roaring' caused his wife, who was in childbed, to contract a fever of which she died - Duff of Braco Nov. 10, 1707, Hume, i. 183 - which seems to be a case in which the criterion of directness was abandoned on grounds of foreseeability.

At the other extreme is the case of Heidmeisser ((1879) 17 S.L.R. 266). There the victim was in hospital recovering from a wound inflicted by the accused. He died of a chill caught when 'He had been brought through the danger, and nothing more was required but ordinary skill and care - but he had not recovered, and if a chill was sufficient to carry him off, as in point of fact it seems to have done, the man who put his fellow-man in a position where a chill would carry him off is responsible' (Lord Moncrieff at p. 267).

Now, although the deceased had not entirely recovered from his wound, the general tenour of the case seems to conflict with Hume's statement of the law. And the ratio of the case - that the accused put the deceased into a position in which a chill might carry him off - is capable of much wider application. Indeed, it is very like the unsatisfactory criterion of the causa sine qua non (cf. supra, 70). If Heidmeisser's victim had caught a disease which might have been fatal to a healthy man, but which was endemic in the hospital in which he was recovering from his wound, it could still have been said that Heidmeisser had 'put him in a position' where this disease would carry him off.

It is submitted that Heidmeisser is wrong, and that the proper criterion is that of directness, subject to an exception in the case of direct consequences which appear too remote to make it reasonable to attribute them to the accused's act. The law is probably contained in Lord Cockburn's summing-up in Jas. Wilson ((1838) 2 Sw.16,19), where he said that 'provided the disease, from which death follows, be not altogether new, but a natural consequence of the injury, the law holds that injury to be the cause of death', but that where 'the disease was an entirely new disease - not produced by the wounds, but by infection, or some other external cause', death will not be treated as a consequence of the injury. (Cf. also J. Campbell, April, 1819, Alison, i.147).

Acts of the victim. Here the element of blame is most important. If it appears fair to say that the victim had only himself to blame, his death will probably not be attributed to his assailant. This is, of course, particularly so if the wound was trivial.

'If a person receive some slight injury, in itself nowise dangerous or difficult to be cured, but which owing to his obstinacy and intemperance, or to rash and hurtful application, degenerates in the end into a mortal sore' he is regarded as 'having killed himself' (Hume i, 182). In the case of Jos. and Mary Norris (1886) 1 Wh. 292) the wound was trivial, but the victim went drinking, exposed himself to the cold, and took off his bandages, so that he caught tetanus and died. Lord Craighill told the jury that the question for them to consider was whether the tetanus would have developed whether or not the victim had behaved as imprudently as he did (at p. 295). (Cf. also Jos. Flinn and Margt. Brennan, (1848) J. Shaw 9 where the victim was struck on the head with a tray, and then drank whisky and died - the Crown dropped the charge of homicide.)

These cases are perhaps comparable to cases where improper treatment makes a trivial wound fatal, but the reference to 'obstinacy and intemperance' suggests that even where the wound is foreseeably fatal there may be cases in which the victim's own behaviour will be regarded as the cause of death; it is probably necessary to retain this possibility in order to provide for the case of a spiteful victim deliberately disobeying his doctor in order to ensure the conviction of his assailant for murder. Since the victim's actions could hardly be regarded as foreseeable, the conviction of the assailant could be avoided, in the present state of the law as to situations where the wound is foreseeably fatal, only by treating acts by the victim as different from acts by third parties. In one case, that of Daniel Houston (25 Nov. 1833, Bell's Notes, p. 70), the Court stopped a homicide

trial because they thought that the rejection of medical advice might be on a different footing from improper treatment, but the point was left undecided.

Conversely, of course, there might be cases in which the victim's conduct, although imprudent, was foreseeable, and so would not operate as a novus actus interveniens. If A inflicts a wound on B which induces a strong thirst in B and at the same time makes it dangerous for him to drink, and both results are foreseeable, B's conduct in drinking, however obstinate, intemperate and lacking in self-control, may not constitute a novus actus interveniens.

There may also be situations in which the assailant is so clearly deserving of punishment for the victim's death, and the victim's own behaviour so clearly not blameworthy, that the assailant will be convicted of murder, irrespective of causal considerations, provided of course that the death was in some material sense a consequence of the assault. In Stephenson v. State ((1932) 205 Ind. 141, 179 N.E. 633, see Francis X. Busch, *Guilty or Not Guilty*, pp. 77-124, and G.C.T., 'A Note on Stephenson v. State', (1932-3) 31 Michigan Law Review, 659), the accused raped a girl, and in doing so inflicted wounds on her breast. The wound caused an abscess; the girl took poison a few days after the rape with the intention of killing herself; the poison itself would not have caused death, but it did so in combination with a complication of the partly-healed abscess. The Appeal Court upheld the accused's conviction for murder, holding that the abscess had actively contributed to the death, that the suicide was not a responsible act, and that in any event the girl was compelled to commit suicide to escape the accused's

violence. As was pointed out in a note in the Michigan Law Review (supra) none of these grounds was sufficient according to the letter of the law - the abscess was not foreseeably fatal, there was no precedent for treating the suicide, on the evidence, as involuntary or irresponsible, and the girl took poison, not to escape violence, but to escape shame. The accused was convicted because 'Assuming that his act has caused death in fact, its punishability as a homicide should be determined, not so much by the more or less fortuitous course of events subsequent to the acting, as by the social menace of the act and the viciousness of the actor's intent' (31 Michigan Law Review, p. 663).

The place of the act

Criminal conduct and the actus reus

In talking of criminal conduct and the actus reus it has been assumed that the two can always be separated. 'The actus reus, which is the result of conduct, and therefore an event, must be distinguished from the conduct which produced the result' (Kenny, para. 12). This is not, it is submitted, always so. There are crimes in which the actus reus is inseparable if not logically indistinguishable from the conduct. The actus reus of perjury, for example, is just the giving false evidence on oath. But in most crimes the two can be separated, and when this is so, there will not be a completed crime until the actus reus has occurred, as for example, where a man dies as a result of an injury inflicted some time previously. The kind of crime in which conduct and actus reus

are separated is known in German law as an Erfolgsverbrechen, a success- or result-crime, since the criminality of the conduct depends on the result produced.

In such crimes the conduct and the actus reus may occur in different countries, and the question then arises; In which country was the crime committed?

Where the actus reus occurs in Scotland. It is clear, both in principle, and on authority, that where criminal conduct abroad has as its result an actus reus in Scotland, a crime has been committed against the law of Scotland. The leading authority on the subject is the case of John Witherington ((1881) 4 Coup. 475) in which the Lord Justice-General, Lord Inglis, illustrated the rule as follows:-

'The best and most conclusive example... is the case of a murder by poisoning, which takes place in Edinburgh, while the murderer is domiciled and resident in London, and never was in Scotland. The manner in which the murderer accomplishes his purpose is to send by post, or otherwise, to his victim in Edinburgh, a packet of deadly poison, recommending it to him (knowingly and maliciously for the purpose of accomplishing the death) as a salutary medicine... If the victim acts on the suggestion and swallows the poison it is not doubtful that a murder has been committed in Edinburgh' (at p. 489).

Lord Inglis also pointed out the importance of the concept of the result-crime,

In most of these cases the perpetrator's success is his criminal object is necessary to complete the crime. In the case of poisoning there would have been no murder if the victim had not swallowed the poison...

There are crimes of a different description which may be fully committed without the criminal succeeding in the object for which he commits the crime. The most obvious of these are forging and uttering. If a man forges a...cheque, and sends it by post or by

messenger for the purpose of its being used and acted on as genuine, the crime is completed as soon as the document passes out of his own possession or control, although the forger may be immediately afterwards detected, and no one is injured...

Now, the question of jurisdiction here seems to me to depend on whether the offence charged in this indictment belongs to the former or the latter of these descriptions of crime' (at p. 491).

Witherington itself, like many of the cases on this subject, (e.g. Wm. Bradbury, (1872) 2 Coup. 311, Thos. M'Gregor and Geo. Inglis, (1846) Ark. 49), concerned a type of long-firm fraud. The accused who lived in England sent letters to Scottish traders containing false representations by means of which he persuaded them to send goods to him in England, the goods being despatched by railway carrier. The ratio of the decision that the Scots Court had jurisdiction to convict the accused of fraud was that the actus reus consisted in the obtaining of the goods, and that this had occurred when the railway accepted them for transmission to him. As Lord Inglis said, 'It is here (i.e. in Scotland) that [the dupe] is imposed upon and induced to believe the false and fraudulent representations of the panel; it is here that he acts on the belief... and delivers the goods in Scotland to a public carrier who is thereby constituted the innocent agent of the panel in carrying out the fraudulent scheme to its completion. When the goods were delivered...the imposition was successful and complete' (at p. 492).

Where the actus reus occurs abroad as a result of conduct in Scotland. The position here is more difficult. If the conduct is criminal in itself, it is punishable as such in Scotland, whether or not its remoter results are also punishable there. If, for example, it were a crime to possess poison, and A sent poison from Scotland to England to kill B there, he can be convicted in Scotland of the crime of possessing poison, whether or not he can also be convicted of B's murder. The difficult question is whether he can also be convicted of B's murder.

It seems to have been assumed that a foreign actus reus is punishable in Scotland, provided that the 'main act' is committed in Scotland (Macdonald, p. 191). There are dicta which take it for granted that the man who shoots across the border from Scotland into England and kills someone there, can be tried for murder in Scotland as well as in England (Wm. Bradbury, (1872) 2 Coup. 311; Lord Neaves at p. 319; Wm. Allan, (1873) 2 Coup. 402, Lord Ardmillan at p. 407; Macdonald, p. 191). Nor is this view confined to Scotland. The English Draft Code of 1879 proposed that

'Every offence...shall...be deemed to be committed at every place where any act is done... the doing...of which forms a part of the offence, or where any event happens necessary to the completion of the offence...' (Report of Royal Commission on Draft Code, 1879. Draft Code, s.4)

But this view conflicts with the principle of territoriality. At common law, and by the basic principles of international law the criminal jurisdiction of any country extends only to crimes committed within its boundaries (cf. Huntington v. Attrill, [1893] A.C. 150; John Hall, (1881) 4 Coup. 438, Lord Young at p. 449). It will only be exercised with

respect to crimes committed outwith these boundaries where there is special statutory provision for such exercise (cf. Mortensen v. Peters, (1906) 5 Adam 121; Hetherington, (1915) 7 Adam 633).

There are also practical difficulties in regarding the creation of an actus reus abroad as a crime against the law of Scotland. No two countries have the same criminal law, and presumably the Scots Courts will not convict a man of a crime for doing something which, though criminal in the country in which it takes effect, is not criminal in Scotland. Would it, for example, have been possible to try someone in Scotland for arranging to smuggle refugees from Nazi Germany in contravention of German emigration laws, even if the plan to do so were concocted in Scotland, the necessary materials made in Scotland, and the whole operation directed from Scotland by radio? Even where the actus reus would have been a crime in Scotland, it may not be the same crime in the place of its occurrence as in Scotland. Suppose that, before England adopted the principle of diminished responsibility, a person of diminished responsibility sent a parcel bomb from Scotland to England and killed someone there - would he be guilty in Scotland of culpable homicide or murder?

Conversely, suppose A does something x in Scotland which is lawful in itself, and which causes a result y in England, and suppose that y is an actus reus in Scots law, but lawful in English law. It is not a crime to cause y in England, nor to do x in Scotland - how then can it be a crime against the law of Scotland to cause y in England by doing x in Scotland? To charge A in Scotland with committing y is either to charge him with creating a situation which was not criminal in the place of its creation, or to assert

that the Scots courts have jurisdiction at common law over crimes committed anywhere in the world - both of which ratios are clearly wrong.

It is accordingly submitted that on principle the better view is, as Kenny puts it, that the crime is committed where it takes effect, and only there, so that homicide is committed where the victim dies, and not where the shot was fired or the poison dispatched (Kenny, para. 648). (Strictly speaking, the crime is probably committed where its results begin to take effect. If A shoots B in Glasgow, and B dies as a result in an English hospital, A's crime is probably a Scots one. But the difficulty here is one of causation, and not of jurisdiction.) This view was taken in State v. Hall ((1894) 114 N.C. 909, 41 Am. St. Rep. 822), where a citizen of North Carolina standing in North Carolina shot across the border and killed a man in Tennessee, and it was held that there was no jurisdiction to try him for homicide in North Carolina since the crime had been committed in Tennessee.

The cases supporting the view that conduct in Scotland is enough. It is submitted that although there are dicta contrary to the submission just made, there is no binding and acceptable authority against it. Macdonald (p. 191) relies in part on Hume, but the latter is concerned mainly with continuing crimes, and his other examples, such as uttering in Scotland a deed forged abroad, or sending threatening letters from abroad, are cases where the actus reus occurs in Scotland, and the 'main act' relied on as a criterion by Macdonald, is described by Hume as that 'which completes the crime' (Hume, ii. 54; Macneil and Mackay, April 1817, Hume, i. 156. The crime of uttering is not a result-crime, but may be committed on a

number of occasions with respect to the one deed, since it is committed each time the deed is uttered.)

In Thos. M'Gregor and Geo. Inglis ((1846) Ark. 49) an accused was convicted of obtaining goods by false pretences where he wrote letters from Scotland to England whereby an English trader was induced to send goods from England to Scotland where they were received by the accused. The Court did not consider the question of jurisdiction in detail but simply held that the sending of the letters from, and the receipt of the goods in, Scotland, were sufficient to confer jurisdiction - i.e. the actus reus was taken to be the receipt of the goods in Scotland. The case is thus the exact converse of Witherington (supra), and the two can only be reconciled by saying that the crime was committed in both countries, which conflicts prima facie with my argument. It is submitted, however, that cases like Witherington and M'Gregor are special, since they involve the agency of public carriers. Even if the actus reus is regarded as the obtaining of the goods (Witherington supra; cf. Reg. v. Ellis [1899] 1 Q.B. 230; Salmond, p. 406), the goods can be said to be obtained by the accused at either end of transmission - personally at the receiving end, and by the agency of the carrier at the dispatching end. 'Where something is going on by the medium of the post, the offence is committed...at both ends of the transmission by the Post Office' (Lipsey v. Mackintosh, (1913) 7 Adam 182, Lord Justice-General Dunedin at p. 187; cf. Kenny, para. 647).

In S. Michael ((1842) 1 Broun 473) the charge was of taking a letter from Edinburgh to Birmingham and uttering it there in order to persuade the dupe to send goods to Scotland. The goods were sent, and

appropriated by the accused on their arrival in Scotland. The part of the charge concerning the representations made in England was dropped and the accused were convicted merely of obtaining the goods in Edinburgh by fraud, which supports the submission set out above.

In Wm. Jeffrey ((1842) 1 Broun 337) a forged letter was sent from Edinburgh to London for a fraudulent purpose, and the crime of uttering the letter was held to have been committed in Scotland, because posting was treated as equivalent to uttering - i.e. on the ground that the actus reus had taken place in Scotland, uttering not being a result-crime. (Cf. R. v. Owen, [1957] 1 Q.B. 175).

In John M'Key ((1866) 5 Irv. 329) the accused was a Scots bankrupt who had concealed from his creditors that he had money in Liverpool and had 'put it away' there. He was charged with concealment and with the 'away-putting'. The Court held that it had jurisdiction, because 'the away putting in its essence is committed in Scotland as well as the concealment. There is an away-putting and concealment by a bankrupt domiciled and sequestrated in Scotland, whose duty it was to reveal all his property for the benefit of his creditors within Scotland' (L. Cowan at p. 335). In other words the away-putting was treated as criminal conduct having as its result the prejudicing of the Scots creditors of the bankrupt.

None of these cases supports Macdonald's view. The only one cited by him which does support it is Semple (1937 J.C. 41) and it, it is submitted, was wrongly decided. The charge was of attempted abortion by supplying abortifacients to someone in Glasgow. Nothing was said of where the abortifacients were to be used, and the Court rejected an

argument that this omission rendered the indictment irrelevant. The ground of judgment was that 'the attempt to procure abortion began with the supply of the drug with the intention that it should be used, and that was in Glasgow' (Lord Justice-Clerk Aitchison at p. 45). But the supplying was not charged as a separate crime, but as attempted abortion, and accordingly if any place was irrelevant it was the place of supply, and not the place of the abortion. The supply could only be criminal if the abortion was criminal, and if the abortion was to take place in a country in which abortion was legal, the supply would not be criminal, or at any rate would not amount to attempted abortion. If the drugs were supplied for the purpose of being used to procure a miscarriage in Ruritania, and were used there, the attempted crime was an attempt to procure a miscarriage in Ruritania - and if that act is not a crime in Ruritania, it is impossible to see how anyone can be convicted in Scotland of attempting to commit it. Or again - the supplier's guilt was accessory to the guilt of the person who actually tried to procure the miscarriage; now if that person committed no crime because he tried to procure the miscarriage in Ruritania where such actings are not criminal, how could the Scots supplier be guilty of being an accessory to that 'crime'?

It is submitted that the proper approach to problems such as that of Semple is the one adopted by the House of Lords in Board of Trade v. Owen ([1957] A.C. 602, see esp. Lord Tucker at p.622). There the accused were charged with conspiring in London to defraud a German Export Control Department, and with uttering forged documents in London in pursuance of the conspiracy. They were convicted of the uttering

since it was held, following Wm. Jeffrey (supra), that that crime was completed when the documents were posted in London (see R. v. Owen [1957] 1 Q.B. 175). The conspiracy charge was rejected as irrelevant, because there was no conspiracy to do anything contrary to English law. It is submitted that the same reasoning would apply to a charge of attempted abortion by supplying abortifacients in Scotland for use in another country, since the crime charged would really be a crime against the law of that other country. This would be so whether or not attempted abortion was a crime in the other country, although the principle involved appears more clearly where it is not a crime in the other country. Even if attempted abortion is criminal in Ruritania, a person in Scotland who is an accessory to a Ruritanian attempt at abortion has committed a crime in Ruritania, not in Scotland.

Continuing crimes.

Continuing crimes, such as crimes of possession, are committed wherever the possessor goes. Reset is committed wherever the accused goes with the stolen goods (Gracie v. Smith (1884) 5 Coup. 379). But the thief himself cannot be guilty of reset (Wilson v. M'Fadyen, 1945 J.C. 43), and the question arises whether a person can be tried in Scotland for a theft committed abroad if he is found in Scotland with the stolen property in his possession. It may be true that 'Possession in Scotland is evidence of theft in England' (Clement's Case, (1830) 1 Lewin C.C. 113, quoted in Megarry, Miscellany-at-Law, p. 289), but the question is whether it is theft in Scotland. I am inclined to the view that on principle a man's presence in Scotland in possession of the proceeds of an English

theft should no more give the Scots Court jurisdiction to try him for the theft, than his possession of the proceeds of an English housebreaking gives jurisdiction to try him for the offence, or rather aggravation, of breaking into the house (Alison, ii. 78). But there is authority that the Scots Courts can try a person for an English theft if he is found in possession of the proceeds in Scotland (Jas. Taylor, Mar. 1767, Maclaurin, No. 76). This decision must depend on the view that theft is a crimen continuum, committed wherever the thief goes with the stolen property, and not simply the taking of the property, which would be a once-for-all thing like housebreaking. Whether this view of theft is correct depends on the law relating to the specific crime of theft, and not on any general principles regarding criminal jurisdiction. Hume held that a kidnapper commits a crime wherever he goes with the abducted person, but this seems to be because the victim has a claim to the protection of the Courts wherever he is (Hume, ii. 54) - which is probably correct, because the kidnapper is continually depriving his victim of his liberty, and the protection of the liberty of everyone within its jurisdiction is one of the basic functions of Courts of law. The position with regard to the theft of property is by no means so clear. Hume himself seems to have regarded Taylor as rather anomalous, and perhaps simply based on 'the high expediency of bringing the possessors of stolen goods to speedy justice, and at a moderate expense, upon either side of the Border' (ib, 55), a view which, as he remarks, is borne out by the fact that the matter, as between Scotland and England, was regulated by legislation shortly after Taylor's case (by 13 Geo. III, c.31). It is now

regulated by the Larceny Act, 1916, (6 & 7 Geo. V, c. 50. s.39) but so far as other countries are concerned, Taylor probably still represents the law.

Chapter 4: Actings Art and Part

Art and part and acting in concert.

The basis of art and part guilt.

It is a basic principle of Scots law that all persons who are concerned in the commission of a crime are equally guilty, and that the guilt of each is of the ultimate actus reus, whatever his own part in the criminal conduct. Everyone who is party to a plot to commit a crime is guilty of that crime; the subordinate nature of the participation of any one of the plotters is irrelevant to the question of his guilt, although it may, of course, influence his sentence.

This rule applies even where it is legally or physically impossible for a particular accused to have committed the crime himself. It is said to be the law that a man cannot rape his wife (at any rate provided there is no separation order in force, - cf. R. v. Clarke, (1949) 33 Cr. App. Rep. 216), but he may be guilty of rape on his wife if he assists another man to have forcible connection with her (Hume, i. 306). Logically a woman who assists a man to rape another woman should be convicted of rape, on the same principle, but in fact in the only Scots instance of such a situation the woman was charged with 'aiding and abetting' the man to commit a rape, by closing the door and preventing the victim escaping or calling for assistance, although the words 'aiding and abetting' are not Scots terms of art (but cf. Martin and Ors., 1956 J.C.1), and the woman's actings

were enough to make her art and part in the rape (Chas. Matthews and Margt. Goldsmith, Glasgow High Court, Dec. 29, 1910, unrepd.).

Where an accused person's part in the crime is that of an accessory, where he does not himself carry out the final or principal act, he is said to be guilty 'art and part'. Anyone charged with a crime may be convicted whether the evidence shows his part to have been that of an accessory, or of a principal (Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c.35, s.7), but where several persons are charged with acting together, it is normal to state this in the charge; and where only one person is charged, but he is thought to have committed the crime with the help of others, he is usually charged with acting together with other named or unnamed persons. Once it is established that a number of persons acted together then since each is guilty of the crime charged, the crime is regarded as having been committed by them all as a group, or 'concert', and what is evidence against one of them is evidence against them all, so far as it relates to things done or said in pursuance of the group's common plan. The most recent reported statement of the position is in a summing-up by Lord Patrick in a case where a number of accused were charged with organising and carrying-out a bank robbery. Lord Patrick said:

'If a number of men form a common plan whereby some are to commit the actual seizure of the property, and some according to the plan are to keep watch, and some according to the plan are to help to carry away the loot, and some according to the plan are to help to dispose of the loot, then, although the actual robbery may only have been committed by one or two of them, everyone is guilty of the robbery, because they joined together in a common plan

to commit the robbery: But such responsibility for the acts of others under the criminal law only arises if it has been proved affirmatively... that there was such a common plan and that the accused were parties to that common plan. If it has not been proved that there was such a common plan, or if it has not been proved that the accused were parties to this previously conceived common plan, then in law each is only responsible for what he himself did, and bears no responsibility whatever for what any of the other accused or any other person actually did'. (Lappen & Ors., 1956 S.L.T. 109, 110).

Generally speaking a man is only responsible for his own actings, but a group is responsible for the actings of the group, and therefore each member of the group is responsible for the acts of all the other members. The group is defined by reference to their common purpose, and so each member of the group is responsible for what any of them does in furtherance of that common purpose.

Acting in concert. Acting in concert is just another way of describing art and part guilt, and is the phrase more often used where a group of people are found engaged in an allegedly criminal activity, all at one time. Where A supplies B with instructions to carry out a crime, and with the means of carrying it out, and B carries it out, we should normally speak of A as being guilty art and part, and of B as being the principal actor. But both are equally guilty, and they are acting in concert. Where we find a group of people, such as a gang of youths, engaged in a crime, such as breaking into a shop, or attacking someone, we talk of them as committing the crime while acting in concert. This phrase is thus used where there is no independent evidence of any prior group purpose, of any meeting at which it was decided to

commit the crime. But persons 'acting in concert' are art and part in the crime, since concerted action involves a plan, however spontaneously conceived. Therefore each is guilty of the whole crime. This concept is of great use in gang fights. For if it can be shown that a group of people were acting in concert, and that one or more of them delivered a fatal blow, all are guilty of the homicide. Moreover because their guilt is equal, it is unnecessary to prove which of them actually delivered any blows - they may all be convicted of homicide even if no-one saw a blow delivered, provided it is proved that they were acting in concert, and that the fatal blow must have been delivered by one of them (cf. Crosbie and Ors., Glasgow High Court, 11-15 December, 1945, unrepd., discussed infra 182ff).

The position of co-accused.

Where several accused are charged in one indictment with acting together, and concert is not proved, it is quite proper to convict some of them - provided that each person convicted can be shown to be sufficiently connected with the crime by reason of his own actings. If several men are charged with robbery, those who actually assaulted the victim and took his property, can be convicted, even if the man who planned the robbery, and the man who had arranged to dispose of the proceeds, are acquitted. But the planner and the resetter cannot be convicted of robbery if the actual perpetrators are acquitted, because their only connection with the crime is through the actual perpetrators.

Similarly, if an accused can be convicted of a certain crime only on the assumption that he was acting in concert with his co-accused, he cannot be convicted if they are acquitted. In the famous Scottish Silks

case, Young, the company secretary, was convicted on a charge of issuing fraudulent allotments of shares, a charge on which all the directors of the company were acquitted. This was a crime Young could not have committed on his own, and accordingly his conviction was quashed (Young, 1932, J.C.163). It seems, indeed, that even if it had been shown that Young had committed the offence in concert with other persons not named in the indictment, he would still have been entitled to an acquittal. For if Y's sole part in a crime is that he is alleged to have acted along with A and B, and A and B are acquitted, there is nothing left of the indictment to connect Y with the crime charged. It is not clear whether he could later be charged with having committed the same offence in concert with X and Z; but if guilt art and part is the same as guilt as a principal, which it is, then acquittal art and part should be the same as acquittal as a principal, and to retry Y for acting with X and Z would be to retry him on the same charge, the only difference being in the alleged mode of commission, so that the second charge could probably be met by a plea that Y had tholed his assize.

It has been held that where A and B are charged with acting in concert to commit a crime, and A is acquitted, C cannot later be charged with having committed the crime together with A and B (M'Auley, 1946 J.C. 8). This is because it is improper for the Crown to infer that A, who has been acquitted, is none the less guilty, and also because in order to convict C they would have to prove A's guilt, which would amount to retrying him in his absence. Despite the cogency of these considerations I venture to submit that it may not be a universal rule that where one conspirator has

been acquitted, no-one can be subsequently charged with having acted along with him. It is possible to figure a case where the acquitted conspirator was prepared to confess his complicity in the crime and to give evidence against his former associates. In such circumstances it would be in the interests of justice to charge the former associate. The difficulty of giving him fair notice of the charge against him without averring the guilt of the acquitted conspirator would be merely technical where this guilt was admitted (cf. Greig v. Muir, 1955 J.C. 20), although there would remain the objection that had they been tried together they might have both been acquitted.

The forms of art and part guilt.

There are three ways in which a person may be art and part in a crime - by counsel or instigation; by supplying materials for the commission of the crime; by assisting at the time of the actual commission of the crime. In the words of the French Penal Code:

'Seront punis comme complices...ceux qui, par dons, promesses, menaces, abus d'autorité ou de pouvoir, machinations ou artifices coupable, auront provoqué à cette action, ou donné des instructions pour la commettre; ceux qui auront procuré des armes, des instruments, ou tout autre moyen qui aura servi à l'action, sachant qu'ils devaient y servir; ceux qui auront avec connaissance, aidé ou assisté l'auteur ...dans les faits qui l'auront préparée ou facilitée ou dans ceux qui l'auront consommée' (Art. 60).

Counsel and Instigation

The distinction between counsel and instigation is not of real importance in the context of art and part guilt. But where the intended crime is not in fact carried out, the distinction may be important, since

where there is only counsel and not instigation the plotters may all be guilty of conspiring to commit the intended crime, but none can be convicted of inciting the others to commit it. It may be, also, that a man cannot be convicted of conspiring with a hired assassin but only of inciting him. There is no great practical importance in the distinction, but equally there is no great harm in retaining it.

Counsel. The simplest form of concert is the case of a conspiracy to commit a crime, and in such a case none of the conspirators need incite any of the others, so long as there is mutual counsel among them. Where a group of people plan a crime and decide that one of them will hire a professional assassin to carry it out, they may all be said to have counselled together to instigate the assassin to commit the crime. They are all guilty of the instigation, and of the ultimate crime if it is carried out, not because they instigated one of their number to hire the assassin, but because they agreed that he should do so. The basic principle in such a case is probably that qui facit per alium facit per se.

Again, anyone who is in a position of authority such that the conspirators have to apply to him for his fiat before proceeding with the projected crime, becomes art and part in the crime by giving his permission for it to be carried out, in the sameway as does someone who instructs others to carry out his criminal orders. (Cf. D. 48.8.15(1). For an example of such situations see B. Turkus and S. Feder, Murder Inc., passim.)

Another example of a concerted plot without the element of instigation occurs where two criminals decide

independently to steal a particular article, and then on discovering each other's plans, agree to pool their resources and do the job together. Here it is submitted that the ultimate crime is the result of a concerted plot, so that both will be guilty of theft even if one of them merely supplies the other with information regarding the location of the article in return for a share of the proceeds.

Instigation. There is instigation where A instigates B to do something, where A and B are not involved in any plot or pre-formed group at the time of the instigation, and where there is no detailed discussion between them about the commission of the crime. The instigation must be more than 'a naked advice, which has no effect on him who received it, further than as a coincidence of wishes' (Hume, i. 278), but must be 'very serious, earnest, and pointed' (ib.). Hume states that 'No proclaiming of it as a meritorious thing to destroy the hateful object; no words of mere permission or allowance to do the deed; no intimation of thanks or approbation if it shall be done; not the strongest expressions of enmity to the person, or the most earnest wishes for his death: None of these amount to what the law requires on such an occasion' (ib.). (These strict requirements may not, however, apply where the relationship of speaker to hearer is such that any expression of wish by the former is treated as an order by the latter. Indeed, if the crime is one that can be committed unintentionally it may be enough that the speaker ought to have known that his words might be acted on: Henry II, on this view, might have been guilty art and part in the killing of Becket, albeit only to the extent of being guilty of culpable homicide.)

Just what words will be treated as instigation thus depends on the circumstances of each case. The offer of a reward will probably be enough in any case, since it clearly shows interest and seriousness. Short of that, it must be shown that the instigation was such as to be capable of influencing the perpetrator, and that it did in fact influence him. There must always be difficulty in making one man responsible for influencing the 'free' actions of another. The case of financial inducement is perhaps special because there the perpetrator becomes the agent of the instigator. But where there is only persuasion or suggestion the difficulty is greater, although it is as much a difficulty of proof as of anything else. How prove that it was because of the suggestion that the crime was committed. If it was committed independently of the suggestion or inducement, there is no causal nexus between the instigation and the crime, and so no art and part guilt. If A decides by himself to steal an object, and lays all his plans to do so, and B then incites him to steal this same object, B would probably not be guilty of theft (although he would be guilty of attempted inducement), because the theft would have been committed independently of the instigation: B's criminal conduct would not have caused the actus reus. This situation is different from that where two thieves pool their individual plans, since then the resultant theft is the result of their combined plan.

It is because of the evidential difficulty that Hume desiderates 'a direct and special counsel' (ib. 279) which must be 'relative, less or more, to some near occasion of doing the deed, so as to excite him

to an immediate course of action' (ib.). Mere general expressions of desire cannot amount to instigation being 'nothing more than the expression of the party's own distempered state of mind' (ib., 278). But where the evidence is clear Hume allows the possibility of treating a series of suggestions as an instigation, even where there is no specification as to how or when the crime is to be committed. He gives the example of a series of letters written by a man to a woman pregnant by him in which he gradually persuades her to have an abortion (ib. 279). If the evidence shows that there was instigation - that the mind of the perpetrator was turned towards the crime because of the deliberate suggestions made to him by the instigator, there seems no need to require the instigator to say how the crime is to be committed, any more than there is such a need in the case where a hired assassin is told 'Kill X and I will pay you £1,000 - I leave the details to you'.

Withdrawal of instigation. Since the instigation is the conduct of which the actus reus is the consequence, the instigator will be guilty of the completed crime if it follows on the instigation, even although he had changed his mind in the meantime and no longer wished the crime to be committed. Such a change is no more significant than the repentance of a murderer after the death of his victim. In order to clear himself of guilt the instigator must interrupt the chain of events either by preventing the commission of the crime, or, at least, by removing the influence of his instigation (cf. Hume, i. 280). This he can perhaps do by telling the prospective perpetrator that he has changed his mind and no longer wishes him to commit the crime. If the perpetrator then carries on

and commits the crime the instigator will be free of responsibility, not because he has given evidence of the sincerity of his repentance, but because it will no longer be true to say that the crime was committed under the influence of his instigation.

That is the simple case, but there may be cases where even although the instigator has intimated his change of mind to the perpetrator, the latter carries on as a result of the state of mind induced in him by the instigation. Suppose that in Hume's example of the young man who suggested that his mistress should have an abortion, the man changed his mind and told the girl he would rather she had the child, but that the girl had by then become convinced by him that she should not have the child, an idea she would never have entertained but for his suggestions, and suppose she went on and did have an abortion. It could be said that the young man had set in train a series of events calculated to lead to abortion, that they had in fact led to abortion, and that his ineffective change of mind was no more relevant than the ineffective attempts of a murderer to save his victim's life after he has shot him. On the other hand, it could be said that by intimating his change of heart, the young man broke the connection between his suggestions and the abortion, and that the latter must be regarded as the consequence of the girl's voluntary decision to have the abortion, and of that alone. There is a suggestion in the case of Baxter ((1908) 5 Adam 609), a case of supplying abortifacients that the supplier if he changed his mind should write to the recipient 'forbidding him to use them for the purpose for which he sent them, and saying that, if he did not get an undertaking that they would not be used, he would himself inform the police of the matter'

(Lord Justice-Clerk Macdonald at p. 615). If the police act and prevent the abortion, all will be well; but suppose the police fail - in strict logic is the instigator not guilty of being art and part in the abortion? Perhaps so, in strict logic, but in practice his having done all he could to avert the danger he has created will probably be treated as excusing him.

Supply of materials.

Where the person who supplies the tools with which a crime is committed is also a conspirator or instigator his responsibility as an accessory can be dealt with under that head. Normally there will have been some element of concert beyond what is involved in the supply of materials, but it is possible to spell concert, and thus art and part complicity, by reference only to the circumstances surrounding the actual supply of the materials; the supplier may bring himself into the plot just by supplying the materials with which the crime is carried out. 'Whosoever, being in the knowledge of the mortal purpose, though contrived and imagined by another, shall lend immediate and material aid towards the execution, is thus involved in the guilt of murder' (Hume, i. 274).

Knowledge of the criminal plot is of course essential - a man cannot be art and part in a crime of which he knows nothing, he cannot be in a plot without knowing of its existence - the gunsmith who sells a murderer the fatal weapon in the normal course of his business and in ignorance of the latter's purpose cannot be art and part in the murder. But mere knowledge is probably not enough either. If he

sells the gun in the ordinary way at the ordinary price, without any discussion regarding its proposed criminal use, the seller does not become art and part in the crime (Hume, i. 157). On the other hand, a member of a criminal organisation whose 'job' is to supply the materials necessary for the carrying out of the organisation's criminal purpose, is clearly art and part in the ultimate crime - but he has been one of the counsellors of the crime, and so is in concert with the principal perpetrators (*ib.*). And so is someone who hears that a crime is to be committed, and offers to help by supplying the necessary materials.

The situation which raises acutely the problem of whether mere supply of materials can make the supplier art and part is intermediate between that of the gunsmith and that of the member of the organisation. This is the situation of the tradesman who knows that his goods are being bought for a criminal purpose, and as a result charges more than their usual price, but who has no further interest in the crime. This situation is referred to by Hume (*ib.*), but he gives no answer to the problem. The answer probably depends on the precise circumstances in which the materials are supplied. Consider the following situations:

(a) A takes a fourteen year old girl to a hotel with the intention of seducing her. He asks the hotelier for a room. The latter knows that the reason A wants the room is to seduce the girl; but he says nothing of this and lets the room at the usual price. It is difficult to see how the hotelier can be said to have made himself party to any plan to seduce the girl, and so he is not art and part. (b) The hotelier discloses his knowledge and tells A that since he

wants the room for an immoral purpose he must pay extra. In such a case it can be said that the hotelier has pushed himself into the plot, and so made himself art and part in the seduction. Once the hotelier has disclosed his knowledge and demanded his reward, he becomes a conspirator. (c) A discloses his purpose to the hotelier and asks the latter to help him by providing a room. Here the hotelier, if he agrees, is clearly art and part, since he is acceding to a request for help from the principal criminal. (d) This is the most difficult of all. The hotelier knows of A's purpose, but he says nothing, and doubles the price of the room, pretending that that is the normal price. There is here no concert, there is no officious attempt to 'get into the plot' as there is in case (b), but the hotelier is making a profit out of the crime. It is submitted that in the absence of the essential element of concert, there can be no conviction of the hotelier as art and part in the seduction, but it must be admitted that the distinction between (b) and (d) is a difficult one to make.

The importance of the element of concert, of participation in a plot with the principle perpetrator can be seen by examining two modern cases. The first is Johnstone (1926 J.C. 89). The accused gave a woman the name of an abortionist with whom he had no connection himself, and whom he knew only by name; he was acquitted of being art and part in the subsequent abortion. Lord Moncrieff pointed out that it would be straining the law to hold that the mere giving of a name by a party who was not in actual communication with the party named amounted to participation in the crime. He told the jury that what they had to consider was whether there was any

association between the accused and the abortionist (at p. 90). Had the accused been employed by the abortionist as a canvasser, or received a commission on business introduced, the necessary connection would have been present, and the supply of the abortionist's name would have been sufficient to make the accused art and part in the abortion. If a woman approaches X and asks 'Do you know a good man for abortions?' and X replies 'Yes, A.B.', he is not art and part with the woman, because he has done no more than impart information, or at most give a 'naked advice' (Hume, i. 278); and he is not art and part with A.B. if he has no dealing with him.

In Semple (1937 J.C. 41) on the other hand, there was ample evidence of complicity. The accused supplied a woman with abortifacients, told her how to use them, and advised her to make use of them. Lord Aitchison said 'Supply by itself does not amount to a crime, but here it is coupled with use, and the distinction between supply and administration does not appear to me to be material in a case where the supply is closely related to the use by words of instigation or by some act of instigation' (at. p. 44). This suggests that the supplier must be a moving spirit in the enterprise, be much more than just 'in the know', and be the equivalent of an instigator, which, it is submitted, goes beyond what the law requires. But the law does require an element of complicity, and it is this which distinguishes the mere supply of Johnstone from cases of art and part by supply in circumstances which make the supplier a conspirator.

The supply must be for a specific crime. The material must be supplied for the commission of a particular crime and, indeed, of an imminent crime

(Hume, i. 276). This requirement rests partly on evidential grounds, and partly on the rules regarding mens rea. Suppose A says to B 'I am on my way to kill C. If you lend me your car I'll just catch him before he goes to work'; B lends A the car, and A goes off and kills C; B is art and part in the killing. Now suppose A says 'Lend me your car please. I want to catch C before he leaves for work; I've a bone to pick with him. In fact, I'm getting a bit fed up with him, and if he doesn't change his ways I'll kill him one of these days'; B lends him the car; A goes off and kills C; B is probably not art and part, because he did not supply his car for the purpose of helping A to kill C (cf. ib.). The intention necessary to bring B into A's plot is lacking in the second case, and in any event a vague threat to kill someone in the future is hardly a plot. If A all along intended to kill C that day B cannot be art and part because he knew nothing of this; if he did not, but was only mouthing vague threats, there was no plot for B to join. Of course, if B should have realised that A's intended quarrel with C would end fatally, things might be different, and B might be held responsible for C's death since the death would be the consequence of a situation B helped to create. If A had asked B for a pistol with which to frighten C, and B had given him it, B might well have been art and part in the death of C (although in practice prosecution would be unlikely) since he ought to have realised that A might kill C. But that would depend on the law regarding responsibility for the consequences of one's actions, and not on any specialty of the law of art and part by supply of materials (see infra, 179).

Assistance in the actual commission of the crime.(1) Where there has in fact been a prior concert.

Examples of this type of art and part guilt are very common. The man who keeps watch while his friend breaks into a house, the man who stands on the edge of a crowd and collects the property his friend has picked from the pockets of members of the crowd (cf. Hume i. 115), the man who holds a girl down while his friend rapes her; all these are art and part in the principal crime. Similarly if two people agree to go out on a joint pickpocketing expedition and arrange that one shall operate on one side of the street and one on the other, but that they will share the proceeds and be prepared to help each other should occasion arise, each will be guilty art and part of the thefts carried out by the other.

In all these cases the assistance is rendered in consequence of a prior agreement, and need only be regarded as evidence of that agreement. Where there is independent evidence of the agreement, where, for example, someone has overheard the criminals arranging their crime, it does not matter what part each actually took in the crime. Where there is no such evidence then what each did will be important in the sense that it will constitute the facts from which the prior agreement is to be inferred; and the more active a man's part in the actual crime, the easier it will be to infer a prior agreement. It is easier to convict a person of art and part guilt where he has stood by and encouraged his friend to commit a crime, than when he has just stood by and watched, since in the latter case there is probably not enough evidence to enable a jury to infer any prior agreement about the crime, and in the absence of independent evidence

of such an agreement, mere presence is insufficient to make a person art and part (cf. Geo. Kerr and Ors. (1871) 2 Coup. 335). Again, where two pickpockets are operating on opposite sides of the street it will be very difficult to convict one of being art and part in the other's crime in the absence of independent evidence of their agreement to 'go into business' together; but if one of them does actually come to the assistance of the other, it will be easy to infer such an agreement. In all such cases the difficulty is evidential, and the question always is - are there facts from which prior concert can be inferred?

(2) Where there is no prior concert. There may be art and part guilt even in cases where there has in fact been no prior agreement. In such cases the assistance given is not evidence of a concerted plot, but constitutes the plot, which is created by the act of assistance. The plot, accordingly, can only be defined by reference to the intention of the assister. Suppose A sees his friend B attacking a girl and thinks he intends to rape her; the girl tries to escape; A without any prior arrangement with B, intervenes and takes hold of the girl to prevent her escaping, and so enables B to rape her; A is art and part in the rape. But suppose in such a case B does not rape the girl but stabs her. A is then not art and part in the stabbing, because he did not enter into any agreement to stab the girl, but only to rape her. The 'agreement' is, of course, of a peculiar nature, in that it is spontaneous, and may be entered into without the knowledge of the principal criminal. But by lending his assistance A brings himself into a plot which at the same time he creates, a sort of spontaneous concert; and by

doing so, he renders himself liable to be treated as if he had entered into a prior agreement with B to carry out the crime.

It is difficult to find illustrations of this type of art and part activity. The case of Ryach (1721, Burnett, p. 277, Hume, i. 267) did, however, proceed on the same principle. The accused there intervened in a fight which was going on between her husband and the deceased. She held the deceased by the hair while her husband stabbed him. But she did not know that her husband had a knife, and she was trying to stop the deceased attacking him, so she was acquitted of killing the deceased. Similarly, in Ross and Roberts (9 July, 1716, Hume, i. 267) one of the accused held the deceased's hands while the other stabbed him, but as he had not known his co-accused had a knife, he was held not to be art and part in the use of it.

The modern case of Gallacher and Ors. (Glasgow High Court, 31 Oct.-3 Nov. 1950 unrepd. - it is reported on another point in 1951 J.C. 38) may also be an example of 'spontaneous concert'. In Gallacher the three accused were part of a group which stood round the deceased and kicked him to death. There was no evidence of any prior agreement among the accused or other persons, to attack the deceased, but the accused were all convicted of murder since they 'were in a kicking crowd and animated by a common purpose, joining in the attack, assisting and encouraging' (Lord Keith, Judge's Charge, p. 37).

The position is usually looked at from the point of view of the intervener. But what about the original criminal? He is not in any plot, and has not asked for help. Suppose A intends to steal a man's watch-chain; an officious friend sees him, helps him to

steal the chain, and, thinking A was going to steal the man's wallet, takes it as well. A is surely not guilty of stealing the wallet, since he did not intend to steal it, and entered into no agreement with his friend to steal it. There can only be a plot insofar as the intentions of the two criminals coincide (Ryach and Ross and Robertson, supra), and this rule must operate in favour of the original criminal as well as in favour of the intervener.

In Gallacher (supra) the matter was complicated by the rule that all the members of a concert, spontaneous or prearranged, are responsible for the consequences of the plot (see infra). Suppose A starts to kick X with the intention of causing slight injury, and other persons come along and join in the kicking so that X is killed. If A retires as soon as the others join in, he cannot, it is submitted, be guilty of homicide, unless his own acts would have been sufficient to cause death. But if he continues to kick X after the others have joined in and the assault has become foreseeably fatal, he will be guilty of homicide even though his own acts were not in themselves foreseeably fatal, because he will have made himself party to a spontaneous concert to kill X, or at any rate to inflict foreseeably fatal injuries on him.

Responsibility for the unintended consequences
of a plot.

Responsibility for consequences in the case of an individual.

The criminal law sometimes holds a man responsible for the unintended consequences of his actions, and where a person unintentionally causes death he may be guilty of murder if his acts were so clearly dangerous that

he must have realised they might well be fatal, i.e. if he acts recklessly. A man who beats another to death with a crowbar may be guilty of murder whether or not he intends to kill him. Where the act which caused death was so dangerous as to be foreseeably fatal, but not so dangerous as to be regarded as reckless, the agent may be guilty of culpable homicide. In addition, there is a rule of law that any death caused by a criminal act is culpable homicide, however unforeseeable the fatal consequence was. So if A punches B and B falls and cuts his head on a stone and dies, A is guilty of culpable homicide. (These rules are discussed in detail infra, ch. 14).

Responsibility for the consequences of a plot.

Where death is the unintended result of a plot, the same rules apply, so that if the plot, is, so to speak, reckless, each conspirator may be convicted of murder if death is caused in the course of carrying it out. In other words the conspirators are regarded as one person, and the plot and its carrying out as their act, so that if someone is killed as a result of the carrying out of the plot, all the conspirators are guilty of homicide. The cases are mostly concerned with homicide, but the principles apply to any crime which can be committed unintentionally.

Death as the consequence of a criminal purpose.

The simplest example of this principle is that of a concerted housebreaking in the course of which one of the housebreakers kills the householder. If the housebreakers had agreed to use whatever violence was necessary to effect their purpose, then they are all guilty of homicide, unless the violence was employed for a private purpose and not to further the housebreaking. So long as the violence used can be

regarded as part of the plot, all are guilty. If the agreement is to use only limited violence, say only hand blows, and the householder is killed but such a blow, all are guilty of homicide because of the rule that death caused by criminal violence is culpable homicide, even although the death was unforeseeable. It is probably therefore the law that all the parties to a robbery are guilty of homicide if the victim is killed, since an agreement to rob involves an agreement to use force (cf. Fraser and Rollins, 1920 J.C. 60; Wm. and Helen Harkness, Glasgow High Court, 30 and 31 Jan. 1922, unrepd.).

The only exception to the above rule is that where the violence used is more serious than that agreed upon, it may be that only the persons who use the violence are guilty of its results. In order to convict all the conspirators it is essential to show that the violence used was a result - intended or foreseeable - of the plot, and if the violence used was so different from that contemplated that it could not be regarded as a foreseeable development of the plot this essential requirement will not be satisfied. If the plotters agree to use their fists and one of them uses a fruit dish, or if they agree only to use violence to effect their escape, and one of them attacks the housekeeper in order to effect entry, it will depend on the circumstances of the case whether or not the use of violence is regarded as a consequence of the original plot. An example of circumstances in which it would not be so regarded was given by Lord Thomson in the reported case of Harris and Ors. (Glasgow High Court, 6th-9th Sept. 1950, see infra, 184) where his Lordship said 'Suppose three men set out to perpetrate some act of minor violence on a fourth man and proceed to beat him up. Now, if quite unexpectedly

one of the assailants produces a revolver, which none of the rest know he had with him, and the man who produces the revolver shoots the victim...the unexpected character of that event could not be laid at the door of those who had no just cause to expect such a thing to happen. That is to say, shooting would not be within the scope of the common purpose'. (p. 375 of transcript). What is important is not the unexpectedness of the death in relation to the violence actually used, but the unexpectedness of the violence actually used in relation to the violence agreed upon. Had the victim died as a result of the beating up, however unexpected such an event, all three men would be guilty of homicide - even although one of them only kept watch while the other two assaulted the victim.

Even if there is no agreement to use any violence at all, the plotters may all be guilty of homicide if fatal violence is used by one of them, provided that such violence was foreseeable. Suppose a group of householders agree that they will not use force to effect their purpose, but one of the group carries a gun with him and this is known to the others. If he uses the gun in breach of the agreement the others may be guilty of homicide if his action is regarded as one they ought to have foreseen as likely.

The type of situation in which only the person who uses the violence is responsible for its consequences may be illustrated by reference to the case of Walsh and M'Lachlan ((1897) 5 S.L.T. 137) in which it was alleged that two men had broken into a house and that one of them had beaten the owner to death with a crowbar. It was not known which accused had struck the blows, and indeed there seems to have been no evidence at all about what happened in the house. In these

circumstances Lord Young told the jury that in view of the sudden and unexpected nature of the violence, and the absence of any agreement between the accused to use violence, each could only be held responsible for his own part in the affair. Accordingly, since it was not known who had struck the blows, both must be acquitted of homicide. (In fact, both were acquitted of housebreaking as well, but that does not affect the argument. In Webster and Anr. v. Wishart, 1955 S.L.T. 243 the accused were two thieves who used a car to make their getaway. The car was driven recklessly and both were convicted of reckless driving. On appeal the convictions were quashed since there was no evidence to show which had driven the car, and no evidence of the circumstances of the reckless driving - i.e., presumably, no evidence of a concert to drive recklessly, and no evidence to show that the reckless driving was a foreseeable consequence of the theft.)

Even where there is no agreement to use violence there may, of course, be art and part guilt by reason of spontaneous concert, a concert which would require to be established by evidence of what happened at the time of the assault, evidence which was lacking in Walsh. Such a spontaneous concert to do violence would be quite independent of the original concert to break in. The case of M'Cudden and Cameron (Glasgow High Court, 17 - 20 April, 1932, unrepd.) may be regarded as an example of this type of situation. The two accused agreed to break into a shop, expecting the caretaker to be absent. They asked a friend to keep watch for them, and assured him that no violence would be used. In fact the caretaker was present and disturbed the accused, who killed her,

one of them striking her after the other had bound and gagged her. (That is the effect of the only available evidence which consisted of statements by the accused.) It was accepted that neither had intended to kill her. Lord Blackburn directed the jury that both were responsible for the death. His Lordship also referred to the position of the man who was supposed to keep watch for them - it seems that in fact he did not do so - and said, '...if... he had been keeping cop outside as part of the general scheme to rob the shop, he might quite well have been sitting here today in Court on the charge of art and part in the murder, although he may have had a different defence that he was only keeping cop to enable the two accused to escape detection when burgling the safe. But he would just as likely have been charged with murder' (p. 300 of transcript). It is submitted that he would have been guilty of murder only if he had known that serious violence was contemplated. If he had been charged with murder and the jury had believed that he had only agreed to keep watch on condition that no violence was used they would have been bound to acquit him - for violence would not then have been part of the plot he was in, nor a foreseeable result of it since no weapons were carried. His mere presence outside could not, of course, make him party to any concert entered into inside by the other two.

Concerted recklessness. The same principles apply when death results from a concert to do something lawful in itself, but to do it recklessly. In Geo. Barbier and Ors. ((1867) 5 Irv. 483) two men went shooting on a range: they did not put up the customary warning

flags, or give any other warning that they were going to shoot: they shot in the direction of a public beach, and a girl was killed, having been hit by only one bullet. Lord Neaves told the jury that '...if two or more persons went together to shoot, and shot in a reckless manner in the direction of a public place... and death resulted, all would be guilty of culpable homicide, although it could not be proved who fired the fatal shot' (at pp. 487-8). This, as stated, is too wide; there must be an agreement, not merely to shoot, but to shoot recklessly. All the members of a shooting party would not be guilty of homicide if one of them stupidly pointed a gun at a ghillie and killed him. Even if two of them independently were stupid enough to fire in the direction of some passers-by these two would not be both guilty of homicide. If it were known whose gun fired the fatal shot he would be guilty; if it were not known, both would have to be acquitted (cf. Docherty, 1945 J.C. 89).

It does not matter in this connection whether or not the reckless discharge of firearms is a crime in itself even where no injury is caused. What is important is that where death is caused by the reckless actings of an individual that individual is guilty of homicide; accordingly, where death is caused by the reckless actings of a concert, then all the members of the concert are guilty.

Homicide in a brawl.

The cases discussed above are all fairly simple, both in their facts and in the law applicable to them. The rule regarding responsibility for foreseeable consequences is also applied in the more complicated situation of the street brawl in the course of which someone is killed. Such cases are usually distinguished

by the presence of a number of people, associated for the purpose of creating a disturbance or of committing some minor crime, by a deal of confusion as to how the victim was killed, and by the fact that one or more of the people so associated delivered the fatal blow.

The ideal approach to such a situation, especially where there is no pre-concert to do any violence, is no doubt that advocated in the Digest - to investigate the blows given by each of the persons assembled at the scene of the brawl (D. 48. 8. 17), and where such an investigation yields results, these results will normally be taken into consideration and an individualistic approach will be adopted, so that only those who actually took part in the attack on the deceased will be convicted of murder. But this is a counsel of perfection - it is usually impossible to discover which of the accused struck the victim, and in such circumstances the tendency is to adopt a collectivist approach, and to treat the death as the consequence of the brawl, and therefore to regard all the brawlers as guilty. The law tends to oscillate between the two approaches, depending on the information available, and the general mood of the times. I propose first to consider Hume's treatment of the problem, and then to consider some modern cases, in order to show the way in which the matter is dealt with in practice.

Hume's treatment of the problem. Hume deals with two situations in this connection. The first is where 'a felonious purpose is taken up suddenly, on a fortuitous quarrel among persons who were lawfully assembled for some other object', and someone is killed with a lethal weapon. In such cases Hume holds that anyone who co-operated in the killing, by using a weapon,

or at least having one ready in his hand, is guilty of homicide, but that 'a person shall not be liable to any punishment, unless he have in some measure been active in the assault' (Hume, i. 270-1). Hume seems to require a spontaneous concert to kill, or do serious violence, and he treats the display of weapons as evidence of the accused's adherence to that concert. He excludes from guilt those who do not use or brandish weapons, considering that they may have been involved only 'out of curiosity or indiscretion, or at worst with no more criminal purpose than that of raising a brawl in the street' (ib. 271). Mere presence as part of a group of brawlers, mere intention to brawl, is not enough to make one guilty of murder if one or more of the brawlers uses weapons and kills someone.

The second situation with which Hume deals is that where there are no lethal weapons, and so no line can be drawn between those who had weapons and those who had not. He gives the following example: 'Two parties of men, all of them in liquor, meet and quarrel on the streets of a town, in the dusk of the evening. Words pass at first; and it soon comes to blows (owing to faults on both sides) with such instruments as the parties have with them, or can lay hold of at the time; and in this bustle a man is killed, it cannot, with certainty, be said how, or by whom, but probably through a succession of injuries, done by several persons...In these circumstances it would plainly be unjust to punish everyone capitally, who is proved to have struck or at all meddled with the sufferer...the fair result is, to inflict an arbitrary pain on those who struck the man, and entirely to acquit the others' (Hume, i. 272). Hume seems deliberately to have made the facts confused,

and he includes among the reasons for his solution that it was probably partly the fault of the deceased anyway. Such a consideration may be irrelevant in strictly logic, but in fact, of course, it will influence a jury, and so affect their views on reasonable foreseeability. Hume's main grounds seem to be that the quarrel arose suddenly and that no lethal weapons were used. He apparently rejects the simple view that the fact that the members of the group were assisting each other in the attack is enough to make them art and part with each other.

Hume's approach is supported by at least two cases. The first is Geo. Hutchieson and Ors. (Aug. 12, 1784, Hume, i. 272) in which a group of people were engaged in molesting and insulting passers-by in the street. The deceased intervened to protect one of their victims, and the group attacked him with stones and killed him. All the accused were convicted of rioting, but none of homicide. The second case is Thos. Marshall and Ors. (Sep. 1824, Alison, i. 64) in which a group of Dundee apprentices got into a fight with some country masons. There were blows on both sides, and a mason was killed. In the absence of previous concert and of evidence that any of the accused had struck the fatal blow they were convicted of riot and assault, but not homicide (cf. also Macpherson and Ors., 11 Jan. 1808, Burnett, 281, Alison, i. 63-4).

The modern treatment of the problem. It is difficult to pin down the modern law, but it seems to be more collectivist in approach than Hume. It makes use of the idea of foreseeability and it does not lay any particular stress on the presence or absence of lethal weapons. The differences are perhaps only differences in approach, even perhaps only differences of impression, but some modern cases do suggest that at

least some of the accused in Hutchieson (supra) and in Marshall (supra) might have been convicted of murder had they been tried in Glasgow in recent years.

The best statement of the modern law is contained in Lord Moncrieff's opinion in Docherty in 1945 (1945 J.C. 89, 95-6). (The passage in question is obiter since the facts of the case - three men went into a room, one was killed by a hatchet, one disappeared, and the third was tried for murder - are rather different from those of the brawl. The accused's conviction was quashed because there was no evidence that he had struck the fatal blow and no evidence of concert, following Walsh and M'Lachlan (1897) 5 S.L.T. 137, see supra, 173.) Lord Moncrieff criticised an illustration given by the trial Judge, Lord Jamieson, to the effect that 'If without premeditation, two or three men set on to someone in the street with the intention, just perhaps entered into at the time, of causing him injury, and one stabs him fatally, then all are equally guilty although there was not really an intention, until the man came along, to attack him at all'. This, said Lord Moncrieff, was 'too widely and unguardedly expressed'. He referred to Hume's treatment of the subject and to Anderson's statement that 'If a sudden brawl arise, rixa per plures, sticks and fists being used, and one draws a knife and stabs another, the friends of the man who used the knife and stabs another, the friends of the man who used the knife are not guilty of murder if the injured man dies' (Anderson, p. 48). This, of course, is because in such circumstances the use of the knife is treated as unforeseeable.

Lord Moncrieff went on to state the law as follows:

'It is true that if people acting in concert have reason to expect that a lethal weapon will be used - and their expectation may be demonstrated by various circumstances, as for example, if they themselves are carrying arms or if they know that arms and lethal weapons are being carried by their associates - they may then under the law with regard to concert each one of them become guilty of murder if the weapon is used with fatal results by one of them. In view of their assumed expectation that it might be used, and of their having joined together in an act of violence apt to be completed by its use, they will be assumed in law to have authorised the use... Secondary responsibility for a criminal act arises only in the cases of reasonable expectation' (at pp. 95-6).

Lord Moncrieff confines himself to the use of lethal weapons, but his statement that 'Secondary responsibility ...arises only in cases of reasonable expectation' is capable of wider application, and indeed is the kernel of the modern law - all else is merely illustration and exposition. It is notable, however, that Lord Moncrieff requires a joining together in an act of violence, although not active participation in the violence. It is also notable that he talks of an 'assumed expectation', i.e. of what the jury deem to be the expectation of the accused. This assumption depends on reasonable foreseeability, on whether the jury treat the death as a foreseeable consequence of the group action, and this in turn may depend on the jury's view of the responsibility of the accused for the crime.

Three modern cases. The modern law can perhaps best be illustrated by discussing three unreported cases which involved the problem of concert, and which resemble the typical brawl more or less in their respective facts.

The Crosbie case. The first is that of Crosbie and Ors. (Glasgow High Court, 11-15 Dec. 1945, unrepd. The case is reported on another point sub.nom, Lennie, 1946 J.C. 79). The facts of Crosbie are typical of the 20th century street killing which has been a feature of Scottish, and particularly of Glasgow, crime, for some time. The facts are confused, and most of the witnesses were unreliable, but I think the following is a sufficient summary of what happened. The accused were members of a group of about five people who went about the streets for about an hour before the murder creating a disturbance, brandishing bayonets and knives, and threatening at least two persons. They ultimately debouched from a tramcar into a crowded street where they probably chased, or were chased by, a rival group. In any event, they chased after the deceased (who did not belong either to the Crosbie group or to the group the Crosbies appeared to be 'out to get'), shouting cries of 'Kill him' or 'Get him', and waving bayonets. A few minutes later a group of people were seen standing round the deceased's body, and one of the accused came from the edge of the group (or the other side of the road) brandishing a bloody bayonet and shouting 'Here's your victim'. Of the four accused, all of whom were charged with a breach of the peace, two assaults prior to the murder, and murder, those who had been seen brandishing weapons were convicted of all the charges, and one who had not been seen with a weapon was acquitted of all except breach of the peace; the one who was seen waving the bayonet after the murder was hanged.

On these facts it is fairly simple to infer a concert to do serious harm to the deceased, albeit a

concert formed only a short while before his death, and the result was consistent with Hume's version of the law. But the presiding Judge, Lord Mackay, approached the problem from the foreseeability point of view, and laid hardly any stress on the question as to which accused was carrying weapons, or on what was actually done by each accused at the time of the killing. He described the accused as forming 'a little group - I will not use the word "Gang" - or bunch of wrongdoers who were, if not ready to use lethal weapons, at least brandishing lethal weapons and threatening the lieges with lethal weapons'. He then directed the jury as follows:

'...if the Crown has proved that if there is a group of associated people with some common purpose, whether suddenly taken up or at more length considered, and in this case I shall say short of pre-concert - for instance pre-concert to kill anybody, that is not averred - but short of pre-concert, if they are found associated for a continuous time brandishing lethal weapons which should not be brandished in public streets, threatening the lieges, or three particular people in the lieges with these weapons, terrifying the populace, if they are doing that at four different places and times consecutively within an hour and a quarter, and on the last occasion one of their weapons is used to lethal purposes, and the others so grouped as to help in that lethal purpose they cannot escape the consequences. If they have killed a man it does not matter that the Crown cannot put their finger on the right person, but there must be a group associated for that purpose' (Judge's Charge, pp. 43-4).

This is not altogether clear. The last sentence begs the question of the purpose of the group, and 'so grouped as to help' is unsatisfactory - the question is 'Did they help?' It is also clear from the general progress of the case, and the lack of any clear

distinction between those who did and those who did not have or use weapons, that the ratio was not so much the formation of a spontaneous concert to attack the deceased, as that, 'If you go around the streets brandishing weapons, someone will get hurt', and accordingly all the accused could have been held responsible for the death. The alternative approach - that the jury could only convict persons seen using or waving bayonets at the time of the murder - does not seem to have been considered, perhaps because the evidence about who had weapons, and what happened at the end, was very confused, and such an approach might have led to the acquittal of all, or all but one, of the accused. (It should perhaps also be noted that the case was heard at a time when street fighting by gangs of youths was rife in Glasgow, and that the authorities regarded this case, and the execution of one of the accused, as responsible for the subsequent decline in crimes of violence - see R.C. App.6, para. 78. The execution was the first in Scotland for seventeen years, and the trial the first example, at least in this century, of a conviction of several persons for the murder of one person in a brawl. There were only three prior cases in this century in which two people had been convicted of murdering another in concert, and they were connected with robbery or housebreaking - I am indebted to Mr. D.J. Stevenson, Depute Clerk of Justiciary, for this information -cf. R.C. App. 2, Table 5.)

The Harris case. The second unreported case I propose to discuss is that of Harris and Ors. (Glasgow High Court, 6-9 Sep. 1950, unrepd.). Three men - two brothers, Paul Christopher Harris and Claude Milford Harris, and a third man, Walter

Drennan - were charged with assaulting Drennan's Brother-in-law M., and a man Boyle, and with murdering a man Donleavy, by striking him with a broken bottle. The facts, so far as relevant to this discussion, were as follows. The three accused were together in a public house when Drennan announced his intention of going to see M. who had the day before assaulted his wife, Drennan's sister. It seems clear that Drennan intended to assault M., and the Harrises agreed to go along and see fair play. At least some of the accused carried bottles, a weapon recognised as lethal. (So much so that the Lord Justice-Clerk directed the jury that there was no room for a verdict of culpable homicide - i.e. that the use of a bottle was reckless and not merely negligent quoad the possibility of death.) The three went together to where M stayed, and there is evidence that one of them said 'Come on, we'll get them one by one'. Drennan went up to M's house, followed by Christopher; Claude remained at the closemouth. In the house Drennan made to attack M who retreated, while Boyle and the deceased, who were in the house, intervened. Drennan did not manage to strike M, but Christopher did. A running fight then seems to have developed between Boyle and Drennan, and between Christopher and the deceased, and it seems that when this fight reached the close, Claude joined in. In any event Drennan and Boyle moved out into the street, and the Harrises and the deceased went into the back court where they were seen to kick him. Very soon afterwards the deceased received fatal bottle wounds administered by one of the Harrises, but there was no evidence about how this happened, or which brother used the bottle. In the course of the trial the Crown dropped the

charge against Claude of assaulting M, and the Judge directed the jury to acquit Christopher of the assault on Boyle, and to acquit Drennan of the murder. In the result, Drennan and Christopher were convicted of assaulting M, and both the Harrises were convicted of murder (Drennan and Claude were acquitted of assaulting Boyle for reason that do not affect this discussion.)

The Lord Justice-Clerk, Lord Thomson, adopted an individualistic approach to the matter, and did not stress the aspect of foreseeability. He did say that 'People that take the law into their own hands must, I think - you are to judge - have in contemplation that there may be resistance to the act and that third parties may intervene' (p. 384 of transcript), and that the jury must ask themselves if the use of a bottle was 'within the purview of the common purpose' (p. 375), but he did not go on to say that all the accused could be convicted of all the charges since they were in a concert to assault M and knew bottles were being carried. Instead, he directed the jury that to convict even the Harrises of murder they must find that the brothers had formed an agreement specifically to kill or grievously injure the deceased, saying that 'If one of them killed the deceased while they were acting together with the common purpose of killing him or of doing him grievous bodily harm regardless of the consequences, then each is responsible for the acts of the other, but you must be satisfied...that they were acting in concert in that common criminal purpose' (p. 373), and not, presumably, in any other, such as a purpose to assault Drennan's brother-in-law. Drennan was freed of responsibility for the death because he was

not present at the time, and therefore was not in any concert to kill Donleavy.

In the same way, although the Lord Justice-Clerk said of the assault on M that, 'If you are satisfied that Drennan and Christopher had formed a common criminal purpose to combine and punish M...then, in virtue of that common criminal purpose Drennan is responsible for what Christopher did and Christopher is responsible for what Drennan did' (p. 362), he obviously accepted the Crown view that Claude, who had also been in the concert, could not be charged with assaulting M, because he had remained downstairs, although his later actings made it clear that he had not in any way dissociated himself from the plan.

The Hamilton Circus case. The third and last unreported case I wish to consider is that of Gallacher and Ors. (Glasgow High Court, 31 Oct. - 3 Nov. 1950, unrepd. The case is reported on another point in 1951 J.C. 38), and it is of interest because of the absence of any lethal weapons, and also, apparently, of any prior concert at all. The background of the case was a feud between the members of a travelling circus and the local inhabitants of Hamilton, and it is thought that the deceased was mistaken for a member of the circus staff. It seems that one of the local men started a fight with the deceased on the circus ground while the circus was being dismantled, and that a number of other men joined in. Ultimately, they all stood around the victim who was kicked to death. Three of the crowd were charged with murder and convicted (R.C. App. 4 para. 6).

There was some evidence that each of the accused had kicked the deceased, but the presiding Judge, Lord Keith, did not regard this as necessary for

conviction, saying that, 'If...any of the accused was part of a crowd or group engaged in the common purpose of assaulting this man each is responsible for the consequences of that assault, although only one of them may have delivered the fatal kick. If the accused were in a kicking crowd, and animated by a common purpose, joining in the attack, assisting and encouraging, each and all are responsible for the consequences (Judges Charge, p. 37).

Gallacher applies the rule of foreseeability to cases of 'spontaneous concert' where there are no lethal weapons, and thus seems to go beyond Hutchieson (supra) and Marshall (supra). The ratio of Gallacher is that if A joins a group of people who are assaulting someone, and joins with the purpose of aiding in that assault, then, if the assault proves fatal, he is guilty of homicide, whatever his own part in the assault was. Whether his guilt is of murder or only of culpable homicide depends on how likely it was that the assault would prove fatal. The two verdicts were left to the jury in Gallacher; in Crosbie and in Harris the Court took the view that the weapons used were so dangerous that those using them must be regarded as reckless, and so as guilty of murder.

Conclusion. It is very difficult to reach a conclusion on this matter. It is clear that it makes no difference whether the brawl is conducted with lethal weapons or not, so long as no-one produces any weapons unexpectedly. It is clear that it is not necessary for the Crown to show that any particular accused struck any blows in order to obtain a conviction against him. It is clear that where two or more men agree to do serious injury to another and he dies, they are responsible for his death (Harris) this

follows, from the rule that an intention to do serious injury is regarded as involving recklessness quoad death. If one man intends seriously to injure another who dies, he is guilty of murder, and in the same way if two so intend, and the man dies, both are guilty of murder. This is, so to speak, the minimum operation of foreseeability, and causes no difficulty.

It is when we try to formulate any more general rules than these that there is difficulty. Crosbie and Gallacher may be authorities for the view that anyone who joins in an operation of which death is a foreseeable result is guilty of homicide; but there was in fact evidence in Crosbie and Gallacher that each accused had struck a blow or brandished a weapon, and Harris suggests that membership in a criminal enterprise which results in death is not enough, even where death is foreseeable.

I would suggest, very tentatively, that the doctrine of responsibility for foreseeable consequences is used by the law only as a last resort, and only where no detailed information is available about the fatal assault. I think this is borne out by the way the accused were treated in Harris. There was evidence that only Christopher and Drennan were actually engaged in the assault on M; there was evidence that Drennan had nothing to do with the final assault on the deceased. So an individualistic view was taken, even though the result was that Drennan, who started the whole thing and on whose behalf the Harrises entered the quarrel, escaped most lightly. It was known that both Harrises were involved in an assault on the deceased by kicking him, so it was possible to go the length of finding a spontaneous concert on their part to injure him. But it was not

known who killed the victim, or who had wielded the bottle, so at that stage, rather than acquit both, recourse was had to the concert to attack the deceased - not to the original concert to attack M - and only then was the concept of foreseeability used. One can go even further - it is said that after conviction one of the brothers confessed that he had struck the fatal blow, and that he was hanged and his brother reprieved (I owe this information to the Depute Clerk of Justiciary, Mr. Stevenson), so that once fuller information was available the approach became individualistic again. Now, compare this to the Crosbie case. There there was no evidence on which to base a concert to attack the deceased, so the matter had to be taken back to the only concert of which there was evidence - the concert to brawl. (At least that seems to have been the view of the evidence taken by Lord Mackay.) But even so, the accused who was not actually seen brandishing weapons was acquitted, albeit by a verdict of not proven and not, as in the Harris case, by direction of the Judge. In Gallacher there seems to have been nothing to choose among the accused on the evidence, so all were convicted.

This suggestion leads to yet another, even more tentative. It is that the foreseeability rule is used rather as a rule of evidence than as a rule of substantive law, and is used in a way which shifts the onus from the Crown to the accused. Where a group of people is involved in a murder the jury will assume, in the absence of evidence to the contrary, that they each acted in accordance with what one would reasonably expect. If a group brawl and brandish weapons, and chase someone with their weapons, it is foreseeable that they will attack and kill him. So the jury

will assume that each member of the group in fact continued to brandish his weapon, and took part in the final assault. But if it can be shown that this did not happen, that one accused did not take an active part in the assault, the jury will disregard their assumption and that of the law of concert, and deal with that accused as an individual responsible only for his own actings.

Where, therefore, a number of people are engaged in a common purpose which is not itself a purpose to kill or do serious injury to another, and someone is killed as a result of that purpose, they are all guilty of homicide providing (a) the death was a foreseeable consequence of the common purpose or was the result of a criminal act which was itself a foreseeable result of the common purpose; and (b) there is no evidence to enable a distinction to be drawn among them on the basis of their actings at the time of the fatal assault. If, and insofar as, these conditions are not satisfied, each will only be responsible for his own actings.

The Homicide Act, 1957. It should be added at this point that where the charge is capital murder an individualistic approach is now required by statute. Section 5(2) of the Homicide Act, 1957 (5 & 6 Eliz. II, c.11) provides that if, in a capital murder 'two or more persons are guilty of the murder, it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on, the persons murdered, or who himself used force on that person in the course or furtherance of an attack on him; but the murder shall not be capital murder in the case of any other of the persons guilty of it'.

The aim of this section is clearly to ensure that only persons who took an active part in the murder shall be hanged for it, although it is not clear what 'attempted to inflict grievous bodily harm' means, or how it is to be distinguished from using force 'in the course or furtherance of an attack on him'. This means that in cases of capital murder it will be necessary for the Crown to show that a particular accused did take an active part in the assault (probably by striking, or aiming at and missing, the victim) before he can be convicted of capital murder. Thus, had Crosbie or Harris (supra) been cases of capital murder tried after the passing of the act, none of the accused could have been convicted of capital murder. But presumably they could all have been so convicted in Gallacher (supra), had the jury accepted the evidence that they had all kicked the deceased.

Accession after the fact.

Since guilt art and part is guilt of the whole crime and the same as the guilt of the principal perpetrator of the crime, no one can be guilty art and part merely because of anything he did after the crime had been completed. The act of hiding a murderer, or a body, does not in any sense 'cause' the murder, and so cannot make the hider guilty of the murder.

The only way actings after the crime can affect art and part guilt is by providing evidence of a pre-existing agreement to help in the crime, evidence of prior concert. The pick pocket's accomplice who carries off the spoils is guilty of theft, not just

because he takes away what he knows to have been stolen, but because his actings are evidence that he was in league with the pickpocket from the outset. If A knows that B is going to kill someone and offers to help him by disposing of the body, A may be guilty art and part of murder because of this prior agreement; but if A knows nothing of the murder until after it is over, and then agrees to hide the body out of friendship for B, he is not art and part in the murder. He may be guilty of a separate crime if what he does is in itself a crime, but that has nothing to do with being art and part in B's crime. The murderer's wife who commits perjury in order to save him from the gallows is guilty of perjury; she is not guilty of murder. (cf. Hume, i. 281-3). The only crime in which there can be accession after the fact is treason, and that is because treason is governed by the law of England - Treason Act, 1708 (7 Anne, c.21).

Chapter 5: Inchoate Crimes

I ATTEMPTED CRIMES

The general theory of responsibility for attempts

The essential difference between attempted crimes and completed crimes is, of course, that in the former the actus reus of the crime attempted is not in fact brought into being, although other crimes may be fully committed in the course of the attempt. The circumstances of an attempted murder, for example, may disclose the crimes of housebreaking and hamesucken, or they may disclose no completed crime at all; what is important, from our present point of view, is that they do not disclose the crime of murder. Punishment for attempted murder is independent of any other crimes that may have been committed in the course of the attempt and that may be punished in addition to it.

The justification for punishing attempts.

In punishing persons for attempting to commit crimes the law is punishing them for something they did not do, for an unfulfilled intention. The justification for this can be stated in two ways. Firstly, it can be said that the man who intends to kill and does not succeed, is just as wicked as the man who does succeed, and indeed should be punished as severely as if he had succeeded - in the words of the Digest, anyone who did not kill a man but wounded him for the purpose of killing him, should be convicted of homicide. (cf. D. 48.8.1.(3)). But although it seems wrong that a wicked man should escape punishment because he has been 'lucky' enough not to succeed in his wicked intentions, it is nevertheless

felt that he should not be punished as severely as if he had succeeded. This may be because it is felt that Providence has intervened to save him from the greater sin of having completed his crime, and that he is entitled to the 'benefit' of this intervention; or it may be, from a more strictly legal standpoint, because the law's main concern is with external harm, and in fact an attempt causes less harm than a completed crime. The law punishes people for what they do, and not for what they intend - and this is true even in the realm of attempts so that, albeit the punishment is based on the wicked intention, it is still proportionate to the harm done.

Secondly, it is only common sense to shut the stable once the horse has shown signs of intending to get out, and foolish to wait until it has gone: in a phrase, prevention is better than cure. If a man shows that he intends to kill someone, it is clearly foolish to leave him to get on with it. The law may not be able to intervene until he has actually tried to kill, but once he has tried, there can be no objection to seeing that he does not remain at liberty to try again. Indeed, as has been pointed out, there is much more point in punishing someone for an attempted crime, than for a completed one. For once there is an attempt, 'the offender appears to the legal system on the strength of the act done, already so dangerous that the law dare not wait for further proofs of his dangerous character; the incompleted act furnishes a sufficient proof'. Success encourages, failure discourages, and punishment discourages still further, weakening the offender's aggressive tendencies, and so 'the punishment of attempted crimes promises a much more effective and

endurable result than the punishment of a completed crime' (W. Ullmann, 'The Reasons for Punishing Attempted Crimes', (1939) 51 Jur. Rev. 353, 363-4).

The actus reus of an attempted crime.

Before the law will inflict punishment for attempting to commit a crime it requires the commission of some overt act in pursuance of the attempt. This overt act, as we shall see, is not required merely as evidence that the accused really was attempting to commit the crime in question, as evidence of his intention; it is required in order to constitute the attempt, and there is no attempt until the requisite overt act has been committed. To be guilty of an attempted crime the accused must have intended to commit the crime, and must have done certain things in pursuance of that intention.

The law is forced by its very nature, as it were, to concentrate on what was in fact done, and not just on what was intended, because what was in fact done, is the standard on which it usually relies in ascribing responsibility. 'Crimes,' says Beccaria, 'are only to be measured by the injury done to society. They err therefore, who imagine that a crime is greater or less, according to the intention of the person by whom it is committed... Upon that system, it would be necessary to form, not only a particular code for every individual, but a new penal law for every crime' (Beccaria, p. 25). The punishment of attempted crimes necessarily involves some departure from this strict view of the irrelevance of intention, but the departure is far from complete. As a result there has grown up something like a definition of attempted crimes in terms of external situations as well as in terms of the accused's intention. An 'attempted crime' thus

becomes almost an entity in itself, with something like an actus reus of its own: a person is not guilty of an attempted crime until he has brought about the appropriate actus reus.

The question in every case is therefore, 'Does what the accused did amount to the "actus reus" of the attempted crime?', and in practice this question becomes 'Has the accused reached the stage of attempt, has he gone far enough in the prosecution of his intention to have committed an attempted crime?' The answer given in any case depends on the theory adopted by the answers regarding the criterion of criminal attempt. There are a number of different theories, some of which must now be considered in detail.

Theories of criminal attempts.

The following are the most important theories of criminal attempts:

(a) The wrongful act theory. This is the theory that A is guilty of an attempt to commit the crime x when, in pursuance of his intention to commit x, he commits a completed crime, y.

(b) The unequivocal act theory. On this theory A is guilty of an attempt to commit x when, in pursuance of his intention to commit x, he has done an act which is such that it can be unequivocally inferred from a consideration of that act that it was done with the intention of committing x.

(c) The appropriate stage theories. These are theories which hold that once A has advanced a certain stage towards the commission of x he has committed an attempted crime. In these theories it is assumed that before we come to consider whether A has reached the appropriate stage we have learned

aliunde that his actions were performed with the intention of committing x. The appropriate stage may lie anywhere between the formation of the intention to commit x and the actual commission of x. In particular it can be placed either:- (i) at the beginning, at the point where A starts to put into effect his intention to commit x - the first stage theory; or

(ii) at an intermediate stage usually described as that at which A passes from preparation to perpetration - the perpetration theory; or,

(iii) at the end, when A has no more to do in order to bring about x, but to wait for matters to take their natural course - the final stage theory.

(a) The wrongful act theory.

As a theory of attempts this can be easily dismissed: it clearly will not do. Whether or not, for example, the buying of poison constitutes attempted murder cannot depend on whether or not the buying of poison is itself a crime. On this theory, a man who breaks into his neighbour's house with the intention of raping his neighbour's daughter is guilty of attempted rape as soon as he forces his way into the house, although a man who goes into his own living-room in order to rape his guest is not guilty of attempted rape until he has started to assault her.

There is no Scots authority in favour of this theory. It is true that Hume opens his treatment of attempts by saying, 'But the vicious will is not sufficient unless coupled to a wrongful act', but he is only pointing to the necessity for an overt act before there can be an attempt. The examples he gives, such as that of a man shooting at someone and missing, are compatible with the theory he in fact develops at length, which is the final stage theory (Hume, i. 25, 27).

Preventive crimes. Although the wrongful act theory is useless as a theory of attempt, it is important in the more general consideration of the ways in which the law can deal with unfulfilled intentions. It is the only theory which insists that a completed crime must have been committed before there can be any conviction at all, and it points the way to the creation of a substitute for attempted crimes. If the accused must have committed one crime before he can be guilty of attempting to commit another, why not just charge him with the crime he has committed, and so avoid the difficulties inherent in any law of attempt? And even if we do not accept the principle that there can be no attempt unless there has been a completed crime, why not deal with the attempt problem by making certain common steps on the way to certain crimes, crimes in themselves? That is to say, why not create preventive crimes? This course was recommended by Hume who said of 'acts of matured and extensive preparation...attended with danger to the interests of trade', that 'it is for the Legislature to interpose and provide a remedy, accommodated to the exigency of the case; and thus the evil is obviated, without infringing on the humane principle of the common law' (Hume, i. 29). If, for example, we wish to prevent people injuring others with lethal weapons, we can do so not by trying to show that anyone who carries a lethal weapon with the intention of using it is ipso facto guilty of attempted assault, but by making it a crime to carry a lethal weapon without lawful excuse (Prevention of Crimes Act, 1953, 1 & 2 Eliz II. c.14). Preventive crimes can also be created in spheres in which attempts would be impossible, e.g. to prevent

the careless infliction of harm, as is done by making careless or drunken driving a crime in itself, whether or not any harm is done.

Although this type of crime is normally created by statute, as Hume indicated it should always be created, and although it is unlikely in the extreme that the common law would today create a new preventive crime (cf. Semole, 1937 J.C. 41; Quinn v. Cunningham, 1956 J.C. 22) there are two cases of such common-law creation. In John Horne (15 Jul. 1814, Hume, i. 150-3) the High Court held that it was criminal for a forger of notes to sell them, as forged to an accomplice. It is not altogether clear whether the Court considered this to be a crime of its own, or whether they considered it to be a form of attempted uttering, but they recognised that to make it attempted uttering would be to go beyond the limit of the general rules governing attempt, and they made the conduct in question criminal because, inter alia, 'In itself, such a dealing was a criminal act, and one of a dangerous as well as a base nature'. The view that Horne created a preventive crime is supported by Alison (i. 406) and by Macdonald (p. 69), both of whom regard the selling of forged notes to an accomplice as an independent crime.

A clearer example of the common law creation of a preventive crime is the case of Chas. MacQueen and Alex. Baillie (15, 22, and 25 Jan. 1810, Hume, i. 102) where a charge of housebreaking with intent to steal was held relevant, although attempted theft was not at that time criminal. Housebreaking with intent to steal filled part of the gap created by the fact that attempted theft was not criminal, but it is in itself a substantive crime, and now that an attempt to commit any crime is criminal (Criminal Procedure (Scotland)

Act, 1887, 50 & 51 Vict., c. 35, s.61) it is relevant to charge attempted housebreaking with intent to steal (Macdonald, pp. 24, 51).

'With intent'. The crime of housebreaking with intent to steal leads to a consideration of the practice of charging accused persons with behaving in a particular way with intent to commit a crime. Where an accused is charged with doing A with intent to commit B there are four possible situations. (i) A is not in itself a crime, but the whole facts libelled disclose an attempt to commit B. In such cases the charge is just a charge of attempting to commit B. In Coventry v. Douglas (1944 J.C. 13) it was held that a charge of putting one's hand into a receptacle 'with intent to steal therefrom' was just a charge of attempted theft. (ii) A is not itself a crime and the facts libelled do not disclose an attempt to commit B. In such a situation there is a crime only if 'A with intent to commit B' is a crime in itself, as in 'housebreaking with intent to steal'. If 'A with intent to commit B' is not a crime in itself, the charge is irrelevant, since it discloses neither a completed nor an attempted crime. In Semple (1937 J.C. 41) the accused was charged with supplying abortifacients to a non-pregnant woman with intent to cause an abortion. It was accepted that this was not attempted abortion, as the woman was not pregnant (see infra 245), and accordingly the question for the Court was whether supplying or administering abortifacients to a non-pregnant woman with intent to cause an abortion was in itself a crime. The Court declined to 'create'

this crime, holding that it was for the legislature to do so if they thought it necessary, and this approach shows that here, as in MacQueen, we have left the real of attempts, and entered the realm of the creation of new substantive crimes. (iii) A is itself criminal and the facts libelled constitute an attempt to commit B. In such situations there has been an attempt to commit B, and such an attempt should be libelled in preference to libelling 'A with intent to commit B'. Hume commented that in his day 'our lawyers have refrained...from libelling directly as for an attempt to murder, rob, ravish, or the like; and have thought it better to shape the charge as for the assault made, or other harm done, and to state the ultimate and flagitious purpose, as an accompaniment only or aggravation of the injury' (Hume, i.26). This practice is inadvisable, since it confuses this situation with the next type where there is in fact no attempt at B but only the commission of A with intent to commit B. (iv) A is itself criminal, but the whole facts do not disclose an attempt to commit B. The commonest examples of this type of charge are assault with intent to ravish and assault with intent to rob. Such charges are usually regarded as aggravations of assault, and this, it is submitted, is the best way of dealing with them. One is tempted to say that this form of charge is a survival from the days when many attempts at crime were not themselves criminal, and that now that all attempts are criminal this form should not be used. But attempted rape and attempted robbery were crimes in Hume's day (Hume, i. 26; Burnett, p. 107), and such charges are still current today. (Macdonald says, 'Formerly it was also the practice to treat assaults as being aggravated by intent to commit more serious crime, but the present practice is to charge

assault and attempt to commit the more serious crimes', but admits that it would still be open to juries to convict of assault with intent to cause serious injury or death, on a charge of attempted murder - Macdonald, p. 117. In fact charges of assault with intent to ravish or rob, at any rate, are still brought, although not very frequently. The 1887 Act itself recognises their continued competency in the same section which provides that attempt to commit any crime is criminal - 50 & 51 Vict., c.35, s.61. The section provides that the jury may convict of assault or of assault with intent to commit another crime even if assault with intent to commit that crime is not charged, provided the charge is of a crime importing personal injury resulting in death or serious injury. The provision is merely procedural and is restricted to charges of murder or serious injury. But it implies that a charge of assault with intent to kill remains competent, and if that is so, then a charge of assault with intent to rob or ravish would also be competent, although a person might not be open to conviction for at any rate assault with intent to rob unless it were specifically charged.) In effect this type of charge represents a sort of half-way house between assault and attempted rape, robbery, or murder, etc., as is recognised by Burnett who suggests that where it is doubtful if the facts amount to rape there should be alternative charges of rape, attempted rape, and assault with intent to ravish (Burnett, p. 107), and the same approach is adopted by the Crown Office today. (In at least two reported charges of assault with intent to ravish the narrative of the indictment bore that the accused attempted to have carnal knowledge of the victim forcibly and against her will - Hugh

M'Namara, (1848) Ark. 521, 522; Jas. Kennedy, (1871) 2 Coup. 139). But there is no warrant for classifying such charges as half-way houses to attempt, or for treating them as substantive crimes (pace Lord Deas in Andrew Allan, (1870) 1 Coup. 468, 469; cf. Kennedy, supra). Housebreaking with intent to steal is a crime consisting of the act of housebreaking with a particular mens rea, just as theft is the act of taking another's property with a particular mens rea but there is no objective act distinguishing assault from assault with intent to rob, until we reach the 'act' characterised as an attempt. To make assault with intent to rob a different and greater crime than assault is to make the mere intent to rob criminal, which is contrary to the fundamental principle that 'the vicious will is not sufficient unless coupled to a wrongful act' (Hume, i.26). Assault with intent to commit another crime is just an aggravated form of assault. (Cf. Criminal Procedure (Scotland) Act, 1887, s.61 - supra, which entitled the jury to convict someone charged with e.g. murder, of assault, or of 'the aggravation that such assault' was committed with intent to kill). The aggravation is different from other aggravations of assault such as indecency or the use of firearms because it depends on the accused's subjective state and not on any objective feature in the situation. But aggravating factors, like mitigating factors, are merely factors the Judge is entitled to take into account in passing sentence; and if he is entitled to take provocation into account in imposing a lesser sentence than is normal for the crime in question, it seems only fair that he should be entitled to take an intention to rape, or rob, or do serious injury,

into account in passing a higher sentence than is normal for the crime in question.

(b) The unequivocal act theory.

This theory holds that before a person can be convicted of an attempted crime he must have committed an overt act of such a nature that the only reasonable inference which can be drawn from a consideration of the act is that it was committed with the intention of going on to commit the crime attempted. The act must be 'unequivocally referable', to the intention to commit the crime. This theory relies on the overt act as evidence of the criminal intent and the intent is only held proved if no other reasonable inference can be drawn from the act but the inference that it was done with that intention.

There is no Scottish authority in support of this theory, but as it is the theory held by Salmond (see 10th edn. pp. 387-9. The passage dealing with attempts has been omitted from the 11th edn.), and also by the editor of Kenny, and of Russell on Crimes (see J.W.C. Turner, 'Attempts to Commit Crimes' in Modern Approach, p. 279; Kenny, para. 63; Russell, p. 195), it requires to be considered.

The critical difficulty of this theory is that no act is unequivocally referable to anything when regarded in isolation. 'It is impossible to determine that issue until we know all the relevant factors, and they usually extend far beyond the immediate behaviour-circumstances which may or may not constitute criminal attempt' (Hall, pp. 108). Salmond explains the theory by saying that the act must be 'of such a nature that it is itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. Res ipsa loquitur'

(10th edn. pp. 388-9). But Salmond himself commences his exposition by saying that 'To mix arsenic in food is in itself a perfectly lawful act, for it may be that the mixture is designed for the poisoning of rats. But if the purpose is to kill a human being the act becomes by reason of this purpose the crime of attempted murder' (ib. p. 387). But on Salmond's own test it is not attempted murder, since it is equivocal - it may be referable to an attempt to poison rats or to an attempt to poison a human being.

The theory is also peculiar in that it is, as Salmond himself accepts, ultimately a theory of evidence: it is not interested in the overt act as such, but only in the act as proof of criminal intention. If that is so, why does the theory accept only overt acts as proof of such intention? Salmond says that it is because of the danger of punishing a man for acts in appearance and in themselves perfectly innocent. (ib. p. 389). But, as Glanville Williams points out in a footnote to the 10th edition of Salmond (ib.), this danger may be completely removed by a confession of criminal intention, and the accused still not be guilty of attempt, on Salmond's view, because of the equivocality of his acts. What in fact happens is, of course, that where the accused has confessed his intention, the Court finds it easier than otherwise to treat his acts as unequivocally referable to that intention.

This sort of situation arose in the New Zealand case of R. v. Barker ([1924] N.Z.L.R. 865) in which Salmond gave judicial expression to his theory. Barker had written a note to a young boy asking him to meet him for five minutes in a paddock and saying 'We can have some fun'. The boy showed the note to his

father, and when Barker wrote to the boy again suggesting a meeting, arrangements were made for the police to be present. Barker met the boy and the two walked together for a short time until the police intervened and charged Barker with attempted sodomy and attempted indecent assault. Barker later confessed to an intention to commit sodomy. He was convicted of attempted sodomy, and his conviction was upheld by the appeal Court which held, for a number of reasons, that his behaviour constituted an attempt to commit that crime. Stringer, J. adopted the unequivocal act theory, and said that there must be facts which 'indicate, of themselves, the intention to commit the offence' (at p. 871), but he seems to have adopted this test because 'Until this stage is reached, the matter rests in mere intention, and there is a locus poenitentia' (ib.); that is to say, he confused the unequivocality theory with a final stage theory (see infra 222).

Salmond, J. himself came out unequivocally for the unequivocal act theory, saying that

'an act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which Res ipsa loquitur. An act...in its own nature and on the face of innocent...cannot be brought within the scope of criminal attempt by evidence aliunde as to the criminal purpose with which it is done' (at pp. 874-5).

The difficulty of the theory becomes apparent when we try to understand how Salmond, J. succeeded in applying it to the facts of Barker in such a way as to produce the conclusion that Barker was guilty of attempted sodomy. Barker's conduct in inviting the boy

for a walk and going for a walk with him is in itself, it is submitted, as referable to an intention to take the boy for a walk, or to the zoo, or to kill, the boy, or to many other possible intentions, as it is to an intention to commit sodomy. In fact, as Fringer, J. suggested, the 'guilty complexion is probably due to the light cast upon [Barker's actings] by the subsequent confession of the accused, which, admittedly, could not be legitimately used for that purpose' (at p. 871).

It is interesting to note that in the English case of R. v. Miskell ((1954) 37 Cr. App. Rep. 214) in which the facts were very similar to those in Barker - a soldier met a boy and made an indecent suggestion with a promise of money; they met again, the soldier said 'Let's take a walk', and was arrested - the accused was convicted of attempting to procure the boy for an indecent purpose, but Hilbery, J. pointed out that the facts did not amount to an attempt to commit indecent behaviour (at p. 218). Glanville Williams also points out that to offer a girl money to go into a park has been held in New Zealand to be an attempt to have carnal knowledge of her (Yelds, [1928] N.Z.L.R.18) but that to offer a girl money to enter a hut has been held not to be attempted indecent assault (Moore, [1936] N.Z.L.R. 979; see Gl. Williams, para. 145). These examples make it clear that the theory is untenable.

(c) Stage theories.

Theories which require that the accused shall have reached a certain stage in the commission of his intended crime before he can be convicted of attempt suffer from a difficulty not altogether unlike the main difficulty of the unequivocal act theory. These theories do not view the act in isolation, but they have to fix on a

stage in the series leading up to the completed crime which they can characterise as the beginning of the commission on the crime, or the stage of perpetration, or the final stage. There is no agreed standard of measurement which will tell us, for example, whether the poisoner begins to commit murder when he buys the poison, or when he puts it in the food, or when he invites the victim to dinner. The standard is a variable one, and the decision in any case may well depend on whether the Court feels that the accused deserves to be punished, rather than on the logical application of a principle. 'No facts or events force us by their very nature to relate them in a particular way to some other fact or event. Between any two facts there may be a number of relations among which we may choose, and our choice will depend on our purpose' (O.C. Jensen, *The Nature of Legal Argument*, p. 134). In cases of attempt the purpose behind the choice is either to convict or to acquit the accused, and the decision to treat his acts as sufficiently closely related to the intended crime to constitute an attempt to commit it may often be itself the result of a decision to convict him, and conversely, the decision that his acts do not amount to attempt may often just follow on the decision that he ought not to be punished.

Are there different stages for different crimes?

Professor Jensen, following Mr. Justice Holmes, takes the view that the real criterion of attempt is simply public policy, the important factors being, as Holmes puts it, 'the nearness of the danger, the greatness of the harm, and the degree of apprehension felt' (Holmes, *The Common Law*, p. 68; cf. Jensen, op. cit. p. 130, 163; Swift and Co. v. U.S. (1905) 196 U.S. 395, 396). If this is so, it will be reasonable to relate the

appropriate stage to the seriousness of the intended crime, or to the amount of danger involved in the acts already committed. In that case no principles drawn from a consideration of cases of attempts to commit crime x would be applicable to cases of attempts to crime y. The law might be, for example, that where the intended crime is trivial, there is no attempt until the final stage has been reached, but where the intended crime is serious, there is attempt as soon as the accused has started to put his intention into operation.

This type of approach is envisaged by Hume, who says of his own rules 'that in some instances, there seems to be room for an exception to the ordinary rule, on account of the deep atrocity of the intended mischief, or the extensive, mature, and elaborate preparation and contrivance. The case has been put of one who has stored his neighbour's cellar with gunpowder, for the destruction of him and all his family; and that of a plot, in a state of great advancement, to burn and plunder a whole quarter of a certain town' (Hume, i. 29). A similar approach lies behind the decision of the Court in John Horne (15 Jul. 1814, Hume, i. 150-3) that it was criminal to sell forged notes to an accomplice. The Court justified their decision, by reference, inter alia to the 'daring energy of disposition in the artist...', describing the preparations in question as 'important steps of a deep and advanced conspiracy against the safety of trade' (ib. 152). As such, the Court regarded them as punishable, even although they had not reached what was normally regarded as the stage of attempt. (It is not clear whether they regarded Horne as guilty of attempted uttering or of the independent

crime of selling forged notes to an accomplice → cf. supra - but whatever the form, the effect of the decision was to extend the boundaries of attempt because of the dangerous nature of the accused's behaviour.)

This approach has not survived into modern times. This is partly because the 'deep and advanced conspiracy' can be dealt with by using the law of conspiracy without recourse to the law of attempt (see infra), but mainly because it is more difficult to maintain such an approach in a system in which an attempt to commit any crime is statutorily declared to be criminal (Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c.35, s.61) than it was in the time of Hume. In Hume's day attempts were criminal only in the case of serious crimes, and the fact that attempts to commit less serious crimes were not criminal at all could be viewed as the logical conclusion of this approach. In any event, there is no suggestion in any modern cases that there is more than one standard for criminal attempts.

(c)(i) The first stage theory.

On this theory A has committed an attempted crime as soon as he has performed an overt act with the intention of committing a specific crime, providing that the act was regarded by him as a step towards the commission of that crime. The difference between this theory and the unequivocal act theory is that on this theory the intention of the accused may be discovered otherwise than by examining the act itself. On this theory if A buys poison as part of a deliberate scheme to poison B he is guilty of the attempted murder of B; but if he buys poison with a vague idea that it might come in handy one day should he ever make up his mind to poison B, he is not guilty of

attempted murder, and will not be so guilty until he has formed a specific plan to poison B, and committed some further act in pursuance of that plan.

The theory adopts a subjective criterion - an overt act may constitute an attempt, provided it was part of a scheme to commit a particular crime; in order to decide whether a particular act or series of acts constitutes attempt it is necessary to know if the accused considered them as part of the carrying out of his intention to commit a crime. The fact that the conduct appears to be unequivocally referable to such a scheme will be evidence of the accused's intention, but no more. It has been said that on the unequivocal act theory, '...If A intending to kill Z, goes into the street with a loaded gun, but fails to find Z...A has not attempted to murder Z ... [but] if a person goes out at night with apparatus specially fitted for committing mischief by fire, not only must he be presumed to intend to commit that crime, but he has already made a move towards his purpose sufficient to constitute an attempt' (A. Gledhill, "Attempt" in Indian Criminal Law', Indian Year Book of International Affairs, 1955, p. 1, at p. 2). The distinction, however, seems unfair, and the first stage theory avoids the necessity of making it. On the first stage theory A will be guilty of attempted murder if in fact he was carrying the gun in order to go and kill Z with it; he will not be guilty of attempted fire-raising if he can bring evidence to rebut the presumption of fact that he intended to raise fire.

The first stage theory seems to fit the ordinary meaning of 'attempt', since all it requires is that the accused shall have been seriously bent on the commission of a crime, and have in fact started to put his criminal intention into effect. On this theory

a jury need only ask themselves 'Was the accused engaged in carrying out his intention to commit the crime when he was arrested? This is a simple and easily understandable test, and concentrates attention on the accused's state of mind, which is, after all, what is being punished when we punish attempts. The theory also has the advantage that it enables wicked intentions to be punished and so frustrated more often than do the other theories which may require considerable harm to be done before the law can intervene.

A number of codes use language which could be interpreted as embodying this theory, perhaps because of the similarity between the theory and the ordinary meaning of 'attempt'. The French Penal Code talks of attempts manifested 'par un commencement d'exécution' (C.P. Art. 2.); the English Draft Code of 'an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if..not interrupted' (Report of Royal Commission on Draft Code, 1879, Draft Code, s.74); the New Zealand Code of 'an act for the purpose of accomplishing' the criminal object' (Crimes Act, 1908, s.93, (i)), the Indian Code of anyone who 'in such attempt does any act towards the commission of the offence' (Indian Penal Code, s.511); the Queensland and Western Australia Criminal Code of someone who 'begins to put his intention into execution by means adopted to its fulfilment' (s.4); and the Swiss Code of someone who 'mit der Ausführung eines Verbrechens... begonnen hat' (SchwStGB Art. 21).

But in fact all of these systems reject the first stage theory, and all for the same reason. They all distinguish acts of preparation from attempts, and agree that acts of preparation are not punishable (see, e.g.

Donnedieu de Vabres, p. 132; New Zealand Crimes Act, s.93(ii); Ranchhoddas and Thakore, The Indian Penal Code, p. 456; H. Pfander, 'Swiss Criminal Law', 1944 Can. Bar Rev., p. 874). It is felt that to punish mere preparation for the commission of a crime is to go too far, since it comes near to punishing mere intentions, which it is not the purpose of the criminal law to do. The nearest approach to the first stage theory I can find is that of German Law. Art 43 of the StrafGesetzbuch talks of 'Anfang der Ausführung', and this is interpreted as excluding preparatory acts, but the distinction between preparation and perpetration depends on the intention or plan of the intending criminal - Nach ihm kann allein beurteilt werden, ob eine Handlung schon der Ausführung oder nur der Vorbereitung dient' (Schönke-Schröder, p. 192). It is on this principle that a distinction is drawn between someone who buys a revolver with which he intends to commit a murder after some weeks, and someone who pulls out a pistol when he intends to kill a particular person at once. On this view again, it is possible to regard the poisoning of a watchdog as attempted theft, which it probably would not be on a strict perpetration theory. (ib. p. 193).

Although this theory is an inviting one, there is no authority for it in Scotland, and its approach is out of tune with the general attitude of Scots law towards attempt, which requires an almost complete act of execution before there can be an attempted crime.

(c)(ii) The perpetration theory.

Despite its wide adoption this theory is highly unsatisfactory. It is objective theory since it requires more than the combination of intention with an overt act - it requires a particular sort of overt act. That being so, it should be able to point to

a quality which distinguishes the type of act it requires - an act showing that the accused has passed from the stage of preparation to that of perpetration. But it is unable to do this, and as a result it is so vague that it enables the Court to adopt an individual approach to each case, and to decide whether or not there has been an attempt solely by reference to whether or not it wishes to punish the accused. If this were frankly admitted it might not be altogether a bad thing - it would be flexible and would take account of ordinary moral reactions - but it would not be a stage theory of attempt. In the same way, the theory can be used to introduce the tenable Holmesian theory that the criterion of attempt is public mischief, but it would be better to adopt the Holmesian theory explicitly, For when Judges continually talk about preparation and perpetration, and not about morality or public mischief, they end by convincing themselves that the words mean something, and the result is that in order to justify their decisions on attempt they employ the perpetration theory. But the theory is quite incapable of standing on its own, and it tends to be combined or confused with an unequivocal act theory when the Court wish to convict, and with a final stage theory when they wish to acquit. (Cf. Donnedieu de Vabres, pp. 132, 134; R. V. Barker [1924] N.Z.L.R. 865; O.C. Jensen, op. cit., Pt. III, passim.) The most striking example of this is offered by two South African cases, in one of which it was held that a man putting on a contraceptive beside a naked coloured woman had not attempted to have intercourse with her because there was still an opportunity for him to change his mind, and in the other that a man lying undressed in bed with a naked coloured woman, in a state of erection, had attempted to have intercourse

with her - N and B [1952(4)] S.A.L.R. 210, and S, ib. 591).

The theory in Scotland. Hume talks at one stage of 'ambiguous cases, with respect to which it is very difficult to say where preparation ends, and perpetration begins', but he is talking there of the possibility of treating dangerous attempts, or attempts to commit dangerous crimes, differently from ordinary attempts. In any event it is clear from his examples, that he equates the beginning of perpetration with the final stage. For he says that it is not attempted assault to lie in wait for someone, or to lurk in the night near a shop with a ladder and pick the lock, because until the person is assaulted or the lock of the shop picked, there is no 'inception' of the crime, and 'fear, remorse, a moment's confusion, some accidental alarm, might have prevented any attempt from being made' (Hume, i. 29).

Again, in Baxter ((1908) 5 Adam 609), Lord Macdonald said that 'A man who has done something by way of overt act with the purpose of committing a crime, but does not complete it, is punishable for attempting to commit the crime', but his examples are of placing poison in a teapot, or sending a parcel of explosives through the post so that they will blow up on being opened. And it is these acts that he describes as 'acts done by a person who is in course of committing the full crime, and the person attempting had by overt act directly taken steps, not merely to prepare for the perpetration of a crime, but to put his machinations into a practical action' (at p. 615). It is clear from the examples and from the whole tenour of the case that the theory adopted was the final stage one (and indeed probably the possibility of repentance version - cf. infra). Lord Macdonald also spoke of a house-breaker seen by a watchman looking into a house,

with all his tools ready to break in, and said that such a man was not guilty of attempted housebreaking if he went away when the watchman caught sight of him (ib. p. 614).

The only direct authority in Scotland for the perpetration theory is the case of Camerons ((1911) 6 Adam 456). The accused were husband and wife, and they were charged with attempting to defraud an insurance company. The attempt involved an elaborate scheme much of which had been carried out before they were arrested. They had obtained possession of a necklace for a limited time during which they effected an insurance on it. Then, after they had given the necklace back, they pretended that the wife had been robbed of it, and even went so far as to produce simulate injuries on her. They then reported the 'theft' to the police and to the insurance company's assessors. The latter requested a formal claim, and although it appears that such a claim was made the Crown failed to prove this, and the case went to the jury on the assumption that no claim was made. In these circumstances the accused were convicted of attempted fraud.

The presiding Judge, was Lord Dunedin, and he consulted the other Judges before directing the jury, so that his charge is of considerable weight as an authority. It is submitted, however, with respect, that it is nonetheless wrong insofar as it purports to define the Scots law of criminal attempts in terms of the perpetration theory.

Lord Dunedin approached the law by way of Hume's requirement of an inchoate act of execution. He then referred to Hume's example of scuttling a ship with the intention of defrauding underwriters. But although

Hume regarded this as attempted fraud (Hume, i. 27) Lord Dunedin did not appear to do so, since he treated the simulate robbery in Camerons as itself insufficient to constitute an attempt, although he said that 'very little more will do' (at pp. 484-5). He went on to quote Hume's statement about ambiguous cases in which it was difficult to say where perpetration began (Hume, i. 29), and summed up his own view of the law by saying that 'the root of the whole matter' was 'to discover where preparation ends and where perpetration begins. In other words, it is a question of degree, and when it is a question of degree, it is a jury question' (at 485). (This last statement is rather surprising - the question was decided on relevancy in the earlier cases of Sam. Tumbleson, (1863) 4 Irv. 426 and Baxter, (1908) 5 Adam 609, and in the later cases of Mackenzies (1913) 7 Adam 189 and Semple 1937 J.C. 41, and is generally regarded as one of law - cf. Report of Royal Commission on Draft Code, 1879 - Draft Code, s.74; New Zealand Crimes Act, 1908, s.93(ii); Gardner and Lansdown, South African Criminal Law and Procedure, Vol. I, p. 103.) The jury, naturally enough in the circumstances, convicted the accused - naturally, because there could be no doubt that the accused had concocted and to a great extent carried out a deliberate and complex plot to defraud the insurers.

It is not clear, however, whether Lord Dunedin would have convicted the accused, had the matter rested with him. He said to the jury, 'Supposing that after getting that letter...saying that they wanted a formal claim...they said "No, we have changed our minds, and we give it up; we are not to claim at all" - do you think there would have been much chance of convicting them? Well, of course they are not in that happy

position, but through the omission of the Crown to prove any claim they are in the same position, as you must just take it, as if they had been arrested after the letter to the broker reporting the theft and asking that enquiries be made' (at pp. 495-6). Lord Dunedin was thus at least flirting with the final stage theory; he certainly thought that actual repentance would prevent conviction; and he was apparently by no means convinced that on the proved facts there had been 'perpetration', - the passage sounds very like a suggestion to the jury to acquit. On the other hand the suggestion that once the robbery had been carried out 'very little more' would do, and the treatment of the question as one of degree make it clear that his Lordship was not directing the jury in terms of either the final stage theory, or the first stage theory. What he himself meant by perpetration, or where he thought it began in the case, it is impossible to tell.

The value of the case as authority. The case is of considerable persuasive authority but it is not, of course, technically binding, and it is submitted that it should not be followed. It conflicts with the decision in Baxter ((1908) 5 Adam, 609) and with the dicta in Mackenzies ((1913) 7 Adam, 189), which will be considered shortly. Again, although the phrase about preparation and perpetration has been used frequently since Camerons, all the later cases in which the accused have been convicted of criminal attempts have been final stage cases on their facts (Semple, 1937 J.C.41; Angus, 1935 J.C.1; Dalton, 1951 J.C.76 see infra 247).

The objections to the theory. It is submitted further that there are so many objections to the theory that it should not be adopted in the absence of binding authority in its favour. The objections may perhaps be summarised as follows:

(1) It is meaningless. To 'perpetrate' is to 'carry through, execute, perform' (N.E.D.). That is to say, attempt and perpetration are mutually exclusive. At least, the crime is not perpetrated until the last act is committed. To begin to perpetrate either means the same as to begin to carry out - in which case the Camerons had committed an attempt when they staged their robbery if not earlier - or it means to carry out the last act, or, of course, it means nothing at all. Hume, as we shall see, took the view that the beginning of perpetration was the stage at which the last act was performed. The same view is probably taken by the editors of the 5th edition of Macdonald when they say that there is an attempt 'when it is beyond the power of the man to prevent the consequences; or, as sometimes put, when the matter advances from preparation to perpetration' (p. 1. My italics).

To 'prepare' means to 'get ready' (N.E.D.), and if what you are getting ready to do is to carry out the crime, then either you are getting ready until you have committed the final act, or you cease to be getting ready when you start to put your plan into operation. If you stop getting ready sometime before the final act but after the start, there is a gap which is neither preparation or perpetration, and there is no point at which the one ends and the other begins.

(2) It is vague. The distinction between preparation and perpetration is said to be one of degree, and that in itself means that it is bound to be difficult to apply. But it is more difficult than many

other questions of degree, because even the points between which the variations in degree operate are unfixed. In most questions of degree there is a wide area in which it is clear on which side of the line we are. We may not know where a horse's tail ends and its body begins, but outside of a small part of the horse we know without any doubt which is horse and which is tail: and we know clearly what 'horse' and 'tail' mean. When it comes to preparation and perpetration the terms are so vague as to be undefinable without reference to the borderline cases themselves, and almost every point in the series can be regarded as the borderline. Any point between the time at which the Camerons obtained possession of the necklace they insured until the time they were arrested can be plausibly described as the point at which preparation ended and perpetration began. A difference of degree which presents difficult borderline cases is one thing, but a difference of degree which leaves nothing but a borderline is quite another.

(3) It is unintelligible. If the question is a jury question it is important to be able to explain the principle involved in intelligible terms. This can be done with the first stage theory and also with the final stage theories. But it cannot be done with this theory which presents the jury with such a broad and meaningless standard of measurement that they may reach any result they please. Indeed, they will have to reach their result in some other way than by applying the theory, and leave it to the lawyers to rationalise their verdict by using the theory. A jury cannot be expected to grapple with the perplexing assonances of preparation and perpetration which sound, and indeed are, much more like the components of a riddle, or some strange shibboleth, than a practical legal principle.

(4) It leads to ludicrous results. The result of trying to use the test is to produce distinction without a difference. In the English case of R. v. Robinson [1915] 2 K.B. 342 a jeweller staged a fake robbery and reported it to the police, all with the intention of defrauding his insurers. It was held that the police were third parties, the statement to them therefore merely preparatory, and accordingly that there had been no attempted fraud, no step taken in the commission of the crime. There is a distinction between this case and Cameron's (supra), but does it mean anything? Could it not have been said of Robinson as it was of the Camerons that one does not normally report the theft of insured goods without a view to a claim? (Cf. Cameron's, supra, at p. 486). This sort of distinction is so slight and artificial that it is objectionable. It is highly unsatisfactory that liability to punishment by the law should rest on distinctions so thin that they seem to be the result of pilpulistic casuistry and not of principle at all.

(c)(iii) The final stage theory.

This theory is probably the one adopted by the law of Scotland, and so requires considerably more attention than has been given to the other theories.

It may take one of two forms:

(1) The last act theory. This is the theory that the stage of attempt is reached once the accused has done all that he thinks it is necessary for him to do in order to bring the crime to completion. On this theory it is attempted fire-raising to set light to a fuse leading to a barrel of petrol in the cellar of a house; it is attempted murder to send a box of poisoned chocolates through the post to the

intended victim; it is attempted fraud to send a letter containing fraudulent statements on the strength of which a request is made for money. In all these cases something remains to be done - the house must burn, the victim eat the chocolates, the recipient of the letter send the money - before the crime is completely executed, but there is nothing more for the accused to do except sit back and hope that all goes well.

(2) The possibility of intervention theory.

On this theory the stage of attempt has not been reached as long as it is possible for the accused to repent, and, following on such repentance, to intervene and prevent the completion of the crime. Thus, in each of the above examples there would be no attempt - the accused might put out the fuse before the house took fire, he might telephone the persons to whom the poison or letter had been sent and warn them of the situation.

Attempt and repentance. Since the ground of punishment in attempted crimes is the evil intention of the accused, any theory of attempts must deal with the question of repentance. Repentance may be important in two types of situation - when the accused, having passed the stage of attempt, abandons his plan, and desists from any further action; or when, having completed his plan, he intervenes to prevent the occurrence of the intended consequence.

Abandonment. The position in Anglo-American law seems to be that once the stage of attempt has been passed, abandonment is irrelevant, since an attempted crime has been 'fully' committed (cf. Gl. Williams, para. 142; Hall, p. 133; Gardner and Lansdown, South African Criminal Law and Procedure, Vol. I, p. 108; A. Gledhill, 'Attempt'' in Indian Criminal Law, Indian

Year book of International Affairs, 1955, p. 1, at pp. 7-8). This approach concentrates on the analogy between acts constituting criminal attempts and the actus reus of a completed crime, and so argues that repentance after the stage of attempt has been reached is as irrelevant as repentance after the completion of a crime. But this, it is submitted, is fallacious; the acts constituting an attempt are not the same as an actus reus, and the Anglo-American approach carries the analogy too far. What is punished in attempts is basically the intention, and not the acts constituting the attempt, and it is therefore unreasonable to refuse to give the accused credit for having abandoned that intention, provided of course that the abandonment was voluntary. It seems unfair and contrary to religious and moral ideas not to accept the accused's repentance, coming as it does before he has committed the harm in question. (If, of course, it is preceded by the incidental commission of a completed crime, it cannot affect the responsibility for that crime, but that is quite independent from the question of responsibility for attempting the 'ultimate' crime.) The acceptance of such repentance is also desirable on utilitarian grounds - 'on veut encourager le repentir' (Donnedieu de Vabres, p. 135). This is recognised in a number of Continental Codes (e.g. St.GB Art. 46(1); SchwStGB Art. 22; Donnedieu de Vabres, pp. 135-9), and it is submitted that Scots law should adopt the same attitude.

The question is, however, unlikely to arise in Scots law because the adoption of a last act theory avoids the difficulty by postponing the stage of attempt until it is impossible for the accused effectively to abandon his object. (Strictly speaking the stage of attempt should probably be set by reference to what the accused thinks is the last act necessary to achieve

his purpose. Thus if A believes that he can kill B by pointing a gun at him without firing it, he could not abandon his plan after he had pointed the gun - but this raises the question of attempts at the impossible. Schönke-Schröder raise the more realistic question of the position in which A fires at B and misses, and adopt the logical view that if A intended only to fire once at B, he cannot abandon his attempt after having done so, but that if he envisaged the possibility of missing and intended to fire again, or to adopt some other means of killing, he can still abandon his attempt by desisting from using his other means of killing - but it is highly unlikely that a Scots Court would take this view - see Schönke-Schröder, pp. 204-5. The Scots approach would probably be objective, and the last act would be fixed by reference to the reasonable man.)

Intervention. Suppose now that the accused has carried out the last act - he has shot at his victim, or sent him a poisoned cake, or a blackmailing letter. He can now no longer abandon his plan, because there is no plan left to abandon; all he can do if he repents is to intervene and prevent events taking their natural course. If he succeeds in doing this - if he obtains medical attention for the man he has shot, or warns the man he intended to poison, or countermands his request for money and gives up the incriminating letters he is using for blackmail - he will have manifested his repentance in the best way possible in the circumstances - by preventing the execution of his crime, and, in the case of murder, saving the victim's life. In such a situation, as in the case of abandonment, it seems reasonable to give the accused credit for what he has done and to treat him as having

by his acts earned remission for his original attempt (cf. Schönke-Schröder, p. 204). This type of repentance must of course be voluntary, and so must probably precede the discovery of the attempt (cf. StGB Art. 46(2)).

Recognition of this type of repentance is not free from difficulty. It means for example that the man who shoots and misses cannot avoid guilt of an attempted crime - since he cannot abandon his completed plan, nor save his victim's life which is not in danger - while the man who shoots and wounds may avoid such guilt by intervention. There is probably a great deal to be said for adopting the Swiss solution which gives the Court a discretion to impose a lesser penalty (Schw. StGB Art. 22) rather than the German which treats intervention as rendering the accused free of all punishment (StGB Art. 46(2)). On the other hand it may be said that successful intervention should result in freedom from blame, and unsuccessful but sincere intervention result in mitigation of penalty as it no doubt would in practice in Scotland, even if only by way of the Royal prerogative. Be that as it may, it is submitted that the law should give some recognition to successful intervention, both because it shows that the accused did not persist in his evil intention, and because it is socially desirable to give intending criminals an interest to prevent the consequences of their actions (cf. Donnedieu de Vabres, p. 139). Of course, if the accused has committed a completed crime, such as assault, his guilt for that will be unaffected by his intervention.

Possible repentance. So far we have been talking of actual repentance. But it can be argued that the law should not punish a man so long as it is possible for him to repent effectively, either by abandonment or by intervention. One of the reasons for the refusal to punish preparations for crimes, and one of the reasons for the adoption of the last act theory in Scotland, is that it is felt to be wrong to deprive a man of his chance to repent his evil deeds. The last act theory leaves him this chance right up to the time he completes his part in the crime, until he fires the shot, or puts his hand into the pocket from which he intends to steal. But if repentance is central to one's theory of attempt, it can be argued that the possibility of intervention should also be treated as sufficient to prevent the stage of attempt being reached. On this view there would be no attempt until something had made it impossible for the accused to intervene effectively, whether the act of another, or the mere passage of time, or anything else. Where the test is actual repentance we ask, 'Had the accused effectively repented when he was arrested?', but where the test is possible repentance we ask, 'Would he have had time or been able to repent effectively had he not been arrested when he was?'

Which form of the final stage theory is preferable?

It is submitted that the last act theory is the preferable form of the final stage theory, and that for two reasons.

(1) It is easier to apply. The last act theory offers a fairly easy way of fixing the stage of attempt in any given case. We need ask only - did anything remain for the accused to do in order to complete the crime? But on the intervention form of the theory it is not so easy to fix the relevant stage, because it is difficult to say when intervention has been excluded.

Is it, for example, enough to constitute attempted murder that the accused shot at the victim, or must we allow the possibility of his repenting thereafter and sending for a doctor or an ambulance, or otherwise saving the victim's life? To allow actual repentance of this sort to extinguish or diminish guilt seems morally sound, and this will in any event happen so rarely that the law may feel entitled to make an exception to the last act theory in favour of such situations when they do occur. But to allow the mere possibility of such intervention is surely to adopt such an extreme attitude that one might as well abolish attempted crimes altogether; for if we stop short of the last conceivable chance of intervention, there will be no principle by which to fix the stage of attempt.

(2) The intervention theory leads to paradox. Suppose A sends a bottle of poisoned wine to B in London with the intention of killing him; he is arrested the following day, by which time B has taken the poison and is seriously ill. A is probably guilty of attempted murder. Suppose now that at the time of A's arrest B had not yet taken the poison because of an unexpected delay in the post, or because the dinner party at which A expected the wine to be drunk was postponed, and the police telephoned B and prevented his drinking the wine. In the second case intervention was still possible at the time of A's arrest, but it seems illogical to convict him in the first case and not in the second, since in neither did he actually repent, and since he did exactly the same thing in both cases.

An even more paradoxical situation may be conceived. Suppose A and B simultaneously shoot X and Y respectively, intending to kill them, and X and Y receive

similar serious wounds. A and B are arrested immediately after firing the shots. A is a lawyer and knows nothing of medicine, and it is impossible for him to do anything about X's wounds; B is an extremely clever surgeon and one of the few men who can save Y's life - is it to be said that A is guilty of attempted murder, but B is not, and will not be so guilty unless he remains at liberty until someone else has saved Y's life?

Objections to the final stage theory. The main objection to the theory is that it allows too many prospective criminals to escape punishment, and allows even those it does punish to advance very far in their criminal purposes before it can intervene to punish them for attempting to commit a crime. It thus renders nugatory the main purposes of the law of attempts - to prevent harm by catching the criminal before he has had a chance to do appreciable damage, and to punish intending criminals who have shown their dangerousness even although they have not succeeded in their intentions.

Another objection is that the theory makes it impossible to convict anyone of attempting to commit a number of common crimes. This result is contrary to the principle underlying the rule that an attempt to commit any crime is punishable (Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c.35, s.61), and also contrary to current practice. Convictions for attempted rape, for example, are not uncommon, but attempted rape cannot be committed on the final stage theory - either there has been penetration, in which case the crime has been completed, or there has not, in which case the last act, penetration, remains to be done and the accused can still change his mind and decide not to commit the rape. Similar objections

can be made to any form of attempted assault, and probably to any charge of attempting to commit a crime which is indistinguishable from the criminal conduct necessary to commit it, i.e. to any crime which is not a 'result-crime' (cf. supra, 140).

The difficulties raised by the theory are even clearer in the case of theft. It seems reasonable to hold, as the law does, that it is attempted theft to place one's hand in a receptacle with intent to steal something therefrom (Coventry v. Douglas, 1944, J.C. 13). But the crime of theft requires that the object to be stolen be taken away, or at least moved, by the accused (Hume, i. 70, ; Alison, i. 265 - attempted theft was not a crime before 1887), so that merely to place one's hand in a receptacle is not the last act necessary to the commission of the theft; the object must be moved. And once it is moved there is a completed crime. All we have in the situation as described is a 'penultimate' act, and if that is to be accepted as sufficient we are on the same slippery slope as the perpetration theory. It may be said that once the pickpocket has put his hand in the victim's pocket, this is virtually the last act, since the possibility of his repentance and withdrawal at that stage is so slight that it can be discounted: but how far must the accused go to reach this stage? If the object is in a desk drawer is it enough for him to open the drawer, or must he put his hand inside the desk? And if there are a number of objects in the desk and he is interested in only one of them, must he go the length of finding, or touching that one? Again, if the object is not in a receptacle, but lying on a table, is it enough for him to stretch his hand out towards the object, or must he reach or touch the table, or the object?

This problem does not appear to have been considered in Scotland. The cases on attempt deal with 'result-crimes' like murder, abortion, and fraud, and the decisions in these cases have not been applied to crimes like rape and theft. It has just been taken for granted that rape and theft can be attempted - they are serious matters, they deserve punishment, and the 1887 Act (supra) said that an attempt to commit any crime was criminal. The most that can be said about the present law is that the final stage theory applies to those crimes which are capable of being attempted on that theory. So far as other crimes are concerned, something approaching the final stage theory is adopted, so that room is left for the possibility of attempt, but at the same time a very advanced degree of 'preparation' is required before the accused will be convicted of attempt.

Attempted theft and attempted rape are too firmly ensconced in the law for the final stage theory to be consistently adopted, but such an adoption would be in accord with principle, and could be reconciled with the requirements of 'public safety'. The 1887 Act (supra) says that all attempts to commit a crime are punishable; it does not define an attempt, nor say that all crimes can be attempted. Even in present practice, concealment of pregnancy and, probably, perjury, cannot be attempted. In many cases in which the final stage theory would prevent a conviction for attempt it will be possible to convict the accused of some completed crime. In cases of attempted rape, for example, it will be possible to convict the accused of indecent assault, or at least of assault with intent to ravish; and in many cases of theft it will be possible to convict him of the preventive crime of housebreaking with intent to steal. In other cases,

where no conviction is possible, it would be consistent with principle to adopt Hume's view that it is for the legislature to create preventive crimes where this is necessary, so as to obviate the evil 'without infringing on the humane principles of the common law' (Hume, i. 29.. This attitude was in fact adopted in Semple, 1937 J.C. 41, where the Court refused to regard the administration of abortifacients to a non-pregnant woman as either attempted abortion or as an independent crime). Again, where there is a serious and advanced plot (cf. Hume, i. 29), the plotters can be dealt with by reference to the law of conspiracy, without the need for any recourse to the law of attempt.

The Scots authorities on the final stage theory.

I turn now to consider briefly those Scots cases which support my submission that this is the theory adopted by Scots law. I shall deal first with those cases which appear to support the possibility of intervention version of the theory, and then with those in favour of the last act version.

(1) The possibility of intervention. In Baxter ((1908) 5 Adam 609) the accused sent abortifacients to A with instructions to use them to procure the abortion of Y. They were not in fact so used. Baxter was charged with attempted abortion and the Lord Justice-Clerk had little difficulty in holding that the indictment was irrelevant. This decision may accord with the last act theory - Baxter's guilt was only art and part and if A had not administered the drugs the last act had not been performed - but Lord Macdonald's language suggests that he was thinking in terms of the possibility of intervention. His reason for rejecting the suggestion that Baxter had been guilty of attempt was that 'There was plenty of room for going back on what

was done. The sender of the drugs might immediately afterwards have sent a letter to the man to whom they were sent forbidding him to use them for the purpose for which he sent them, saying that, if he did not get an undertaking at once that they would not be so used, he would himself inform the police of the matter. It is quite plain that, if he had done that, it could not be said that an attempt to commit the crime had been made. If that is so, it is equally plain that it cannot be said that an attempt was made if nothing took place' (at p. 615).

In Mackenzies ((1913) 7 Adam 189) a husband and wife were charged with being involved in a scheme of the husband's to copy his employer's trade secrets and sell them to a trade rival. Both were charged with attempted fraud - the husband in that he copied the secrets and the wife in that knowing they had been fraudulently obtained she wrote offering to sell them to various persons. Apparently husband and wife were not charged with being art and part in each other's alleged crimes. The charge against the husband was rejected as irrelevant because it was held that what he had done was not criminal, and accordingly the charge against the wife was dropped. But the Court considered what her position would have been had the secrets been criminally obtained and had she known of this when she wrote the letters. The Court took the view that she would not in that event have been guilty of attempted fraud, since she would only have expressed a willingness to commit fraud, and could still have drawn back and repented of her proposal (at p. 197). It is just arguable that this is consistent with the last act theory - the wife had still to hand over the secrets and receive the money - but the impression given by the opinions is that they were based on the intervention theory.

Neither of these cases, it is submitted, is direct authority for the intervention theory. The remarks in Mackenzies are obiter, and the facts of Baxter is too bound up with the question of art and part guilt by counsel to be a clear authority on the application of the theory.

Apart from these two cases the theory is supported only by one or two dicta. Macdonald says that the stage of attempt is reached 'when it is beyond the power of the man to prevent the consequences' (Macdonald, p. 1 - the passage first appears in the 5th edition), but he goes on to equate this with the stage of perpetration, and his authority (Sam. Tumbleson, (1853) 4 Irv. 426) is clearly a last act case. In Tannahill (1943 J.C. 150), it was said that for attempt there must be 'some overt act the consequences of which cannot be recalled by the accused' (Lord Wark at p. 153) but in that case there had been no more than a suggestion to a prospective accomplice that he and the accused might carry out a fraud. This dictum was repeated in Morton and M'Guire v. Henderson (1956 J.C. 55, Lord Justice-General Clyde at p. 58), but there again the facts only disclosed a suggestion that a fraud should be committed.

It is accordingly submitted that the possibility of intervention version of the final stage theory does not represent Scots law.

(2) The last act. This theory receives the support of Hume who says

'even when no harm ensues on the attempt, still the law rightly takes cognisance of it, si deventum sit ad actum maleficio proximum; if there had been an inchoate act of execution of the meditated deed; if the man have done that act, or a part of that act, by which he meant and expected to perpetrate his crime, and which if not providentially interrupted or defeated, would have done so; and more especially

still (but this is not indispensable) where he has done something which must have its own course, and puts repentance out of his power ' (i.27).

It is submitted that this is clear authority for the application of the last act theory and the rejection of the possibility of intervention theory. It is true that Hume speaks of 'that act, or a part of that act', and it is not too clear what he means by 'a part of that act', but his talk of what the man expected the act to accomplish, a providential interruption, and the way in which he deals with the possibility of repentance all clearly point to the last act theory. So do most of his examples, such as giving a man a poisoned cup, throwing combustibles on stacks in a barnyard, ineffectual instigation or subornation. (He treats the scuttling of a ship as attempted fraud on the underwriters, but it is submitted that he is wrong in that, and was probably influenced by the grave nature of the act of scuttling - such an act has been regarded by those who adopt the distinction, as being merely preparatory, and so not even the first, far less the last, act of execution - see Camerons, (1911) 6 Adam 456, 484. cf. supra, 118 . It seems clear that it is not attempted fraud on Hume's own definition of attempt.)

The theory is also supported by Alison, who says,

'In attempts at murder, the crime is to be held as completed if the panel has done all that in him lay to effect it, although, owing to accident or any other cause, the desired effect has been prevented from taking place' (Alison, i. 165).

The cases which focus the problem concern attempts to commit murder by poisoning, and on this matter Alison's views are as follows:-

'Whether the mere purchase of poison, or the mixing it up with a view to mingling it with the food that is intended to be taken, are to be taken as a complete commission of the crime, seems much more doubtful. In other departments of law the analogous cases are against such a construction. An incendiary letter written, but not sent or disclosed, a libel lying in the author's desk not published, a letter offering a bribe and enclosing the banknotes, but still in the pocket of the writer, are no points of dittay...Judging from these principles, there seems good ground to distinguish between those cases where the person meditating poison has merely purchased and mixed up the materials with that view, and those where he has actually put them out of his hands, and Providence or fortune only have prevented the effect. The one case is analogous to an incendiary letter written, but still in the pocket; the other, to such a letter put into the post-office, but intercepted on its route by some supervening accident' (i. 167).

The last act theory is supported, as against the possibility of intervention theory, by two cases of attempted poisoning. The first is that of Janet Ramage (28 Dec. 1825, Hume i. 28) where the accused had placed poison in a teapot full of tea which she found by the fire in the victim's house, and from which the victim was expected to drink her breakfast tea. Now at that stage, the accused could still have prevented the crime - she could have come back and removed the teapot, or warned the victim; but she had done all she needed to do to poison the victim, she had only to wait for the victim to come and take her usual breakfast. Accordingly the charge was held to be relevant.

A similar situation arose in Sam. Tumbleson ((1853) 4 Irv. 426) where the accused put poison in his wife's oatmeal and gave the poisoned oatmeal to a servant to give to his wife. The indictment does not say what happened after the servant was given

the poison and the case must therefore be treated as if the accused had been arrested as soon as the poison was given to the servant, i.e. when he could still have countermanded his instructions about giving the oatmeal to his wife. The charge was held relevant on the ground that the accused had put machinery in motion which 'by its own nature is calculated to terminate in murder', and which was 'let out of the party's hands to work its natural results' (Lord Neaves at p. 430).

There are three modern cases which should be mentioned, which are consistent with both the last act and the possibility of intervention theories. The first is Semple (1937 J.C. 41) in which a charge of attempted abortion was held relevant where the abortifacients had in fact been administered, but no abortion had resulted. The other two concern the crime of subornation of perjury, which is complete as soon as the witness to be suborned agrees to give false evidence. (Cf. Hume, i. 382, where he treats this as a crime sui generis - in any event whether it is called subornation or merely conspiracy to suborn or some other name, the name subornation being reserved for the case where false evidence is given, it forms in itself a completed crime, and not merely an attempt at some other crime.) Where he does not agree or where he in fact gives true evidence, the crime is attempted subornation - although in the latter case it should probably be subornation if he initially did agree to give false evidence, since in that event he was suborned for a time at least. The situation here is essentially similar to that in which a pistol is fired with intent to kill. 'The conspiracy has had its course so far as depended on the suborner' (Hume, i. 382).

In Angus (1935 J.C. 1) the suborned witness had in fact given true evidence and the accused was convicted of attempted subornation. In Dalton (1951 J.C. 76) the accused had asked someone to refuse to make a statement to the police, and there was considerable argument as to whether this was a crime. But it was accepted that if what was intended could be regarded as a form of subornation, the accused had gone far enough to enable the Court to convict him of attempt. (The crime was charged as an attempt to pervert the course of justice, but that is not so much a crime as a description of a group of crimes of which subornation is one - cf. supra). The important point about subornation in relation to attempt is that subornation is a form of incitement, and that the crime of incitement is complete once a suggestion has been made to someone that he should commit a crime.

Art and part in attempted crimes. The case of Tumbleson (supra) is authority for the view that to give poison to the victim's servant to give to the victim, is attempted murder. This is because the servant in Tumbleson knew nothing of the accused's intention, and so was an innocent agent. To give poison to an innocent agent is like posting it, or placing it on a conveyor belt which will take it to the victim. In such a situation there is no need to consider the act and will of the agent, and the intending poisoner has only to sit back and let events take their normal course, just as where he posts the poison, or leaves it in a cup from which he expects the victim to drink. The Indian Penal Code recognises this very clearly in one of the examples it gives of attempted murder - 'A intending to murder Z by poison, purchases poison and mixes the same with food...which remains in A's keeping; A has not yet committed [attempted murder].'

A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed [attempted murder]' (Indian Penal Code, s.307).

The position is, it is submitted, quite different where A gives the poison to an accomplice who knows that the substance is poisonous and who is party to A's intention. It is true that in such a situation A need do nothing more himself; he need only wait for his accomplice to deliver the poison in the same way as he need only wait for the post office to do so. But where the agent is an accomplice we leave the realm of individual action and enter that of conspiracies, and we must therefore leave the logic and language of individual action, and use that of conspiracies, of art and part. This means that we no longer talk of the actions of individuals, but of the conspiracy; we personify the plot, so to speak. If we do that, it is clear that at the stage where A gives his accomplice the poison, something still remains to be done in pursuance of the plot by the conspiracy, and so - notionally - by A, before there is attempt. In such a situation A is not guilty of attempt until his accomplice 'places the food on Z's table or delivers it to Z's servants'. If the accomplice recants before he does this, there will have been no attempt of which A could be guilty. In this situation, although there is nothing more for A to do, A knows that a deliberate human act is still necessary before the crime can be completed, and an act of this kind, by a willing accomplice, is quite different from the operation of a conveyor belt, or the act of a postman, or of any other innocent agent. One might say also that, just as A is responsible for the acts of his accomplice, so he is entitled to the benefit of the accomplice's inaction.

The above situations are fairly simple, but

between them, between the case of Tumbleson or the example of the post office, and the fully-fledged conspiracy, there falls a number of very difficult situations. One such arose in the South African case of R. v. Nlhovo ([192] A.D. 485). There the accused gave poison to one N, telling him that it was medicine, and that he was to put it in V's food because, 'V arrests me when I go and pick mealies and peaches'. N never intended to put the poison in V's food; he took it straight to V and the two men went to the police. The Appeal Court held that there had been no attempt to poison, but only an attempted incitement. One of the Judges, Maasdorp, J.A., considered Scots law in his opinion, and referred to the case of Walter Buchanan (Jan. 15, 1728, Hume, i. 181, Burnett, p. 10). That case is described by Hume as one of attempted poisoning by 'giving poison to a third party, who did not know it for such, and soliciting him, but without success, to administer' it to the victim. In fact the poison was given to a dog who died of it. Maasdorp, J.A. also referred to Macdonald's statement that it was attempted poison to 'give poison to be, to be administered to C, whether B is a consenting party to the crime or not' (Macdonald, 3rd. ed., p. 144, 5th ed., p. 108), and concluded that Nlhovo would have been convicted of attempted poisoning in Scotland, a result he attributed to the influence of the Roman law's special treatment of attempts to commit flagitious crimes (see R. v. Nlhovo, supra, at pp. 499-500).

It is submitted that Buchanan and Nlhovo can be reconciled by making the distinction which Macdonald rejects, between giving poison to an ignorant agent, and giving it to someone who knows it is poison.

It is not clear how much N knew in Nlhovo, nor, and this is more important, how much the accused thought he knew, but his actions, and the Court's view that there had been incitement, suggests that although nothing was said, the accused was aware that N knew he was being asked to poison V. If that was the case, it is submitted that a similar result would follow in Scotland, since the question would then fall to be decided from the point of view of the law of conspiracy. In such a situation the accused would not think of himself as doing all that was required of him to bring about V's death, but merely as entering into a conspiracy with N to poison V. There is authority in Scotland that to invite someone to commit a crime does not constitute an attempt to commit that crime (Tannahill, 1943 J.C. 150, Morton and M'Guire v. Henderson, 1956 J.C. 55), and in practice a case like Nlhovo would probably be decided on that simple ground. If N had agreed to poison V and then been caught by the police or run down by a motor car before he had done so, there would have been no attempted poisoning - that being so it would be strange if there were to be attempted poisoning because N did not agree to poison V. As Solomon, J.A. pointed out, when the poison was given to N, the crime 'was actually further away from being committed than if the poisoner had procured the poison with the intention of himself placing it in V's food' (Nlhovo, supra, at p. 490).

The distinction between Nlhovo and Buchanan depends on the accused's views about the state of knowledge of the person to whom he hands over the poison. Alison describes Buchanan as 'an attempt to commit poison, through the hand of an ignorant person', and thus as similar to offering poisoned food to the victim, or leaving it in the victim's cup. (Alison, i. 166).

The failure of the innocent agent to 'deliver the goods' is comparable to a breakdown in a conveyor belt, his unexpected discovery that he is carrying poison the same as such a discovery by a postman, and these do not affect the guilt of the intending poisoner. (The position becomes difficult where the innocent agent does not accept the poison at all, whether because he thinks it may be poison or for any other reason. There is then no attempted incitement or invitation, but instead something like a telephone on which one cannot get through, or a pillar box that will not take one's parcel, or, perhaps, a gun that will not go off. The difficulty is one of defining the last act. Is the 'last act' the request that the agent deliver the poison, or the placing of the poison in his hands? Is it, similarly, the firing of a bullet from a gun, or the pressing of a trigger? Strictly speaking, it is probably the latter of the two alternatives in each case, but in practice it is probably attempt to pull a trigger that does not go off, but because of the similarity to cases of incitement, not attempt today - whatever the position may have been in 1728 - to ask someone to deliver poison if in fact he refuses to do so. It seems, incidentally, that in the eighteenth century it was attempted poison to deliver the poison to an ignorant third party, but that it was capital attempted poison if in fact the poison had been administered to the victim - Burnett, 10).

Attempts to do the impossible.

In theory two general principles are fairly clear. Since the essence of attempt is that the intended crime should not occur, the reason for its non-occurrence is not normally important, and perhaps should not be

important at all. It does not matter whether the assailant's shot misses because he is a bad shot or because the victim is out of range. On the other hand it is clear that where the accused knows of the impossibility of what he is 'trying' to do, there can be no attempt - a man cannot intend to do what he knows to be impossible. It is not the impossibility but the accused's knowledge of it which is important. A charge of administering drugs with intent to cause abortion, for example, is meaningless unless there is postulated 'a belief in the mind of the panel that what he was supplying was something calculated to cause an abortion to take place' (Semole, 1937 J.C. 41, 44).

But what if the accused administers coloured water in the knowledge that it is coloured water, but in the belief that coloured water has abortifacient properties? If he administers it believing it to be a known abortifacient, he is guilty of attempted abortion, in the same way as a man who administers salt to his victim in the belief that it is arsenic is guilty of attempted murder: such people are clearly bent on crime and so are dangerous. But the man who administers salt in the belief that salt is poisonous is not dangerous, however wicked he may be. 'His mistake' in Glanville Williams' phrase, 'shows his ineptitude and therefore his harmlessness' (Gl. Williams, *papa*. 150).

The solution is probably that the mistake must be reasonable before there is attempt. Unreasonable mistakes are unlikely to occur, since the person who fell into them would probably be insane. Hall's view is that for impossibility to exclude attempt there must be 'a material fact..lacking which makes the commission of the intended harm impossible', and the fact must be such that 'all reasonable persons would have known that the necessary fact was lacking' (p. 125). Hall's view

is that the principle is 'if the risk of effecting the harm sought is great in such situations generally, there is a criminal attempt regardless of insufficient conditions in any particular case', and he adds that 'In such simple factual situations as are met in the criminal cases, most serious mistakes would be symptomatic of a severe psychosis' (Halk, p. 124, cf. Schönke-Schröder, 198).

The decided cases. There is no authority in Scotland on the question of unreasonable belief in the possibility of the impossible, but it is submitted that the view taken by Hall and by Glanville Williams would be acceptable. It may be necessary to punish people in South Africa who believe that it is possible to kill someone by sticking pins in his image, but such practices would not be regarded here as dangerous, but only as signs of insanity (cf. Gl. Williams, para. 150).

The law regarding the more normal type of impossibility is unfortunately contradictory, and no effort has been made to resolve the contradiction. The matter has been considered only with regard to attempted theft and attempted abortion, and the result is that it is attempted theft to place one's hand in an empty pocket with intent to steal, and not attempted abortion to administer abortifacients to a non-pregnant woman with intent to cause her to abort. It is submitted that the rule in theft is the correct one, assuming that it is attempted theft to place one's hand in a full pocket with intent to steal the contents, and that the abortion cases are anomalous. If it is attempted theft to place one's hand in a full pocket with intent to steal, it is equally attempted theft if the intent is frustrated only by the absence of anything to steal. As Lord Sands said in Lamont v.

Strathern (1933 J.C. 33), the case which settled that such conduct was attempted theft, it is 'not reasonable to deny Mother Hubbard the credit of an attempt to fetch a bone for her dog' (at p. 36).

Against Lamont, and the case of Coventry v. Douglas (1944 J.C. 13) which followed it, must be set the case of Anderson (1928 J.C.1) and the case of Semple (1937 J.C. 41) which followed it. Anderson decided that it was not attempted abortion to administer abortifacients to a woman who was not pregnant, and this was followed in Semple despite the fact that it was held in Semple that it was attempted abortion to administer harmless drugs to a pregnant woman in the belief that they were abortifacients.

It is impossible to reconcile Anderson and Lamont without treating abortion as special, and impossible to reconcile Semple with either or with itself without treating the fact that a woman is not pregnant as an exception to the general law of impossibility. Lord Sands in Lamont tried to distinguish Anderson by defining attempted abortion as 'an attempt to make a pregnant woman abort' and attempted theft as 'attempting to steal anything..that might be found' (Lamont, supra, at p. 37). This may represent the ratio of Anderson, but the distinction is logically untenable. It could as well be said that attempted abortion was attempting to remove any foetus that might be found, and attempted theft attempting to steal the contents of a house, or bag, or pocket, etc. The ratio of Anderson rests on a paralogism which is the result of equating the facts which show that the accused has reached the stage of attempt with facts constituting an actus reus. Anderson and Semple treat attempted abortion as an independent crime with its own actus reus which they

arbitrarily define as 'trying to make a pregnant woman abort'. (In France, incidentally, it is specifically declared criminal to procure or try to procure the abortion of a woman 'enceinte ou supposée enceinte - C.P. Art. 317, Dec. of 29 Jul. 1939. Cf. also Schönke Schröder, p. 764, where reference is made to a case in which it was held to be attempted abortion to give harmless drugs to a non-pregnant woman with intent to cause abortion.) But attempted abortion is not an independent crime, it is an attempt to commit the crime of abortion. This should have been clear to the Court in Semple, for in Lamont Lord Sands had suggested that Anderson would have been relevant had it charged the independent crime of administering drugs with intent to cause an abortion (Lamont, at p. 37), and this was the form of the charges in Semple. The Court had therefore to decide the relevancy of this form of charge, and they held that where the charge was of administration to a pregnant woman with this intent it was attempted abortion, and where it was administration to a non-pregnant woman it was neither attempted abortion nor the crime of administration with intent, since the latter was not a known crime (cf. supra, 20).

Attempts to commit unintentional crimes.

If A writes a letter to B with the intention of obtaining money from him, and makes statements which he thinks may be true or false, without inquiring into their truth or falsehood, or if A sees B pass by and pick up and fires a gun at him hoping to kill him, but without ascertaining whether the gun is loaded, he may be guilty of attempt, on the view that he intended to obtain money or kill, whatever the state of his mind as to the means adopted by him (cf. Gl. Williams, para. 142; J.C. Smith, 'Two problems in Criminal Attempts'

(1957) 70 H.L.R. 422). But if A picks up a gun without knowing whether it is loaded or not, and fires it at random, wounding B, is he guilty of attempted murder? It seems that he is not, because he did not intend to kill anyone, and it seems further that even if the circumstances had been such that he would have been guilty of murder if B had died, he cannot be guilty of attempted murder, because he did not intend to kill B, or anyone else. The position is clearer if A would only have been guilty of culpable homicide had B died - i.e. if his behaviour was only negligent and did not amount to wicked recklessness. It seems a contradiction in terms to attempt to commit involuntary homicide - one can hardly try to do something unwillingly.

In the English case of R. v. Whybrow ((1951) 33 Cr. App. Rep. 141) the accused's wife was seriously injured by an electrical apparatus constructed by the accused who was charged with attempted murder. He pleaded that the apparatus had been innocently constructed and that the death was accidental. The trial Judge told the jury they they could convict of attempted murder if they found either that the accused had intended to kill his wife, or that he had intended to do her grievous bodily harm. It was conceded on appeal that this direction was wrong, and Lord Goddard said,

'if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical, because, in that particular case, the intent is the essence of

the crime, while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm' (at p. 147).

In Scotland the mens rea of murder consists of intent to kill or reckless indifference to the possibility of death, but although this is logically different from the definition of 'malice aforethought' the two things amount often to the same thing in practice since recklessness is shown by reference to the seriousness of the injury intentionally inflicted. In any event the ratio of Lord Goddard's judgment is that attempted murder requires an intention to kill, and that ratio would apply equally to exclude recklessness as it does to exclude intent to cause grievous bodily harm. In a way, the position is clearer in Scotland - for intent to cause grievous bodily harm is an intention to commit a crime, while recklessness may exist, theoretically at any rate, without any criminal intention at all. In the case of recklessness, accordingly, it is submitted that the accused cannot be convicted of attempted murder, since he cannot be said to have tried to kill. (There is no reported Scots case on the subject, but I understand that in the case of M'Adam, Glasgow High Court, 8 Jul. 1959, unrepd., Lord Sorn directed the jury that in order to convict the accused of attempted murder they must find that he intended to kill the complainer. In that case the accused had assaulted a woman and then put her on an ashpit where he left her without obtaining assistance for her or informing anyone that she was there. He was acquitted of the attempted murder charge and convicted of assault to the danger of life.)

It is, however, theoretically possible to commit attempted voluntary culpable homicide - e.g. attempted

culpable homicide under provocation. The Indian Penal Code makes special provision for this, in Article 308, which provides that 'Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder' is guilty of attempted culpable homicide. The example given is of a killing under provocation.

The same view is taken by Alison who says 'An attempt to commit homicide, however clearly established, does not necessarily infer an intent to murder, because the circumstances may be such as render it only culpable or justifiable; and the punishment must be proportioned to the magnitude of the offence' (i.165). It is submitted however, that there will never be a conviction for this type of attempted homicide. There are two reasons for this. The first is that the distinction between voluntary and involuntary homicide is imperfectly appreciated in Scotland, and that accordingly the phrase 'attempted culpable homicide' sounds like an oxymoron. The other is this - the reason certain killings are only regarded as voluntary culpable homicide is in order to avoid imposing the penalty of murder. Where the victim has not died there is no question of this penalty, and the charge would be either one of assault or of attempted murder. If it were one of attempted murder and the accused established a 'defence' of provocation or of diminished responsibility, it is difficult even to guess at the result. The jury would probably just have to decide whether or not they wished the accused to be punished, and convict or acquit him accordingly, although they might compromise.

II. CONSPIRACY AND INCITEMENT

Conspiracy.

'Conspiracy, when regarded as a crime, is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it' (Crofter Hand Woven Harris Tweed Co. v. Veitch, 1942 S.C. (H.L.) 1, Visc. Simon, L.C. at p. 5).

Charges of conspiracy are uncommon, and may perhaps be divided into three types, of which the third is most important from the point of view of the development of the law of inchoate crimes.

(1) Where specific crimes have been carried out in pursuance of the conspiracy. Where the accused have conspired together to bring about a certain object by criminal means, and have in pursuance of that object committed certain crimes, they may be charged as art and part in those crimes without being charged with conspiracy. The same is true where the conspiracy is simply to commit a specific crime, and the crime is committed. Where the crime has only been attempted, they may of course be charged with being art and part in the attempt. But where the Crown propose to bring evidence of the actual formation of the conspiracy, such as evidence of a meeting at which it was agreed to commit the crime, they may give notice of this by including a recital of the conspiracy in the charge of the specific crime, and perhaps they must give such notice lest it be said that in leading evidence of the meeting they are leading evidence of a substantive crime (conspiracy) which has not been charged.

In Walsh and Ors. (Glasgow High Court, 8 - 20 Aug. 1921, unrepd.; reported on other points, 1922 J.C. 82) there was a charge that the accused in pursuance of a general conspiracy to further the aims of the Irish Republican Army, 'did..enter into a conspiracy to release from custody one F. S..... and that by murdering officers of police, and did, in pursuance of said conspiracy acting in concert, assemble armed... and did murder' a police officer. This was described by the Lord Justice-Clerk, Lord Scott Dickson as a charge of murder (Scotsman Newspaper, 22 Aug. 1921) i.e. the conspiracy to murder was simply charged as an element in the modus of the commission of the murder and not as a separate crime.

Such charges are, however, uncommon. The more normal course is simply to charge art and part guilt. In Martin (1956 J.C. 1) there was a conspiracy among two free men and a prisoner to effect the prisoner's escape whereby the free men waited for the prisoner and took him away in their car when he came over the prison wall. Although it was averred that the accused had each 'conceived the felonious intention' of carrying out the plan, there was no charge of conspiracy; the prisoner was charged with attempting to defeat the ends of justice by escaping, and the free men with attempting the same crime by 'aiding and abetting' him.

There have also been cases in which the accused were charged with conspiring to effect a certain object by means of a particular crime, and alternatively with committing the crime in pursuance of the conspiracy. (e.g. Margt. Boyle and Ors., (1859) 3 Irv. 440 - conspiracy to extort money by false accusation and

perjury, and making false accusations and committing perjury; Robt. Sprot and Ors., (1844) 2 Broun, 179 - conspiracy to make certain people leave their houses by violence, and injuring someone; John Rae and Ors., (1845) 2 Broun 476 - conspiracy to defeat the ends of justice by having someone else impersonate a prisoner at his trial, and fraud, the deception having been in fact carried out. And cf. Martin and Ors., 1956 J.C. 1 where two of the accused had arranged the escape of the third from prison. The prisoner was charged with absconding from lawful custody, and the other two with 'aiding and abetting' (sic) him, and all three were charged with having attempted to defeat the ends of justice, but the last charge should probably be regarded as a non-technical description of the purpose of the crimes, rather than as a specific crime, although it was regarded as a specific crime by the trial Judge - see supra, 37). The reason for the alternative charges is presumably so that even if the crime is not proved, a conviction can be obtained for the conspiracy, if that is proved. The Crown clearly cannot obtain a conviction against an accused for conspiring to commit a crime and also for being art and part in its commission, since that would be to convict him twice for the same conduct. Nor can they obtain a conviction for e.g. murder on a charge of conspiring to effect a particular object by murder (Thos. Hunter and Ors., (1838) 2 Sw. 1 - the famous case of the cotton spinners).

(2) Where no specific crime is charged. Charges of conspiracy sometimes do not set out any specific crime by means of which the conspiracy was to be effected, but merely state that it was to be carried out by criminal, or violent, means. In Walsh (supra) there was a charge of conspiring to further the purposes of the I.R.A., 'by the unlawful use of force

and violence...and especially by means of Explosive substances...to be used... for the purpose of endangering the lives and persons and destroying the property of the lieges'. A similar charge was brought in the case of M'Allister and Ors. (Edinburgh High Court, 17-23 Nov. 1953, unrepd.) in which the accused were alleged to be members of a 'Scottish Republican Army', and to have formed a plot to blow up St. Andrew's House. The conspiracy was alleged to be 'to further by criminal means the purposes [of the organisation]... with the intention of coercing Her Majesty into the setting up of a separate Government in Scotland, or with the intention of overthrowing Her Majesty's Government in Scotland'. The charge then went on to allege that the accused 'did in pursuance of said conspiracy obtain possession of and retain...explosives' - which is not a crime except under a statute which was not libelled in the conspiracy charge - 'for use...in destroying or damaging the property of Her Majesty's Government and endangering the lives and property of the lieges'. The first conspiracy - to coerce the Government - probably amounted to the crime of treason, but this crime was not charged; the second conspiracy - to endanger life and property by means of explosives - discloses no crime other than the conspiracy itself. Walsh and M'Allister are thus modern authorities for the view that to conspire to further an object by criminal means is to commit the crime of conspiracy, and that any further criminal action is unnecessary (cf. Jas. Cumming and Ors., (1848) Shaw 17).

Unlawful and criminal means. This type of conspiracy raises the question whether the crime is committed by an agreement to accomplish an object by unlawful, although not criminal means; that is to say whether it is criminal to agree to do what if

done by one person would not be a crime, although it might be a breach of the civil law, such as a breach of contract. Macdonald's view is that only conspiracies to do what would be criminal if done by one person are criminal conspiracies (Macdonald, p. 186) and this, it is submitted, is the law. In both Walsh and M'Allister however the presiding Judge described a conspiracy as an agreement to do something 'unlawful' (Scotsman Newspaper, 22 Aug. 1921; transcript of Lord Justice-Clerk Thomson's charge in M'Allister, p. 20), and in Walsh the Lord Justice-Clerk is reported as having said that a conspiracy was a 'plan to do something that was contrary to law... to carry out some project or purpose which was not criminal in itself, by illegal or criminal means' ('Scotsman' Newspaper, 22 Aug. 1921). 'Illegal or criminal' may however have been intended to be tautologous, since the conspiracy was charged as involving the use of criminal means. In order to find a case of criminal conspiracy to do what would not be criminal if done by one man, we have to go back to the special case of workmen's combinations to raise wages by striking work. Burnett is of the view that these, and also combinations by employers to keep down the price of labour, are criminal even if unaccompanied by threats or violence (Burnett, pp. 237-8, cf. Hume, i. 494-496). The modern view is probably that of Anderson who quotes Burnett and then says 'It is clear, however, that such a combination would become criminal only when violence or threats were employed to effect its object' (Anderson, p. 73).

(3) Conspiracy as a substitute for attempt. Where two or more persons have unsuccessfully tried to carry out a crime, such as murder or fraud, they may be charged with conspiracy to commit the crime. And such a charge may be brought in cases where a charge of attempt

would not lie either because, before 1887, an attempt to commit the crime in question was not indictable, or because matters had not reached the stage of attempt. (It may also be combined with an alternative charge of attempt-Euphemia Robertson and Ors., (1842) 1 Broun 295 - conspiring and attempting to extort money by false threats to accuse of adultery, and attempted extortion). The position is that an agreement to commit a crime is a criminal conspiracy, even where no crime is committed in pursuance of the conspiracy, and conspiracy is thus, as Macdonald points out (Macdonald, p. 181) an extension of the law of attempt.

Hume treats conspiracy under the head of 'falsehood' in his chapter on crimes against property (i.170) saying that 'process is properly brought under this generic name, for any sort of conspiracy or machination, directed against the fame, safety, or state of another, and meant to be accomplished by the aid of subdulous and deceitful contrivance, to the disguise or suppression of the truth', although his examples are of conspiracy to murder, or to make a false accusation. Alison has a heading 'False Conspiracy', under which he deals with conspiracies to fix false charges on individuals. (i. 369-70). But today conspiracy is not confined to any particular sort of crime; as soon as two persons have agreed together to commit a crime they are guilty of conspiracy.

Incitement.

Despite the circular wording of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict., c.35. s.61) to the effect that 'Attempt to commit any indictable crime shall itself be an indictable crime', it is not possible to extend the boundaries of attempted crime by charging an accused with attempting to commit the indictable crime of attempting to commit a crime, say

murder. That would involve an infinite regress. But although conspiracy is an inchoate crime in that it does not require the putting into effect of any criminal purpose, it is in itself a substantive crime. That being so, it is a crime to attempt to form a conspiracy. This crime is usually called incitement, or attempted incitement (or instigation). Whether it is called attempted conspiracy, incitement, or attempted incitement, is unimportant. It seems to be the practice to charge attempted incitement where the person incited resists the instigation, although once the invitation has been made to him there has been a completed, even if unsuccessful, crime. This position is recognised in the particular instance of incitement known as subornation of perjury (cf. Hume, i. 382), but the same reasoning applies to any form of incitement. Where the invitation is one to enter an existing conspiracy it may be charged as 'attempt to induce A.B. to enter said conspiracy' (M'Allister supra), or as 'attempt to instigate and attempt to conspire with A.B.' (cf. Kay and Strain, Glasgow High Court, 8 May, 1952, unrepd.). What is important is that as soon as one person approaches another with an invitation to join in the commission of a crime, that first person has committed an indictable offence, call it attempted conspiracy, attempted incitement, incitement, or what you will.

Cases of conspiracy and incitement.

The starting point for the use of conspiracy as an extension of the law of attempt seems to be the case of Elliott and Nicolson in 1694 (Hume, i. 170-1). N wanted to poison his wife and obtained poison from E for that purpose which he gave to M to give to his wife. This plot failed, and N and M then concocted a scheme

to have N's wife accused of poisoning him, and got E to make out a receipt for poison purportedly given by N's wife. There were thus two conspiracies, one to murder (which may have reached the stage of attempt), and one to fix a false charge of attempted murder, and the Court treated them as together involving a capital crime.

The case of Nicol Muschet and Campbell (March 1721, Hume, i. 170) is a clearer case of a charge of conspiracy where attempt could not be charged. M bribed C to obtain false evidence of M's wife's adultery. C did this by drugging Mrs. M., placing a man in bed beside her, and calling in two honest people to witness this. As Hume points out, there could be no charge of attempted subornation since the witnesses would not have committed perjury had they given evidence of what they had seen. The crime was accordingly punished as 'a false conspiracy and machination, or crime of its own sort' (Hume, ib.).

In 1720, in the case of W.A. Fraser (Hume, i. 136) there was an example of a charge of incitement where the persons incited had refused to take any part in the proposed crime. The charge was of 'having invited or solicited others to set fire' to a barn.

Again, a century later, in 1818 in Roderick-Dingwall, (Hume, i. 27, 28-9) the accused was charged with 'attempting to prevail upon' a surgeon 'to enter into a conspiracy to commit murder by furnishing poison for that purpose'. Dingwall had asked the surgeon for poison for his wife, and asked him to also visit the wife and advise her to take the poison. In fact the surgeon gave him some harmless medicine. Dingwall was charged with attempted murder, with procuring poison with intent to murder, and with

attempted conspiracy, but only the last was held relevant.

It seems, therefore, that by the early 19th century it was recognised that attempted conspiracy was a crime, but the matter appears to have lain dormant until the case of Tannahill in 1943 (1943 J.C. 150). Tannahill was charged with forming a scheme whereby contractors would charge the Government for work they had in fact done for him, and with attempting to defraud the Government. He was also charged with instigating and attempting to induce the contractors to render false accounts, and to defraud the Government. Lord Wark directed the jury that in the absence of an overt act of fraud they could not convict of attempted fraud, but that they could convict of the attempted inducement.

The position of attempted inducement and attempted conspiracy were discussed on a plea to the relevancy of the first charge in the case of Kay and Strain (Glasgow High Court, 8 May, 1952 unrepd.). The accused were acquitted on that charge, and so the matter was not discussed in the Court of Criminal Appeal. The accused were police officers, and they were charged with approaching one F with a scheme to defraud an Insurance Company. The scheme was that the two accused would enter F's home (the fact that the house belonged to Mrs. F. was regarded as immaterial), and 'steal' his wife's fur coat, after which F would get his wife to make a claim on the insurance company, and the accused would share in the proceeds. (It was argued that as the coat was Mrs. F's and she was not in the plot, the coat would in fact be stolen and that there was no question of fraud, but this argument was rejected). F pretended to comply with this scheme, but in fact he informed the police, and Kay and Strain were caught

while removing the coat from F's house - they were charged with theft as well as with conspiracy and were convicted of theft. The first charge was of attempting to instigate F to defraud the Insurance Company, and of attempting to conspire with him for that purpose, and of entering the house and stealing the coat in pursuance of the conspiracy. (There was no charge that the two accused conspired with each other to instigate F to enter the conspiracy, or to steal the coat. The second charge was a simple charge of art and part theft, and the allegation in the first charge that they 'stole the coat in pursuance of the conspiracy' merely narrative, and not a charge of theft).

The charge of attempted inducement and attempted conspiracy (the two things were treated as being one and the same) was held relevant by Lord Keith who followed Tannahill (supra). He went on to say,

'It is unnecessary to consider what the basis of the doctrine is, whether it is something of a half-way house between preparation and perpetration, a recognition of acts that may mark the end of preparation and the prelude to perpetration, or whether it is that because conspiracy to commit a crime is itself a crime an attempt, although unsuccessful of course, an attempt to engage in conspiracy or to instigate someone else to conspire in a crime is an attempt to commit a crime. Hume deals with the matter on p. 27 although I confess that...it is not by any means easy to distinguish passages referring to attempts to commit a crime from passages which may refer to unsuccessful instigation to a crime, there are [detailed references] to at least two cases which support the view that instigation to commit a crime in which the instigation is unsuccessful, may of itself be a crime' (The two cases are Dingwall and Fraser (supra)). The original entries from the Acts of Adjournal relative to Dingwall were produced to L. Keith and satisfied him that the instigation there had been unsuccessful).

It is submitted that to treat attempted incitement as a half-way house between preparation and perpetration would be unsatisfactory. This is not only because the distinction between preparation and perpetration is itself unsatisfactory (supra), but also because it does not explain why this half-way house should only exist where more than one person is involved, or is sought to be involved, in the crime. It is much simpler to treat the charge in Kay and Strain as disclosing an attempt to commit the crime of conspiracy, or of attempting to incite someone to commit a crime.

Furthermore, if attempted incitement is merely a half-way house to perpetration, it is a sort of attempt to commit the ultimate crime, and so does not have to be specifically libelled, since on any indictment charging a crime, the jury can convict of an attempt to commit that crime. (Criminal Procedure (Scotland) Act 1887, 50 & 51 Vict., c.35, s.61). This approach comes perilously near to making attempted incitement an attempt to attempt to commit a crime. But there is authority that where a conviction is sought for incitement, the incitement must be charged specifically. In Morton and M'Guire v. Henderson (1956 J.C. 55) the accused were charged with attempting to defraud bookmakers by 'requesting' a racing dog's owner to 'impair the racing ability of his greyhound...by administering to it a concoction', and it was held that these acts did not disclose attempted fraud, since matters had not reached the stage of attempt. But it was observed by the High Court that if the complaint had been appropriately framed the accused could have been convicted of attempted incitement.

Conspiracy, Incitement, and Attempt.

The effect on the law of attempt of the existence of the crimes of conspiracy and incitement is considerable. When a single criminal reaches the stage of attempt he becomes guilty of an inchoate, uncompleted crime. Up to that stage he is guilty of nothing at all; at that stage he has still not committed a crime, but only attempted to do so. But when two criminals agree to commit a crime, then, although matters are much more inchoate and uncompleted than when, for example, a would-be poisoner invites his victim to dinner, they have committed a completed crime, the crime of conspiracy. And this is so, whether the aim of the conspiracy is to blow up the Houses of Parliament, to coerce the Government, to defraud bookmakers, or to steal a stick of rock from a child. The crime of conspiracy probably began as a result of the danger to society involved in large-scale political conspiracies, and as a result the term 'conspiracy' carries with it a great deal of emotive effect - a conspiracy to do something sounds much worse than an attempt to do it, may even sound much worse than simply doing it. But this emotive element, which led, for example, to making Trade Unions illegal, and to Hume's suggestion that the rules regarding attempted crimes should suffer exception in the case of deeply atrocious or extensive plots, has been forgotten in the later logical approach to the idea of conspiracy. Once it is accepted that the mere agreement of a large group of people to attain their ends by violence is an example of the crime of conspiracy, it follows logically that any agreement by two or more people to commit any crime, is an example of the crime of conspiracy. The mistake, if mistake there be, is in thinking of conspiracy as a 'logical' crime at

at all, rather than as the reaction to certain special kinds of threat to the whole structure of society, or at any rate to the administration of justice.

The recognition of the crime of attempted conspiracy, which again follows logically from the existence of conspiracy, takes matters even further, for it means that merely to invite someone to commit a crime is criminal. The result of recognising this crime is that as soon as one criminal asks another to join him all the principles underlying the reluctance of the law to punish people for attempts and its insistence on the actual execution of a considerable part of the criminal plan before it will do so, go by the board. Yet these principles cannot be said to be valid where one criminal is involved, and invalid as soon as he tries to bring in a second to join him. It is true that to commit attempted conspiracy there must be a final act - the act of asking someone to join your criminal plot. But once the invitation has been given, there is a completed crime.

Whatever the objections to its existence, attempted conspiracy is a crime, and for aught yet seen, is a crime in every case in which it occurs, whatever the object of the conspiracy, provided of course it is criminal. This means that the law is much more strongly armed against intending criminals than its adoption of the last act theory in attempt would lead us to think. The common law is able to squash in the bud any suggestion that a crime should be committed, as soon as the suggestion is imparted to a proposed accomplice. The strict rules of attempt only apply to the solitary criminal who does not seek anyone else's aid in his crime. This development seems to be comparatively new. Hume's difficulty in reconciling

the law of attempt with the necessity to forestall extensive conspiracies, (i. 29), the High Court's difficulty in holding it to be criminal for a forger to sell forged notes as such to someone who bought them for the purpose of uttering, (John Horne (15 July, 1814, Hume, i. 150-3), the approach of the Court in Baxter ((1908), 5 Adam 609), the absence of any suggestion of a charge of conspiracy in Cameron's ((1911) 6 Adam 456), all suggest that the early cases were not regarded as containing any general principle regarding conspiracies and incitements. It may be that the time has come to relate the development of the law of conspiracy to the law of attempt, and to consider whether Scots law should encourage the development, since it minimises the number of cases where the strict law of attempt prevents the law from administering deserved punishment, or whether it should discourage it as being contrary to the general spirit of a law which requires at the very least extensive and advanced preparations as a pre-requisite for the punishment of prospective criminals.

Chapter 6: The Criminal Mind.

Mens rea.

The basic principle of the common law in criminal matters is that actus non facit reus nisi mens sit rea - no act is punishable unless it is performed with a criminal mind, i.e. by a person whose state of mind is such that it makes his actings criminal. Thus, for example, the killing of someone by a lunatic is not punishable, because the lunatic's state of mind is such that he has no mens rea. This principle reflects the deontological outlook of the common law, and demonstrates the close connection between the common law and ordinary moral judgments. Mens rea may be defined amorally as 'a legally reprehensible state of mind' (Kenny, para. 11), but the standard of reprehensibility is essentially a moral one, so that the ascription of mens rea is a moral judgement.

Mens rea and dole.

The nearest Scots term to 'mens rea' is 'dole', but 'dole' as used by Hume has a somewhat different meaning from 'mens rea' as used in modern English textbooks, and in modern Scots law. To use the word 'dole' to indicate the mental element required by the modern law would, I think, be misleading, since it would carry over into modern law the Humean concept of dole as a general wicked disposition. On the other hand, to use the word 'dole' to indicate this general disposition, as against the modern idea of mens rea as a particular mental attitude to a particular act, might also be confusing, because 'dole' is still

sometimes used as the Scots word for mens rea, however the latter is defined (cf. T.B. Smith, pp. 707-8).

Three possible meanings of mens rea.

When we describe a man as possessing a criminal mind we may mean one of three things - (1) That he is a man of wicked or criminal character in general; (2) That a particular act of his reveals him as a wicked man, or as a man of criminal propensity; (3) That he committed a particular act in a particular state of mind which is regarded by the law as sufficient to make that act a particular crime. So far as the law is concerned it is of course criminality and not wickedness which is important, but the first two meanings of the phrase are closely connected with ideas of moral wickedness, and tend to be expressed in the language of morality.

(1) General character. We may call a man a person of criminal mentality when we mean that he is a criminal by nature. This is a judgment of what sort of man we take him to be, by and large. We can look back on a man's life and say 'He was a decent chap; mind you, he did one or two things that were not altogether admirable, but on the whole he was a good man. His bad deeds were really out of character'. Conversely we can say, 'He was a really wicked man, a right criminal, even although he was kind to dogs and once saved someone's life'. Crippen was of a quiet and kindly disposition, but the murder of his wife was none the less a wicked act; Hitler may have performed many 'Little nameless unremembered acts of kindness and of love', but he was none the less of a wicked disposition.

This type of judgment has no bearing on a man's

responsibility, moral or legal, for any particular act. Its only relevance to the law is that it may influence the Judge in passing sentence. It is by way of this sort of assessment that a Judge may feel justified in treating a particular criminal leniently because he is by and large a good man. Thus a man who has otherwise led a blameless life will be less severely punished for a particular crime than would a hardened offender who had committed the same crime.

(2) General mens rea. Instead of looking to a man's whole life, we may judge his character from the point of view of one particular act, and ask only if that act was done out of wickedness or criminality of disposition. We treat the act as evidence of the criminality of the agent's nature. This approach treats the criminal mind as a general characteristic of the man involved which has been exhibited in the commission of a crime, just as kindness is a general characteristic exhibited in particular acts of charity.

This is what Hume means by dole, which he describes as 'that corrupt and evil intention, which is essential (so the light of nature teaches, and so all authorities have said) to the guilt of any crime' (i. 21). The requirement of dole, Hume says, does not mean that there must be 'evidence of an intention to do the very thing that has been done, and to do it out of enmity to the individual who has been injured', but only that there must be circumstances which 'indicate a corrupt and malignant disposition, a heart contemptuous of order, and regardless of social duty' (i.21-2). Because this approach treats the criminal mind as a general characteristic, revealed by a particular act, but capable of being extended to cover

other acts, I propose to refer to it as 'general mens rea'.

This way of treating mens rea is open to serious objections. The criminal law is concerned with actions and not with character, and it is not concerned with motive which is the clue whereby a man's character can be related to his actions. There is a difference in character between the man who visits a sick uncle out of sympathy and one who does so out of a desire to be left something in his uncle's will, but the man who commits bigamy out of a sense of religious duty is as guilty as the man who commits it out of a desire to deceive and seduce.

The presence or absence of general mens rea is not strictly relevant to criminal responsibility, but it is important in two respects. It makes possible legal doctrines which depend on the transferring of a criminal mind quoad one crime to the commission of another crime, so that a person who accidentally does X while criminally doing Y may be deemed to have done X criminally; and it forms a basis for certain recognised mitigating factors.

(i) Constructive crime and transferred mens rea.

If the requirement of mens rea is satisfied by the presence of a 'corrupt and malignant disposition', then the requirement is the same for all crimes. This means that if a man breaks into a house and accidentally kills the householder, his killing of the householder must be a crime. For the actus reus - the killing - is present; and so is the mens rea, because the housebreaking is a circumstance exhibiting the necessary corrupt and malignant disposition. Although this rule may not operate in Scotland to make the killing of the householder constructive murder, i.e. to transfer the intent to break in to the killing

so as to make the latter intentional (see infra, d. 14), it probably does operate to make it constructive culpable homicide where without the element of house-breaking it might not be a crime at all.

This idea of general mens rea is also one reason why recklessness is said to be equivalent to intention. A reckless indifference as to whether one's acts will cause harm may exhibit a corrupt and malignant disposition, as where A attacks another with a weapon, regardless of the possibility that he may kill him. If, then he does kill him, there is a crime, since the killing has been done in circumstances indicating a criminal mind.

(ii) Mitigation. Where a crime has been committed in the absence of circumstances indicating corrupt and malignant disposition, or wickedness, or, as it is often called, malice, then, even although it has been intentionally committed, and so is reus according to modern ideas of mens rea, the Court will almost certainly take the absence of malice into account in passing sentence. Now in homicide the sentence can only be reduced if the crime itself is reduced by the jury from murder to culpable homicide, and accordingly there have grown up recognised grounds on which a jury may make this reduction. There are certain circumstances which are almost compulsorily mitigating factors, matters of law rather than of that general discretion which a judge employs when he takes general character into account. These circumstances do not affect the accused's responsibility for his actings, but they do affect his liability to punishment. A man who kills in circumstances which exhibit such mitigating factors is not liable to capital punishment but only to what used to be called an 'arbitrary penalty',

to imprisonment or fine in the modern law. Since the Homicide Act, 1957 (5 & 6 Eliz. II, c.11) these mitigating factors mean that a man cannot be hanged for capital murder or sentenced to life imprisonment for murder, but only to a fixed term of imprisonment or other fixed penalty for culpable homicide. (I am speaking here, of course, of voluntary culpable homicide, intentional homicide under mitigating circumstances, and not of involuntary or negligent homicide. The difference between murder and involuntary homicide is a difference in responsibility, that between murder and voluntary homicide merely a difference in liability to punishment.)

The circumstances which are regarded as mitigatory in this way are so regarded because they show that the crime was not committed out of malice, but from some other cause, such as the accused's mental state, or his reaction to provocation. This idea of the requirement of general mens rea for a murder conviction also influences the Crown authorities in deciding whether to charge an accused with murder or with culpable homicide. It is because of the absence of malice and corrupt malignancy that it is thought that the survivors of suicide pacts and those who commit euthanasia would only be charged with culpable homicide in Scotland (cf. R.C. Evid. of Lord Cooper ¶. 5428).

(3) The particular act. The modern meaning of mens rea is quite independent of moral wickedness, or even of any idea of general criminal depravity. Mens rea is 'not the desire to do wrong but the intent to do that which causes social injury' (F. B. Sayre 'The Present Significance of Mens Rea in the Criminal Law,' in Harvard Legal Essays, p. 399, at p. 402). Each

type of crime has its own mens rea, the mental state appropriate to its commissions, so that 'it is quite futile to seek to discover the meaning of mens rea by any common principle of universal application running alike through all the cases' (ib, p. 404). In Stephen's famous sentence, 'The truth is that the maxim about "mens rea" means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes' (Stephen, 2 H.C.L., p. 95). As Glanville Williams puts it, mens rea is merely 'the mental element necessary for the particular crime' (Gl. Williams, para. 9). For example, the mental element required for murder is an intention to kill or a reckless disregard of the probability of death (cf. Macdonald, p. 89), the mens rea of theft an intention to take something 'with a purpose to detain it from the owner' (Hume, i. 75), the mens rea of culpable homicide merely a sufficiently negligent failure to take into account the possibility of death.

There are three attitudes of mind which may form part of the mens rea of a crime - intention, recklessness, and negligence.

Intention.

Intention is defined by Glanville Williams as 'that species of desire on the part of a person that is coupled with his own actual or proposed conduct to achieve satisfaction' (Gl. Williams, para. 11). The requirement of 'actual or proposed conduct' is necessary in order to distinguish the mental state of intention from that of mere wishful thinking. I may desire to go to London, but unless I make more or less detailed and definite plans to go there, such

as reserving a room in a hotel, or buying a railway ticket, or at least 'set myself' to do these things, I would not be said to be intending to go there.

Intention and desire. Intention can, however, be distinguished from desire. To desire an end is to intend the means adopted for the attainment of that end, even if the means are not themselves regarded as desirable. Again, a man is said to intend whichever of two possible courses of action he adopts, even although it would be true to say that the way he acted was not the way he 'really' wanted, not the way in which he would have preferred to act.

The relation between intention and desire was discussed by the Judicial Committee of the Privy Council in the Australian case of Lang v. Lang ([1957], A.C. 402). It was there held that a husband who pursued a course of conduct which he knew would lead to his wife's leaving him, intended her to leave him, although he did not want her to go. Lord Porter said, 'A man may well have incompatible desires. He may have an intention which conflicts with a desire: i.e. he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of health. But "intention" necessarily connotes an element of volition: desire does not' (at p. 428).

His Lordship went on to say 'If the husband knows the probable result of his acts and persists in them, he is to be held to have intended that result (at p. 429). This seems to confuse intention and recklessness - if the result is only foreseen as probable it is brought about recklessly rather than intentionally. The distinction between intention and desire arises from the fact that a result foreseen

as certain is regarded as intended - and this is enough to distinguish the two without reference to probable results. Deliberately to bring about a result foreseen as certain, is to bring it about intentionally. As Hall puts it, 'One who, in an effort to escape from officers, drives his automobile in a certain direction, knowing that various persons block the passage of his car, intends their destruction regardless of any regret he may feel and despite the fact that harming them is not his ultimate goal' (Hall, pp. 215-6).

The vocabulary of Scots law.

The terms used in Scots indictments before 1887 to indicate the mens rea of intentional crimes were 'wickedly and feloniously', or 'wilfully and maliciously', and in the case of fraud and similar crimes, 'falsely and fraudulently'; each of these terms is now implied 'in every case in which according to the existing [i.e. pre-1887] law and practice its insertion would be necessary in order to make the indictment relevant' (Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c.35, s.8). There is therefore no longer any possibility of an objection being taken to the relevancy of an indictment on the ground that it fails to libel any of these qualifications (or even that it fails to allege that an act was done 'knowingly' - ib.). If the qualifications are not necessary to the guilt of the accused no objection can be taken to their absence; if they are necessary, they are impliedly present (see Swan, (1888) 2 Wh. 137). As a result, there are no modern decisions on relevancy concerned with the pure question of the mens rea of any crime; the modern law must be derived from those charges to juries on the subject which are still extant, and from occasional appeals on the ground of misdirection.

'Wickedly and feloniously'. This phrase, and also 'wilfully and maliciously', were described by Lord M'Laren in Dingwall ((1888) 2 Wh. 27,34) as 'expletive expressions', and as having 'in general...no particular meaning'. This seems a little too harsh: Lord Young pointed out in the same case that 'if the act was criminal or innocent according as it was done, fraudulently or feloniously or not, then the allegation that it was done fraudulently or feloniously is no mere epithet' (at pp.40-1), and it is submitted that the same is true of the other qualifications. (The actual decision in Dingwall was overruled in Swan, supra. In Robt. Vance ((1848) J. Shaw, 212), where a charge of culpable homicide bore that the killing had been done wickedly and feloniously the Court directed the jury to acquit because although there had been culpable homicide the accused had not acted wickedly and feloniously.)

It is almost impossible to give any precise legal meaning to 'wickedly and feloniously'. 'Wickedly' is simply a term of moral disapprobation, and 'feloniously' which, despite its frequent use in Scotland from Hume onwards, is not a Scots term of art, means only 'atrocious' or 'heinous' (N.E.D.). Lord Inglis observed in Jas. Millar ((1862) 4 Irv. 238,244) that 'the settled meaning' of these words is 'a quality of the act which is...charged; they express that which is essential to the constitution of the crime - a certain condition of mind on the part of the accused at the time of committing the act libelled'. But this does not tell us anything about the condition. The tautological nature of these words as they appear in indictments was recognised by Lord Inglis in the later

case of Elizabeth Edmiston ((1866) 5 Irv. 219, 222-3) when he said that 'Every crime is wicked and felonious, and the moment you arrive at the conclusion that the act charged against the prisoner is a crime, that of itself is sufficient proof of wicked and felonious intent. The words mean no more than that the act is criminal'.

'Wilfully and maliciously'. This phrase has more meaning. 'Maliciously' is an ethical term which strictly speaking has no legal meaning, unless in any special case its meaning of 'spiteful' is important, and is just another word for 'wickedly'. But it does indicate the presence of 'general mens rea' (cf. supra) It does not mean intentional. The offence of malicious mischief, for example, can be committed without any intention of doing injury, 'it is enough if the damage is done by a person who shows a deliberate disregard of, or even an indifference to, the property or possessory rights of another' (Ward v. Robertson, 1938 J.C. 32, Lord Justice-Clerk Aitchison at p. 36). Reckless actions can be described as malicious if they exhibit wickedness of disposition (cf. supra, 268).

'Wilful' has a more precise meaning in Scots law, where it seems to be the word for 'intentional', and means more than just 'perverse' or 'obstinate' (N.E.D.). 'Wilfully' in the Salmon Fishings Act of 1844 (7 & 8 Vict. c.95, s.1) has been interpreted as meaning 'designedly and with a certain intent' (Grant v. Wright, (1876) 3 Coup. 282, Lord Young at p. 287). In a charge of wilfully making a false entry in a register contrary to the Registration of Births Act 1854 (17 & 18 Vict., c.80, ss. 60, 62) 'wilfully' was said to mean 'with the intention to do the thing which is prohibited' (Jas. Kinnison (1870) 1 Coup. 457,

Lord Justice-Clerk Moncrieff at p. 461). Lord Moncrieff went on to say 'It can bear no other construction...As a general rule where that which would not be in itself an offence is made a criminal act by the addition of the word wilful, the interpretation, - the legal interpretation - of that term is, that it implies an intention to do the thing which was prohibited....You must be satisfied that he knew it was false, and intended to put in the register an entry which he knew was false'.

These are, of course, examples of the use of the word in a statute, but it is submitted that its common law meaning is the same. The common law crime of wilful fire-raising is an intentional crime, distinguished from culpable and reckless fire-raising in that in the former the fire must be raised 'wilfully and with purpose to destroy the thing to which it is applied' and not merely 'recklessly, or from misgovernance' (Hume, i. 128). (The matter is confused because prior to 1887 wilful fire-raising was the nomen juris for capital fire-raising, and the crime was only capital when fire was wilfully set to certain specified subjects. Where it was set intentionally to other subjects it was called culpable and reckless fire-raising -cf. Angus (1905) 4 Adam 640). For a person to be guilty of wilful fire-raising he must 'designedly and in cold blood, set fire...well knowing what he was about and intending to do so' - Geo. Macbean (1847) Ark. 262, 263.)

'Wilful negligence'. The requirements of design, intention, and knowledge, clearly set wilfulness apart from any form of negligence, however gross; wilfulness and negligence are categorically different. Yet in Bastable v. North British Railway Co. (1912 S.C. 555)

this difference was ignored by four out of a Court of five Judges in the Court of Session who were considering the meaning of 'wilful misconduct'. Lord Dunedin spoke of 'that degree of negligence which comes under the description of wilful misconduct....the question is whether he is guilty of gross negligence which comes to be wilful misconduct' (at p. 566). But to regard gross negligence as equivalent to wilful misconduct is to use 'negligence' in a most peculiar way. As Lord Johnston pointed out in his dissenting opinion, 'In Wilful misconduct..the will must be party to the misconduct. Negligence, even gross and culpable negligence, excludes the idea of will. Negligence done on purpose is a contradiction in terms' (at p. 562). To regard gross negligence as a sort of wilfulness is to use 'negligence' to mean 'intention', and in that case 'gross negligence' is no more a sort of negligence than a hot dog is a canine animal. And accordingly to talk of degrees of negligence culminating in intention, is like building a theory about sausages by reference to the behaviour of dogs. (cf. J.W.C. Turner, 'The Mental Element in Crimes at Common Law', in *Modern Approach*, p. 195, at p. 208).

The matter is further confused by the associations of the phrase 'wilful neglect'. Neglect is not a form of negligence; to neglect to do something is simply to omit to do it, as is shown by sentences such as 'He neglected to attend the meeting, because he preferred to go to the cinema instead'. Neglect may be negligent, or intentional: the man who neglects his children by deliberately keeping them short of food and clothing has neglected them wilfully; the man who keeps them short of food and clothing because he is too feckless to look after them properly has neglected them negligently.

Recklessness.Carelessness.

The criminal law is concerned with recklessness only when it involves objective carelessness. Recklessness, like negligence, is a subjective state of the agent, which becomes legally significant when joined to a careless act. Sometimes the act is described as reckless or as negligent, sometimes the state of mind of the agent is referred to as careless; there is no accepted usage whereby 'reckless' and 'negligent' can only be used to describe mental states, and 'careless' only used to describe actions. But it is convenient to distinguish between a careless act on the one hand, and a reckless or negligent agent on the other. The same careless act may be done either recklessly or negligently, depending on the mental state of the agent; but unless the act is careless, the fact that it was done recklessly or negligently does not make it criminal.

The reasonable man. An act is careless when it falls short of the legal standard of care, which is the standard of the 'reasonable man'. The 'reasonable man' does not exist, of course, any more than do the economic man and L'homme moyen sensuel. He is merely a device used by the law in an attempt to provide an objective standard, to achieve uniformity amid a great variety of circumstances. (In practice, of course, the standard is so vague that reference to the reasonable man often merely conceals the fact that the Judge is applying his own standards). Reference to the reasonable man avoids enquiry into the attitude of the particular agent, at the stage of determining an act's objective carelessness. The reasonable man is thought of as an

averagely careful man who appreciates the risks involved in his actions and takes care accordingly. Carelessness always arises with reference to a particular risk; any risk which would be foreseen by the reasonable man is regarded by the law as foreseeable and a man's acts are careless when he behaves so as to increase any such risk, or so as to fail to take the precautions a reasonable man would take against the risk.

Degrees of carelessness. There are different degrees of carelessness, and different scales by which the degree of carelessness of any act can be measured. The simplest scale is constructed by reference to the number or importance of the precautions omitted. It is more careless for a motorist to turn his car to the right from a position on the extreme left of the road than merely to turn right from the proper position without giving a signal; and still more careless to turn without looking to see if the way is clear to do so; and it is more careless than any of these to turn right from the left of the road without giving a signal or seeing that the way is clear.

Carelessness can also be measured by reference to the magnitude of the risk involved. Dropping a lighted match in an empty hut is not as careless as dropping it in a crowded cinema; messing about with a gun is more careless in the presence of a child than in the presence of a dog. Another important factor is the degree of the probability of the risk: it is more likely that a drunk motorist will cause damage than that a sober one will. Where the degree of risk involved is so slight, either in magnitude or in likelihood, that the reasonable man would disregard it, then to act in disregard of it is not careless - and this will be the position whether or not the particular agent in

fact foresaw the risk as likely. It has been held, for example, that the risk that a cricketer will injure someone on the road outside the cricket ground by striking the ball over a high wall is so slight that failure to guard against such a risk is not careless, even although a ball has once before been knocked over the wall (Bolton v. Stone, [1951]A.C. 580. cf. Carmarthenshire County Council v. Lewis, [1955] A.C. 549, Lord Reid at p. 565; Muir v. Glasgow Corporation, 1943 S.C. (H.L.) 3).

Justifiable risks. There are also risks which the reasonable man takes, not because they are minimal, but because they are justifiable, since on balance the risk is worth taking (cf. Gl. Williams, para. 20). The classic example of such a risk is the case of a surgeon performing a dangerous operation. Macaulay restricts the class of justifiable risks to cases where the person who takes the risk does so for the sake of conferring a social benefit, and the victim consents to the risk (Macaulay, p. 451). There may however, be cases where the consent of the victim is not necessary. A fireman may have to take risks in rescuing people, conscious or not, without asking their consent. The pilot of an aircraft which develops engine trouble may have to decide on a dangerous course of action without asking his passengers' consent, or that of the people over whose town he decides to fly, or in whose streets he tries to land. The situation is like that in cases of necessity or compulsion, even if in the particular case, e.g. that of the surgeon, there is no actual compelling force. The risk is a 'calculated' one, justified by reference to its social usefulness - because it is better to take it than to refrain from taking it. In such cases the

agent must choose a course of action, and provided his choice is reasonable his action will not be regarded as careless.

Recklessness and negligence.

A person who does something careless may do it either recklessly or negligently. (He may also, of course, do it with the deliberate intention of creating or increasing the risk in question, in which his act can be dealt with as intentional.) Theoretically, recklessness and negligence are quite distinct. Recklessness is advertent and involves foresight of the risk; negligence is inadvertent and involves an absence of such foresight: Scots usage, however, is very confused and very confusing. (So is Anglo-American usage - see Hall, pp. 227-232.) Culpable homicide, for example, is a crime of negligence, and reckless killing is murder (Macdonald, p. 89), but culpable homicide was often libelled as 'culpable and reckless' (e.g. Robert Reid, (1827) Syme, 235; Wm. Paton and Richd. McNab, (1845) 2 Broun 525; Eliz. Hamilton, (1857) 2 Irv. 738; Jos. Calder, (1877) 3 Coup. 494), or even as 'culpable, reckless, and negligent' (e.g. Geo. Murray, (1841) 2 Swin. 549n.; Wm. Drever and Wm. Tyre, (1885) 5 Coup. 680), when such words of qualification were necessary. There is no clear distinction between recklessness and negligence, and the general impression is that recklessness is just extreme negligence. When the distinction was discussed in a charge of 'reckless or negligent' driving contrary to the Motor Car Act, 1903 (3 Edw. VII, c.36, s.1(1)) in the case of Connell v. Mitchell ((1912) 7 Adam 23), the Advocate-Depute argued that the distinction did not exist, and this argument was rejected only on a construction of the Act, and not by reference to general principle.

Lord Guthrie said that the distinction was 'certainly well recognised in Scotch practice' (at p. 30), but the Scots attitude to any attempt to systematise the distinction was probably represented by Lord Dundas who said 'I shall not attempt to follow the lucubrations of [defending counsel] as to the distinction which (it appears) may or may not exist between the two adverbs, in what I suppose he would call "the subjective mentality of the perpetrator" or elsewhere' (at p. 29).

It is possible to construct a consistent usage based on the distinction between advertence and in-advertence, and though such a usage cannot be easily applied to the Scots cases, it does make it easier to analyse the cases if the distinction is borne in mind. A man is said to act recklessly when he foresees a certain event as a possible consequence of what he is doing, but none the less goes on with what he is doing. Recklessness is distinguished from intention by the fact that in the former the consequence is only foreseen as possible, or at most as probable, and not as virtually certain.

In German law recklessness is said to occur when the agent thinks that his action may result in the creation of a crime, and consents to this result should it happen. A man who seduces a girl under sixteen, not knowing her age but knowing she may be under sixteen, acts recklessly quoad the crime of having carnal knowledge of a girl under sixteen (see H. Mannheim, 'Mens rea in German and English Law', (1935) 17 J. Comp. Leg. and Int. Law, 82, 91-3). In Swiss law, again, there is recklessness 'Quand l'auteur non seulement a envisagé le résultat dommageable comme possible, mais, sans l'exclure,...

l'a accepté pour le cas où il se produirait comme conséquence de l'acte auquel il ne veut pas renoncer' (P. Logoz, 'Pas de Peine sans Culpabilité', (1950) 2 J. Cr. Sc., 197, 202).

Recklessness is often said to involve indifference to the risk foreseen, and this indifference is regarded as evidence of the accused's depravity (cf. Macdonald, p. 89). But indifference, in the sense of 'couldn't care less' is not essential to recklessness. A man may be reckless even though he wishes fervently that the foreseen possibility will not become actual; so long as he knowingly takes the risk, he is reckless. Hall says of motor car drivers, 'And was there not a time or two when we deliberately violated the canons of due care, when, late for an engagement, we "took chances", knowing that we were acting dangerously - though, of course, we believed that no one would be harmed?' (Hall, pp. 217-8). To act in this way is to act recklessly quoad the risk of harming anyone else on the road.

'Conscious Negligence'. Some Continental legal systems have a third category between recklessness and negligence, which is called 'conscious negligence'. A person is 'consciously negligent' when he foresees the harm as possible, but does not believe it will occur. For example, the hunter who realises that his shot may kill a beater, but thinks he is a good enough shot to avoid this, is 'consciously negligent' (P. Logoz, op.cit., loc. cit.). So also is the seducer of the fifteen year old girl if, having considered the question of the girl's age, he comes wrongly to the conclusion that she is over sixteen (H. Mannheim, op.cit. loc.cit.).

This concept allows a distinction to be made between the man who realises that what he is doing is

dangerous and does his best to avoid the danger by being as careful as he can while still doing what he wants to do, and the man who takes no steps to minimise the risk at all. A system which does not recognise 'conscious negligence' would have to class the 'consciously negligent' man as reckless, since he foresees the risk, and would find it difficult to give him credit for any efforts he makes to avoid the danger. (It might, however, be able to take these efforts into account in some cases by holding that what was actually done was not careless because all reasonable precautions were taken to prevent the envisaged harm.) The concept of conscious negligence is a very subtle one, and has proved very difficult to apply in practice (*ib.*); it could hardly find a place in a system whose attitude to recklessness and negligence is as unsophisticated and as unsystematic as is that of Scots law.

Is the reasonable man a test or a standard of recklessness?

The position of the reasonable man as a standard of carelessness has been discussed; he is also important when we come to ask if the accused in a given case acted recklessly or negligently. Recklessness, like any other state of mind, has normally to be discovered by reference to objective factors, unless the accused's own evidence of his state of mind is available and is believed. But whether or not a confession is believed may well depend on whether it is consistent with the inference drawn from the objective facts.

The reasonable man as a test. The reasonable man can be used as a test to help to decide whether or not a particular accused has been reckless. If

the reasonable man would have foreseen the risk, it will be accepted as a fact that the accused foresaw it, unless there is strong evidence to the contrary. But if the accused can show that in fact he did not foresee the risk, then it is illogical to characterise him as reckless on the ground that a reasonable man would have foreseen it. As Hall says, 'In the determination of these questions, the introduction of the "reasonable man" is not a substitute for the finding that the particular defendant on trial knew that his conduct increased the risk of harm any more than it is a substitute for the determination of intent, where that is material. It is a method used to determine those operative facts' (Hall, p. 222).

Since evidence of the accused's state of mind must normally consist of objective facts from which the jury will draw an inference as to his state of mind, the more careless the accused's behaviour, the more likely it is that he will be regarded as reckless, since the more likely it will be that he foresaw the risk involved. A man who kills another by punching him on the jaw may be believed when he says that he did not foresee the risk of death; but a man who kills another by striking him on the skull with a hatchet will be hard put to it to persuade a jury that he did not realise that what he was doing might be fatal. In Robertson and Donoghue (Edinburgh High Court, 28 - 30 Aug. 1945, unrepd. This case contains directions on a number of fundamental questions of criminal law; that it remains unreported, even although it was appealed, is a sad commentary on the interest shown by Scots lawyers in their criminal law.), Lord Cooper, then Lord Justice-Clerk, directed the jury that 'In judging whether...reckless indifference is present you would take into account the nature

of the violence used, the condition of the victim when it was used, and the circumstances under which the assault was committed' (Transcript of Judge's Charge, p. 21). All these are objective factors affecting the degree of the carelessness of what the accused did, viewed as something likely to cause death. The jury proceed by way of syllogism to infer from these objective factors that the accused was reckless, and the major premiss is that a reasonable man would have foreseen the risk. So they argue: All reasonable men would foresee the risk of death as a result of what the accused did; the accused is (ex hypothesi) a reasonable man; therefore the accused foresaw the risk.

Suppose now that the reasonable man test leads to the inference that the accused foresaw the risk, but that the accused strenuously denies this, and asserts that the possibility of the harm never crossed his mind. Suppose it is a crime to have carnal knowledge of a girl under sixteen intentionally or recklessly, and A, who admits having had carnal knowledge of a girl who is in fact only fifteen, says that the possibility that the girl might have been under sixteen never crossed his mind. The jury must then balance his statement and their impression of his credibility against any objective factors such as the girl's obvious childishness which make it clear that a reasonable man would have realised that the girl might be under sixteen. If, on balance, they disbelieve the accused, because of the unreasonableness of his statement, they are using the reasonable man as a test, as a method of arriving at a factual determination of the accused's subjective state. If, on balance, they believe the story, if they think that A is so

patently honest he must be telling the truth, they cannot find that he acted recklessly, just because they accept the view that the reasonable man would have suspected the girl was under sixteen.

The reasonable man as a standard. There is a temptation to decide a priori that if it ever becomes necessary to balance an accused's statement against the inference drawn from objective factors by the test of the reasonable man, the result of the test will always be preferred. To take up this attitude is to use the reasonable man as a standard and not as a test, and is tantamount to saying that whether or not a particular accused is believed when he says his mental state was not what the mental state of the reasonable man would have been, he is nonetheless to be treated as if his mental state had been the same as that of the reasonable man. Whether or not the accused foresaw the risk, he is regarded as reckless because the reasonable man would have foreseen it.

The result of this use of the reasonable man is to make recklessness something as objective as carelessness. It elides the necessity of any decision about the accused's state of mind, it makes the accused's statement about his state of mind not merely incredible, but irrelevant. Although Scots law is not explicit about this, it gives the impression that the reasonable man is used as a standard in this way. Thus, we talk of a man using 'reckless violence' and not of a man 'using violence recklessly' (Fraser and Rollins, 1920 J.C. 60, Lord Sands at p. 63), and emphasis is laid on the likelihood of violence causing death rather than on the accused's foresight of death (see R.C. Evid. of Lord Keith, Q. 5130 where he talks of 'violence that might be contemplated as likely to result in death' -

my italics). Macdonald defines murder as being 'constituted by any wilful act...whether intended to kill or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences' (Macdonald, p. 89), which again places the emphasis on the act rather than on the accused's mental state.

The Scots tendency to regard recklessness as just gross negligence also suggests the adoption of an objective approach. If the reasonable man is a standard in this matter, anyone who does something careless can be said to be acting recklessly, since in doing what is careless he is taking a risk the reasonable man would have foreseen and tried to avoid, and so must be treated as if he himself had foreseen the risk. That being so, the only difference between recklessness and negligence is one of degree - where the act is very careless the agent is called reckless, where it is not so careless he is called negligent. Thus, phrases like 'culpable, reckless, and negligent' are not self-contradictory, but only examples of legal tautology, or at most of a diminuendo. The end result seems to be that although recklessness retains some connection with foresight in Scots law, the accused will be deemed to have had this foresight if, and only if, his act reached a certain degree of carelessness. Where the carelessness is less than this degree he will only be treated as negligent, whether or not he in fact foresaw the risk. The difference between recklessness and negligence thus ceases to be one of fact and becomes one of moral culpability - the worse the carelessness the more it exhibits depravity, and the more likely is it that the agent will be regarded as reckless. The progress from the carelessness of section 12 of the Road Traffic Act,

through the recklessness of section 11 and the greater recklessness of culpable homicide, to the even greater recklessness of murder, depends on the degree of wickedness involved, and that is measured by reference to the degree of carelessness present rather than by reference to the presence or absence of foresight (cf. Road Traffic Act, 1930, 20 & 21 Geo. V. c.43, ss.11 and 12; Paton, 1936 J.C. 19). The precise relationship between recklessness and negligence in Scots law is not, however, altogether clear, and it is made more complicated by the current tendency to depart from the principle that recklessness is equivalent to intention, at any rate in homicide. Today even reckless killing may be only culpable homicide, so that we are left without any particular reason for continuing to distinguish between recklessness and negligence (cf. R.C. Evid. of Lord Cooper, Q. 5417).

The reasons for treating the reasonable man as a standard.

It is worth considering why the law treats the reasonable man as a standard of recklessness, or at any rate why the temptation to do so is always present. There are two principal reasons, both of which operate in other branches of the criminal law as well as in this question of recklessness. The first depends on the idea of general mens rea, the other on what I propose to call the 'principle of disfacilitation'.

General mens rea. Recklessness is described by Macdonald by reference to conduct 'displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences', and as 'wicked recklessness' (Macdonald, p. 89). That is to say, it is regarded as punishable because it exhibits the depravity of the accused's character, and so reveals him as a person of criminal mentality. Now, disregard

of risk may take one of two forms. A risk may be foreseen but disregarded in the sense that the accused decides to go on with his plans in spite of the risk, whether or not he 'cares' about the risk in the sense of hoping that it will not become actual. On the other hand, an accused may disregard a risk in the sense that he does not realise that the risk exists. The latter situation is not strictly one of recklessness but it may well be a pointer to the accused's depravity. Suppose A seduces a girl of fifteen and is so intent on satisfying his lust that he does not even pause to consider what age the girl is, and suppose B seduces a girl under fifteen realising that she may be only fifteen but not caring whether or not she is under sixteen. It is not easy to conclude that A is less blameworthy than B, yet on a strictly subjective view of recklessness A cannot be said to be reckless, but only to be negligent. And if B considers the girl's age and decides wrongly that she is over sixteen, he must still be regarded as reckless, (in the absence of any doctrine of 'conscious negligence' - cf. supra) and it becomes even more difficult to suggest that A is less culpable than B (cf. Gl. Williams, para. 41). Accordingly both are treated as equally reckless, and recklessness is imputed to A by reference to the standard of the reasonable man. Again, a subjective theory would require us to regard a man who fires a gun out of his window without even considering the possibility that there might be people in the street, as negligent only, and as liable to less punishment than the man who realises that the street may be full, but just does not care. Both seem equally callous, the first for not even considering that he might injure others, and the second for not caring whether he injures others or not. The tendency is to treat

the two as equally blameworthy, to equate the man who does not know with the man who does not care, as in the rule that it is reckless fire-raising to raise fire 'in such a reckless state of excitement as not to know or care' what he is about (Geo. Macbean, (1847) Ark. 262, 263).

This tendency is encouraged by a feeling that even if a particular accused did not foresee the risk, he ought to have done so -the seducer ought to have realised that the girl might be under age, the man who fired a gun into a street ought to have realised that he might hit someone, the man who went through a house waving a burning brand ought to have realised that he might set the place on fire. His lack of foresight is regarded as being in itself reprehensible, because it is regarded as being a breach of the general duty to behave reasonably, which in the particular case means to foresee the risk in question. Such a breach of duty, however, can only amount to negligence, and to treat it as recklessness is illogical, and cannot be justified by reference to the strict meaning of 'reckless'. For recklessness requires foresight, and failure to foresee can never amount to foresight. 'A was reckless is not foreseeing that taking that corner at 40 m.p.h. might cause an accident' is equivalent to 'A foresaw that not foreseeing that taking that corner at 40 m.p.h. would cause an accident', which is nonsense. The equation of lack of foresight with foresight does not depend on logic, but on the feeling that the two are equally indicative of wickedness.

The principle of disfacilitation. The use of the reasonable man as a standard, and the consequent refusal to accept any account the accused gives of his mental state which conflicts with that standard

is not uncommon in the criminal law. It is seen most clearly in the law of provocation. The basis of the plea of provocation is that a man who kills because he has been goaded by his victim into losing self-control, should not be punished as severely as someone who kills in cold blood. Accordingly, killing under provocation is not murder but only culpable homicide. In order to operate to reduce the charge from murder to culpable homicide, however, the 'goadings' must be such that it would have caused a reasonable man to lose self-control, and, since the reasonable man is a universal and objective concept, the law has been able to lay down the types of 'goadings' which are sufficient to support a plea of provocation. Any accused who loses self-control in circumstances other than those laid down by the law as sufficient to affect the reasonable man is not entitled to the benefit of the plea of provocation. The use of the reasonable man as a standard is clear in provocation because lawyers are prepared to admit that there may be cases in which it is true that the accused lost control because of the 'provocation' offered by the victim, but where he must nonetheless be treated as if he had not lost control, because he has failed to measure up to the standard of control set by the reasonable man. (See, e.g. Bedder v. D.P.P. [1954] 1 W.L.R. 1119; Russell on Crime, 11th edn., p. 594. The law of provocation and the reasonable man is discussed infra, 527/4.)

Where the question is whether the accused was reckless or negligent, the result of this approach is that an accused who fails to foresee what the reasonable man would have foreseen is treated as if he had foreseen it. The practical difficulties here

are not so acute as in provocation, nor are the results so unjust, because recklessness is normally alleged only where the carelessness is so gross that it is highly unlikely that the accused did not foresee the risk. This in itself, however, merely increases the 'confusion of the material mental state with the proof of its presence' (Hall, p. 223).

I propose to give the name 'principle of dis-facilitation' to the 'rule' that where an accused's account of his mental state conflicts with the standard of the reasonable man, the accused's statement is to be disregarded. The result of the application of this principle is, of course, that where the accused is telling the truth, and where the true facts should logically operate to acquit him, or should at least operate in mitigation, they will not be allowed to do so. Thus, for example, where the truth is that the accused was goaded into loss of self-control, and so ought to be regarded as having acted under provocation he will not succeed in a plea of provocation if the reasonable man would not have been provoked by what was done. The basis of the principle is the deterrent purpose of the law. The criminal law is designed to protect society from crime by punishing criminals, and it assumes that the deterrent effect of such punishment is significant. It must therefore discourage easy excuses, and restrict the scope of such exculpatory or mitigatory pleas as it does recognise. Again, it is important to warn juries against too ready acceptance of the accused's glib statements about his state of mind, especially where those statements conflict with what one would expect the state of mind of a reasonable man to have been.

So far the principle is unobjectionable, and might be called the 'principle of deterrence'. But where it operates to bar the jury from accepting the accused's story even where they are convinced of his credibility and have given proper weight to the requirements of deterrence, it is, it is submitted, objectionable in its operation. It seems self-evident that it is objectionable to say that recklessness involves foresight, but that a man who does not have such foresight will nevertheless be regarded as reckless because a legal fiction like the reasonable man would have foreseen the risk in question. This objectionable attitude is adopted mainly because of the fear that if a jury is allowed to believe a particular accused who is telling the truth, that may lead to other juries believing other accused persons who may or may not be telling the truth, and that if that happens accused persons may 'get away with murder' by telling an appropriate story. I have used the name 'disfacilitation' because when Judges direct juries that they cannot accept the accused's statements they often preface their direction with phrases like 'It would be too easy for criminals if...', or 'It would be a very convenient place for criminals if...' an accused could commit a crime and then get away with it just by coming into Court and saying he was provoked, or mistaken, or did not mean it, or did not realise the danger of what he was doing (cf. Dewar, 1945 J.C. 5, Lord Justice-Clerk Cooper at 9; Robertson and Donoghue, Edinburgh High Court, 28-30 Aug. 1945, unrepd., transcript of Judge's charge, pp. 17-18; Russell, 1946 J.C. 37; R.C. Evid. of Lord Cooper, Q. 5418).

Used in this objectionable way the principle of disfacilitation is really an example of the principle of the thin end of the wedge, and is open to all the

objections to which the principle of the wedge is open. The latter principle has been described as the principle that 'you should not act justly now for fear of raising expectations that you may act still more justly in the future - expectations which you are afraid you will not have the courage to satisfy' (F. Cornford, 'Microscosmographia', 15, quoted by A.L. Goodhart in 'Shock Cases and the Area of Risk', (1953) 16 M.L.R. 14).

In applying the principle of disfacilitation the Courts confuse adjective and substantive law. As has been said, it is unobjectionable to use the reasonable man as a test in the law of evidence so as to ensure that accused persons do not escape punishment by putting forward excuses which are not worthy of credit; and some such rule is probably necessary to counter the rule that an accused need not prove his defence but need only raise a reasonable doubt as to whether the Crown have proved his criminal intent (cf. Owens, 1946 J.C. 119; Lennie, 1946 J.C. 79). But to go on to say that because there is a risk of accused persons escaping by means of plausible falsehoods, they are never to be believed even when they are telling the truth, if the truth conflicts with the inference to be drawn by way of the test of the reasonable man, is to change a test of evidence into a rule of substantive law. Glanville Williams points out that 'The danger of false evidence is one that the law has to meet in almost all situations, and is not in itself a sufficient reason for opposing a change that is otherwise desirable' (Glanville Williams, *The Sanctity of Life and the Criminal Law*, p. 275); in the same way it is not a sufficient reason for excluding an otherwise relevant defence.

What Mackinnon, L.J. said of civil claims is equally true of criminal defences - 'Fear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove' (Owens v. Liverpool Corporation, [1939] 1 K.B. 394, 400). But that is just what we are doing when we use the reasonable man to exclude as irrelevant an accused's evidence that his mental state was not that of the reasonable man. It is too often forgotten that the reasonable man is only a legal fiction; he is not a legislator.

Recklessness and intention.

As has been pointed out, the law tends to regard recklessness as equivalent to intention, at any rate in regard to homicide. The reasons for this equivalence are much the same as those for applying an objective standard to questions of foresight. Recklessness displays the same wicked and depraved disposition as does intention; it is very difficult to believe an accused who says that although he hit the old lady on the head with a hatchet he did not mean to kill her, and it is felt that once juries are allowed to believe such statements, any accused will be able to get away with murder by saying he did not mean to kill (cf. R.C. Evid. of Lord Cooper, Q. 5418). In any event, it is felt that people who use great violence without meaning to kill are as dangerous as those who do mean to kill, and should be as severely punished. The person who intends to beat his victim to within an inch of his life, but actually kills him, is guilty of murder, 'Because, in committing any such desperate outrage on the body, the panel shows an utter contempt of the safety and life of his neighbour, and if not a determination to

kill him, at least an absolute indifference whether he live or die: And because, from the very excess of the injury, the case does not admit any clear or conclusive proof on the part of the pannel, that at the moment of killing he did not intend the very event which has actually ensued' (Hume, i. 257). There is the further difficulty that it is dangerous to allow an accused to inflict great injury without incurring the risk of guilt of murder, because in fact it is difficult to tell just how much injury the victim can undergo without loss of life (ib.).

The identification of recklessness with intention is helped by the highly emotive and pejorative nature of the terminology of recklessness. Phrases like 'utter disregard', 'wicked recklessness', 'a disposition depraved enough to be regardless of the consequences' (Macdonald, p. 89), conjure up the image of a man 'transported with rage and hatred' (Hume, i. 257) wildly and excitedly inflicting horrible injuries on another with a murderous weapon. Indeed, this sort of behaviour is more socially dangerous than that of the husband who carefully poisons his wife or her lover or his rich uncle, and who is not likely ever to harm anyone else in his life. The public at large is safe from such a poisoner, but all users of the streets are exposed to dangers from brawling gangs of hooligans, and all householders to danger from armed housebreakers.

Negligence.

Subjective and objective negligence.

A man is negligent when he does not foresee a risk, and consequently does something careless. Since negligence is the absence of foresight, is inadvertence,

is a blank, it has been said that it is not a state of mind at all. But a blank state of mind is still a state of mind: negligence is not just carelessness - it is carelessness accompanied by inadvertence as to the risk.

Negligence is usually determined solely by reference to objective factors, so that whoever does something careless is negligent (provided of course he is not reckless). But it is possible to distinguish negligence from carelessness, and sometimes useful to do so. For negligence consists in failing to take care where there is a duty to take care, and a person who is incapable of taking care, cannot, strictly speaking, be guilty of negligence. At any rate he cannot be morally guilty, and it would be in accord with the general principles of the common law that he should not be legally guilty either. This difference between persons who cannot help acting carelessly, and persons who could be careful if they took the trouble to do so, is, of course, a subjective one.

In practice this distinction only arises in extreme cases; it is unlikely, for example, that an insane man, incapable by reason of his insanity of taking care, would be convicted of a crime of negligence, but a person who was too stupid to take the precautions the reasonable man would have taken, would probably be convicted of such a crime. The nearest example to a case in which a subjective approach was taken is the unusual case of Ritchie (1926 J.C. 45). The accused was charged with culpable homicide caused by reckless (i.e. very careless) driving. There was no doubt that his driving had been grossly careless, but he was acquitted,

in the words of his special defence, 'in respect that by the incidence of toxic exhaustive factors he was unaware of the presence of the deceased on the highway, and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions'. But such a defence is probably restricted to cases of mental abnormality; the normal person is obliged to exercise normal care, and is assumed to be capable of remaining attentive.

In the English case of Hill v. Baxter ([1958] 1 Q.B. 277) a defence of automatism as a result of a sudden loss of consciousness, i.e. of a blackout, was offered to a charge of careless driving, but was rejected because the evidence showed no more than that the accused had fallen asleep. It was suggested, however, that the defence of incapacity was in general restricted to 'cases where the circumstances are such that the accused could not really be said to be driving at all. Suppose he had a stroke or an epileptic fit, both instances of what may properly be called acts of God; he might well be in the driver's seat even with his hands on the wheel, but in such a state of unconsciousness that he could not be said to be driving' (Lord Goddard, C.J., at p. 283). This approach suggests that the only test of negligence is the objective one, but that in some circumstances, such as those of a fit, the matter can be dealt with as one in which the risk is not created by an 'act' of the accused. In the same way, a driver who does something careless because he is attacked by a swarm of bees, does not act negligently, because again he does not act voluntarily, but under the physical compulsion of the bees' attack (ib., where the swarm of bees was said to introduce

something akin to a novus actus interveniens).

In Ritchie, however, it does not appear to have been argued that the accused could not be said to have been driving the car; the argument was directed to the question of mens rea, and not of criminal conduct.

Ritchie is an exceptional case, and the problem has not been dealt with in any reported case since. It appears that the Courts will rarely adopt a subjective approach to negligence, and may deal even with extreme cases by reference to the law of insanity. If the carelessness occurred in the course of sane voluntary behaviour, it is unlikely that the subjective approach will be adopted. Glanville Williams suggests that 'The best solution is to draw the line between injury or affectation occurring considerably before the time of the alleged offence and an injury or affectation occurring substantially at the same time, and to allow only the latter to operate as a defence'. (Gl. Williams, para. 28). This would account for the application of the objective test to someone who is congenitally stupid. The congenital lunatic is a special position, since the standard of the reasonable man is never applied to someone who is insane.

An incapacity of long standing may be regarded as irrelevant, not simply because of its duration of permanence, but because the operation of the incapacity would itself become foreseeable in time, and there would therefore be a duty to take care that one did not get into a situation in which this incapacity might prove dangerous. A man who knows he is such a bad driver, that he is incapable of reacting carefully in situations of danger is being negligent (strictly speaking he is being reckless) if he drives at all. For the same reason a man may

be responsible for the consequences of fatigue, even although the fatigue does occur at substantially the same time as the accident - for fatigue is a general human condition, and the reasonable man would realise that if he continues to drive, or carry on any other activity which requires care, when he is tired, he may cause harm, and would therefore stop driving when he tires. As was pointed out in Ritchie (supra), the defence of incapacity only operates when 'a person who would ordinarily be quite justified in driving a car, becomes - owing to a cause which he was not bound to foresee, and which was outwith his control - either gradually or suddenly not the master of his own action' (Lord Murray at p. 47). On this view a state such as epilepsy would only be a defence the first time it occurred; and the incorrigibly bad driver might be 'entitled' to at least one accident so that he might acquire the knowledge that he was incapable of driving carefully. Once the epileptic knew of his disease and the bad driver of his incompetence, they would be acting recklessly. Even a plea of involuntariness would not succeed, since the epilepsy itself would be regarded as a foreseeable consequence of the voluntary careless act of driving in the knowledge of one's tendency to have fits. The law is probably, however, that negligence is a purely objective matter except in cases analogous to insanity.

Degrees of negligence.

Although negligence is generally regarded as objective, there is a sense in which the law has regard to the accused's state of mind. The greater the degree of negligence the greater the punishment, because the more negligent a man is, the more nearly

he is thought to approach a state of wickedness. Strictly speaking, there cannot be degrees of negligence, because there cannot be degrees of inadvertence, of blankness. (cf. J.W.C. Turner, 'The Mental Element in Crimes at Common Law', in *Modern Approach*, p. 195, at p. 211; and Kenny, para. 25). The degrees are degrees of carelessness, but the degree of carelessness is regarded as indicative of the accused's criminality which thus ranges from minimal negligence to extreme recklessness. All blanks are equally blank, but they may vary in extent; the man who omits one precaution is not less inadvertent than the man who omits twenty, but he is inadvertent with regard to fewer things. Again, degrees of negligence may be measured by reference to the degree of harm regarding which there is inadvertence, so that inadvertence of the possibility of death is regarded as more criminal than inadvertence of the possibility of some lesser harm.

Should negligence be punished?

It has been argued that negligence is not a form of mens rea at all (Gl. Williams, para. 28), and that it is no concern of the criminal law which is concerned only with 'the voluntary commission of moral wrongs forbidden by the penal law' (Hall, p. 235 - the definition ignores the possibility of forbidding things which are not regarded as morally wrong). Whether a negligent mind is to be described as rea depends on usage. It is clearly not rea in the sense of being wicked or depraved, and it is completely free of any intention to do what is forbidden by law. But it is a state of mind, and its presence is sufficient to make certain acts criminal - it is 'a legally reprehensible state of mind' (Kenny, para. 11).

The important question, of course, is whether it should be legally reprehensible, and that is a question of penal policy. The objection to making negligence criminal depends on the idea that the negligent person is not morally guilty of anything and is not amenable to punishment. Therefore, it is said, neither deontology nor utilitarianism requires that he should be punished. But although we sometimes say of a negligent agent, 'It's all right, we know you didn't mean to do it; you're not to blame', we often regard a negligent person as morally responsible for the results of his carelessness. There is nothing strange in imposing a duty to be ordinarily careful on the ordinary man, or in holding him responsible for a breach of that duty. 'Men do indeed resent what is occasioned through carelessness; but then they expect observance as their due, and so that carelessness is considered as faulty' (Bishop Butler, Sermons, VIII, pp. 126-7).

This does not necessarily involve criminal responsibility - holding a man liable to make reparation, for example, is quite different from punishing him. (This may be arguable in theory, but it is clearly true in practice - a man's insurance company cannot go to goal for him). The law is very reluctant to punish negligence, and usually does so only where great harm such as death has resulted, or in order to prevent risks which occur so frequently that they constitute a considerable public danger. A person who recklessly drops a match beside inflammable material will not be prosecuted unless he actually causes a fire, but a person who drives a motor car carelessly is liable to prosecution whether or not he causes harm. What makes the driver more criminal than the match-dropper

is not that damage is more likely in his particular case, but that it is statistically more likely. If damage from dropped matches were as common as damage from careless driving, careless dropping of matches might become a crime in itself.

The fact that the criminality of negligence may depend on such things as the prevalence of certain dangers in the community as a whole, shows that the punishment of negligence is regarded as performing an important social function. It is difficult to justify such punishment retributively - for all our resentment at the result of carelessness, we still feel it should be distinguished from intentional wrongdoing, and the law recognises this by providing for a lesser penalty in the case of negligence. Again, the negligent man may arouse sympathy as much as indignation, we may feel that 'There but for the grace...' A tribunal conscious of its righteousness may condemn the murderer or thief with a clear conscience, but no one has all that clear a conscience when it comes to negligence. And if the accused is a man who was doing a job as best he could, but failed to take certain precautions, it seems unfair to punish him at all. 'It is hard to impute crime, and it will require exceptional circumstances to impute crime, to a man who is...attending to his duty to the best of his ability and to nothing else', when 'if there was anything wrong it was the human infirmity of a man doing his best, not having seen in time what it is such a misfortune that he did not' (Wm. Drever and Wm. Tyre, (1885) 5 Coup. 680, 687, Lord Young at ¶689).

But the punishment of negligence may have a deterrent effect in that the threat of it may make people more advertent, more careful. It is not quite

correct to say that you cannot deter someone from being inadvertent, since he will only be deterred if he considers his position, in which case he will no longer be inadvertent. (cf. Gl. Williams, para. 31). A man can be encouraged to be advertent by threat of punishment. People set themselves to drive with great care because they know that careless driving may land them in gaol. This form of deterrence seems clearly to be within the province of the criminal law. And it is quite consciously applied by the law. In the early days of railways there were a number of prosecutions for culpable homicide arising out of railway accidents. In the first of these the Lord Advocate explained that because of the increasing number of railways it was important to make clear what the community had a right to expect from railway employees, and that, 'It was right that it should be understood that accidents should be strictly looked into' (Jas. Boyd. (1842) 1 Broun 7, 16). There are a number of examples of charges brought by the Crown because they felt it necessary to warn people of the possible consequences of particular forms of carelessness, such as the case of Alex. Dickson ((1847) Ark. 352), where the accused was charged with causing injury by erecting a faulty hustings. The Advocate-Depute asked for an acquittal after leading evidence, and said he had felt it his duty to bring the case before the public. (See also Jas. Finney, (1848) Ark, 432, 439, a charge of causing injury by careless rocklasting on which the accused was sentenced to two months' imprisonment, and Geo. Armitage, (1885) 5 Coup. 675, 677, a charge of culpable homicide by careless dispensing of medicine in which the accused was acquitted, more or less by direction of the Judge.)

Chapter 7: Error

Mistake and ignorance.

Error may take one of two forms - mistake, or ignorance. Glanville Williams distinguishes the two as follows: 'Every mistake involves ignorance, but not vice versa. Ignorance is lack of true knowledge, either because the mind is a complete blank or because it is filled with untrue (mistaken) knowledge'. (Gl. Williams, para. 40).

Glanville Williams takes the view that mistake excludes recklessness, whereas ignorance does not. The man who acts under a mistake is not reckless, because he has come to the conclusion, as a result of his mistake, that the danger in question does not exist, and so he cannot be said wilfully to disregard it. On the other hand the ignorant man who does not consider the danger at all may be reckless, or rather be deemed reckless, because of his failure to carry out his duty to enquire if what he is doing is dangerous. (cf. Gl. Williams, loc. cit.). The following observations fall to be made on this distinction:

(1) It is correct that strictly speaking a mistaken man cannot be reckless. Glanville Williams quotes Lord Herschell's distinction in Derry v. Peek ((1889) 14 App. Cas. 337, 361) where he said that 'To make a statement careless whether it be true or false, and without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true'. Again, if recklessness is given its strict subjective meaning it can be said that it is excluded by mistake because once the agent has reached

the erroneous conclusion that, for example, a room is empty, he no longer foresees that he may injure someone if he fires a revolver into the room.

But in Scots terminology, where 'reckless' and 'negligent' do not differ in kind but only in degree, a mistake may be so careless as to involve recklessness. If, for example, the accused reached the conclusion that a room was empty simply by looking through a half-open door, his mistake would be due to carelessness, and if his intention was to discharge a gun into the room, his failure to notice that there was someone behind the door might be regarded as sufficiently gross to amount to recklessness.

(2) It seems strange to call an ignorant man reckless, since ignorance is suggestive of inadvertence. But if a man considers that there may be present in a situation facts making his proposed action dangerous, and he does not enquire whether or not these facts are present, his ignorance of their presence will be reckless. Thus, if A picks something up from the street, and it crosses his mind that it might be explosive, but he takes no steps to find out if it is explosive, his ignorance of its explosive nature may be accounted reckless if in fact the thing explodes and injures someone. It will not do for A just to say - 'I didn't know if it was dangerous or not; I was ignorant of its explosive character; I had no views either way on the matter'. But if it never crossed his mind at all that the thing might be dangerous, his ignorance can hardly be described as reckless, since he was completely inadvertent as to the possibility of danger at all. It may be that he had a duty to consider the possibility of danger, but his failure to do so might not be so gross as to amount to recklessness in the Scots meaning of the term.

(3) It appears therefore that the distinction between ignorance and mistake is not important in Scots law. In any event cases of ignorance are very rare. The only case which is at all common is that where the ignorance is of a factor in the physical condition of the victim of an assault, which renders him peculiarly susceptible to danger from violence. In such cases the rule that an assailant takes his victim as he finds him is applied to the exclusion of any considerations of error or of carelessness, and the assailant is always convicted of culpable homicide. (see infra, ch. 14).

The effect of error on intention.

Error vitiates intention. A man's intention cannot be separated from his beliefs about the objective situation. I cannot intend to steal something which I believe to be my own, or murder someone I believe to be an animal, or intend to kill someone by shooting into a room I believe to be empty. As was said in an Australian case, 'Whenever a legal standard of liability includes some exercise or expression of the will, some subsidiary rules of law must be adopted with respect to mistake, States of volition are necessarily dependent upon states of fact, and a mistaken belief in the existence of circumstances cannot be separated from the manifestation of the will which it prompts'. (Thomas v. R. (1937) 59 C.L.R. 279, Dixon, C.J. at p. 299).

Error of fact. A man's duty is to do what is right, or in the case of legal duty what is legally right, in the situation as he sees it. (cf. supra.). The approach to cases of error about the objective facts of a situation is simple - the accused is judged as if the situation were as he believed it to be. (cf.

SchwStGB art. 19 - Handelt der Täter in einer irrigen Vorstellung über den Sachverhalt, so beurteilt der Richter die Tat zugunsten des Täters nach dem Sachverhalte, den sich der Täter vorgestellt hat.) If A kills his wife in the mistaken belief that she is a hyena, he is not guilty of murder, but if he kills her under the mistaken belief that she is his mistress he is guilty of murder. Similarly if he kills her in the mistaken belief that she is about to kill him and that it is necessary for him to kill her in self-defence, he is not guilty of homicide; (Owens, 1946 J.C. 119) if he kills her under the mistaken belief that she has just confessed to adultery, he is guilty of culpable homicide; if he kills her under the mistaken belief that she had committed adultery the previous week, he is guilty of murder. In each case we judge A as if the situation were as he believed it to be.

It follows from this approach that for error to be relevant it must refer to some constituent part of the crime in question, to something which affects the identity or the degree of the crime. Accordingly, the same mistake may be relevant with regard to one crime and irrelevant with regard to another. The mistake is only relevant if, had things been as the accused believed them to be he would either have committed no crime at all, or would have committed a different crime (or a different degree of the same crime). This way of reasoning is particularly important with regard to two types of error-- error regarding the victim, and error regarding the mode of commission of the crime.

(a) Error as to victim. This is generally thought to be irrelevant. If A shoots at and kills B believing him to be C, then A is guilty of murder,

since to kill C is just as criminal as to kill B. Similarly, if A robs a bank believing it to be a warehouse, or has intercourse with a fourteen year old negress believing her to be a fourteen year old white girl, the mistake is irrelevant. But this irrelevancy depends on the fact that the crime is the same in each case respectively, on the fact that the victims are legally equivalent. Where this is not so, then error as to victim may be relevant. Oedipus, as Donnedieu de Vabres cryptically points out, was not guilty of parricide, but only of murder (Donnedieu de Vabres, p. 75). He could no more be guilty of parricide than of incest, because on the facts so far as he knew them, he was not committing either of these crimes (and his failure to inquire into the possibility of his parentage being what it was could hardly be called reckless).

Error regarding the victim of a crime is thus relevant where the circumstances are such that it amounts to error as to the crime. To kill a policeman on duty in the belief that he is a private citizen is not, it is submitted, capital murder, because the intention to commit capital murder is absent: it can only be ordinary murder.

(b) Error as to mode. The position here is the same as in the case of error as to victim, although examples are rarer. If A sets out to kill B by knocking him on the head and then cutting his throat when he is unconscious, it does not matter if in fact the first blow kills B. But if A intends to wound B by shooting him, and then to throw him into the river and drown him alive, it may be important if the shot kills B. For then A will have created the actus reus of capital murder while intending only to commit ordinary murder, and it will not be possible to convict him of capital murder without showing that the shooting of B was reckless

quoad the possibility of its being fatal. Again, suppose A sets out to rob a safe and takes with him a substance he believes to be a non-explosive corrosive, intending it to use it to melt the safe-lock: In fact the substance is explosive and as a result the safe is blown up. In such circumstances, it is submitted, the error would be irrelevant if A were charged with theft by opening lockfast places, but relevant if he were charged with theft by using explosives.

Error as to mode and causality. Error regarding mode may be relevant even where there is no question of a different crime being committed as a result of the error from that intended. If the actual cause of death is sufficiently different from the intended cause of death, then A may be absolved from responsibility for homicide, because of the absence of any causal connection between his act and death. If A intends to kill B by shooting, but in fact his shot is not fatal, and B is killed by a road accident while being taken to hospital in an ambulance, it may be that A is probably guilty only of assault and attempted murder. (cf. Hart and Honore, 'Causation in the Law' (1956) 72 L.Q.R. 58, 404; T.B. Smith, p. 1097). Even if A puts B's wounded body into his own car and drives him off with the intention of burying him somewhere, and B (who was not in fact fatally injured) is killed in a road accident caused by A's negligence, A may only be guilty of the attempted murder and the actual culpable homicide of B. (cf. Schönke-Schröder, pp. 309-10).

Error and transferred intent.

The types of situation just discussed from the point of view of error can also be considered from the standpoint of what is known as 'transferred intent', with rather different results. The doctrine of

transferred intent, briefly, is the doctrine that where A intends to commit a particular crime, or to injure a particular victim, or to commit a crime in a particular way, and in fact commits it in a different way, or injures a different person, or even commits a different crime, the difference is unimportant, and the original intent can be 'transferred' to what actually happened. If Oedipus' intention of killing a stranger is transferred to what actually happened, the result is to make him guilty of parricide. The transfer is explained in this way - Oedipus intended to kill, and therefore he had mens rea; he killed his father, therefore he created the actus reus of parricide, and did so with mens rea. It does not matter that the mens rea was that of simple homicide, because mens rea in this context means simply wickedness of mind, and is transferable from one crime to another; it is that general mens rea which is thought of as characterising all criminal intentions. If mens rea is transferable in this way the rule that any error affecting the type of crime is relevant will cease to apply, and error will be relevant only when the accused would have committed no crime at all, had the facts been as he believed them to be.

(a) Transfer of intent among crimes . In practice this doctrine is only of importance with regard to homicide, and even then only when the original intention was to commit a serious crime. Until recently any homicide occurring in the course of at any rate a crime of violence was murder in England; and in the United States any killing occurring in the course of a felony is murder, while any occurring in the course of a misdemeanour is manslaughter (Hall, pp. 454-60).

It is agreed on all hands that this type of transfer does not exist in Scots law (e.g. R.C. para. 92).

(Whether it is also true, as the Report states, that Scots law does not recognise 'anything akin' to this doctrine, depends on whether recklessness is always regarded as sufficient mens rea for murder, or whether it is only sufficient mens rea where the killing occurs in the course of another crime. This depends on the definition of murder. So far as the general principles of the law are concerned it is sufficient to note that intention cannot be transferred in this way in Scotland, but that the mens rea quoad a given crime whether recklessness or intention, must exist before that crime can be said to have been committed.) It should follow that intent can only be transferred from one victim or one mode to another where the intended crime and the actual crime are the same.

(b) Transfer of intent between victims. It follows from the above that transfer between victims can only be made where, if the situation were approached by way of the law of error, the error would be irrelevant. Thus if A stabs B believing him to be C, the intent to kill C can be transferred to the killing of B only if killing C is the same crime as killing B, i.e. only if the error between B and C is irrelevant. If B is a policeman on duty, and C an ordinary citizen, the transfer cannot be made, because it would involve a transfer between crimes - from ordinary murder to capital murder. (The argument remains sound even if capital murder is regarded as merely an aggravated form of murder, in the way that theft by explosives is an aggravated form of theft, although the additional penalty is mandatory in the case of murder. Error regarding these aggravations is what is called in Germany error regarding facts which increase the punishability of the offence - Tatumständen... welche... die Strafbarkeit erhöhen - StGB Art. 59, and

should be taken into account.)

It is submitted that in view of the actual identity of result in such cases whether that result is reached by way of the rules of error or the so-called rule of transferred intent, the result should be based on error, since this avoids the doctrines of constructive mens rea which is involved in transferred intent, and which has been rejected by Scots law in the case of transfer between crimes.

Aberratio ictus. So far we have been considering the case in which the criminal makes a mistake in identifying his victim, where A shoots at B believing him to be C. This is what is called error in objecto. We must now consider the position where the mistake is not the mistake of the criminal but, so to speak, the mistake of the bullet - aberratio ictus - where A aims at B but accidentally hits C instead.

Scots law treats this in the same way as it treats error in objecto - it regards the error as irrelevant. Thus, as Hume says,

'A criminal charge may be good, though there is no evidence of a purpose to injure the very person who has been the sufferer on the occasion. For instance, in a trial for fire-raising, it cannot affect the judgement of the Court, nor ought it of the Jury, that the house which has been consumed is not the house of an enemy, which the pannel meant to destroy, and to which he applied the fire, but that of another person, to him unknown, and to which, by the shifting of the wind, or some other accident, the flames have been carried. The same is true in a case even of homicide, that crime to which a special malice may seem more natural than to most others. If John make a thrust at James, meaning to kill, and George, throwing himself between, receive the thrust and die, who doubts that John shall answer for it, as if his mortal purpose had taken place on James? (Hume, i. 22).

With respect, and some hesitation, I take leave to doubt this, and would offer the following observations:

(1) We are dealing here with cases in which there is neither intent nor recklessness so far as the actual crime is concerned. Where A shoots at B and kills C whom he knew to be standing beside B, he may well be guilty of murdering C because he recklessly disregarded the possibility that C might be killed. In Matthew Hay (May 1780, ib.) the accused was convicted of murder because he put poison in a pot in which a whole family's breakfast was being cooked, with the intention of poisoning the daughter, but with the actual result of poisoning her parents. This, as Hume recognises, was a case of recklessness, 'as he could not but see the hazard to the whole family'. In such circumstances, there is no need to invoke the doctrine of transferred intent. The doctrine is required where there is no recklessness regarding the actual crime - where the fire laid to A's house is carried to B's by sheer accident, or where C suddenly throws himself between A and B, in circumstances in which A could not have foreseen this, or at any rate where it was not so likely as to make A reckless. (cf. Brown, (1907) 5 Adam 312, where the accused sent a poisoned cake addressed to his intended victim which was actually eaten by the latter's servant. The indictment simply libelled the intent to poison the person to whom the cake was addressed and the actual death by poison of the deceased, and it was not suggested, so far as the report shows, that it was necessary to ask if the accused should have foreseen the likelihood of anyone else eating the cake. The indictment certainly suggests that the charge was based on pure transfer of intent. The case, however, was fought on the ground of insanity, and although an example of, is not an authority on, transferred intent.)

(2) The doctrine depends on the idea of general mens rea. It is made so to depend by Hume (ib), and the only reason it has not been seen to conflict with the Scots attitude to transfer between crimes is that until the Homicide Act of 1956 (5 & 6 Eliz. II, c.11) all victims were legally equal.

(3) The law as stated by Hume can lead to some most peculiar situations. It means that if a man shoots at his wife, and the bullet ricochets and kills his child, who has suddenly come into the room, he is guilty of murdering the child. But if he were about to shoot his wife because he had found her in adultery, he would only be guilty of culpable homicide, since the killing of his wife would only have been culpable homicide. The doctrine means that a man may be convicted of murdering someone of whose existence he was unaware, or 'to whom he bore all manner of regard' (Hume, ib.). For these reasons the doctrine is objectionable (cf. Gl. Williams, paras. 34-5), and for these reasons it is unlikely that a jury would ever follow it, as Hume appears to have suspected when he said that the change of victim 'ought' not to affect the jury. The obvious solution is that adopted by German law - to convict A of the attempted murder of B, and of the negligent homicide of C, if he was negligent quoad C (H. Mannheim, 'Mens Rea in German and English Law', (1935) 17 J. Comp. Leg. and Int. Law, 83, 246; cf. Schönke-Schröder, p. 309).

(4) The real difficulty, as Mannheim points out (op.cit. loc. cit.) is to justify the distinction between error in objecto and aberratio ictus. Why should the person who aims at B believing him to be C be in a worse position than the person who aims at B and hits C because he is a bad shot? It may be that both should be treated

alike, but it can at least be said that it is easier to treat the bad shot as only negligent, than it is so to treat the man who makes an error in objecto. It is difficult to speak of error at all in the case of aberratio ictus, where A does not intentionally shoot C under the mistaken belief that he is B. The simplest way of describing aberratio ictus, is to say just that A carelessly shot C, and it seems reasonable for the law to deal with the matter in that way. Where the error is in objecto it is more difficult, if not impossible, to distinguish the intended act from what happened, since both the intended and the actual shot, so to speak, have the same trajectory. To say that in error in objecto A intended to shoot the person in front of him is too simple, since in neither type of error did he intend to shoot C, and in both cases his shooting of C was in some sort an accident. But the conviction of A for murdering C does not seem so paradoxical in the case of error in objecto, perhaps because in such a case there will usually be an element of recklessness quoad C - a man should make sure at whom he is shooting, but he cannot always make sure that an outsider will not get in the way of his bullet, or that his aim will be perfect.

I can, finally, see no great objection to treating error in objecto as irrelevant error; and in practice it would be very difficult to arouse any sympathy for the accused in such a case. But I consider it objectionable to deal with aberratio ictus by way of transferred intent, because I consider transferred intent objectionable, and I see no great difficulty in treating such situations in the German way. After all, if A had aimed at a tree and accidentally or carelessly hit C instead, he would not be guilty of

murdering C. In cases of aberratio ictus it is easy to consider the situation without taking into account the original intention to shoot B - the intention to shoot B can be treated as no more important than the intention to shoot at a tree. To treat it as more important is very like adopting the old English doctrine of constructive malice.

(c) Transfer of intent between modes. The position here is the same as that where the transfer is between victims. The transfer can only properly be made when the modes are legally equivalent, and where the difference in mode is not so great as to destroy the causal connection between the criminal's act and the actus reus.

This type of transfer is probably only important in cases of art and part guilt. If A and B agree to rob a safe without using explosives, and B, whose job it is to do the actual safe-breaking uses explosives, A cannot be art and part in the aggravated crime of theft by explosives - unless, of course, that aggravated crime can be committed carelessly, and the circumstances were such that A ought to have foreseen that B would use explosives. The principle is simply that where the original conspiracy is so far departed from that a different degree of crime is committed from that planned, the original conspirators are not responsible for the deviations unless they participated actively in them.

Error of law.

Error of law is irrelevant. It is not a good defence to a criminal charge that one did not know that what one did was against the law, or that one thought that it was legal. Provided that one intentionally and voluntarily performed an act which was in fact

criminal, it does not matter that one thought it was not a crime.

The recent case of Clark v. Syme (1957 J.C.1) is an example of the irrelevance of an error of law. The accused was charged with maliciously killing a sheep, and pleaded in defence that he thought he had a legal right to kill the sheep because it was trespassing on his land. In rejecting this defence, Lord Clyde, the Lord Justice-General, said,

'If..it was not clear where the [accused] knew that by doing what he did he was doing or was likely to do damage, the Crown might fail; for the necessary wilfulness might not then be present. But in this case no such doubt could possibly arise. The [accused] in this case acted deliberately. He knew what he was doing...The mere fact that his criminal act was performed under a misconception of what legal remedies he might otherwise have had does not make it any the less criminal' (at p. 5).

Although the distinction between errors of fact and of law is clear, it is often difficult to say whether a particular error is one of law or of fact. Is a belief that a particular person is married, for example, a belief about law or about fact? The distinction between error of law and error of fact probably depends on whether or not error as to a general principle of law is involved. If A commits bigamy in the belief that his first wife has divorced him while in fact she has only obtained a separation decree, he acts under an error of fact - he knows quite well that a separation decree does not entitle him to remarry, but that a divorce decree does, and he believes that in fact his wife obtained a divorce. But if he knows that she only obtained a separation decree, and believes that this entitles him to remarry, his error is one of law - he knows the true facts but

wrongly believes that it is the law that a man whose wife has a separation decree is entitled to remarry. (Cf. Thomas v. R. (1937) 59 C.L.R. 279 where the accused believed his first marriage to be invalid because he mistakenly thought his wife had not obtained a decree absolute against her first husband, but only a decree nisi - an error of fact.) Again, suppose A has intercourse with his sister B in the belief that she is illegitimate. If this belief is based on a mistaken belief that at the time of B's conception her parents were not free to marry, then it is a mistake of fact; but if it is based on a mistaken belief that there is no such thing as legitimation per subsequens matrimonium in Scotland, it is an error of law. As Professor T. B. Smith points out (T.B. Smith, p. 712) there is no Scots authority for this distinction. But the general rule that error of law is no excuse is the law of Scotland, and it is submitted that if the need arose the distinction between errors of law and of fact would be defined in this way.

There may be cases in which even error of general law is relevant. If a crime can only be committed where the accused acts with a specific intention, that intention may be negatived by an error of law. Theft is the felonious taking away of someone else's property, and if the accused believes that the property is his own, he cannot be guilty of theft (Hume, i. 73-5. Dewar, 1945 J.C.5). In Dewar (1945 J.C.5) where the accused was the manager of a crematorium and was charged with stealing coffin lids it was held to be a relevant defence (although it was unsuccessful) that the accused believed that he was entitled to do what he liked with the lids after the bodies had been cremated, because they were ownerless scrap, and that it was the custom in crematoria for them to be regarded

as perquisites of the person in charge.

The basis of the irrelevance of error of law. The rule that error of law is irrelevant is very like the rule that in questions of moral responsibility a man's duty is to do what is right, and not what he believes to be right (see supra, 60). It is, however, difficult to justify the view that an agent is morally blameworthy for doing what was wrong in the belief that it was right, and even more difficult to justify the view that a man who does something criminal in the belief that it is legal, should be treated as if he had deliberately committed a crime. It is perhaps hardly plausible for the conscientious bigamist to say that he would not have committed bigamy had he known it was wrong to marry two wives at one time, because if he is truly conscientious he will not admit that it was wrong. But it is plausible for the bigamist acting under error of law to say that he would not have done what he did had he known it was a crime.

The real basis of the rule about error of law is probably that everyone has a duty to know the law - that ignorantia, or error, juris neminem excusat. This duty depends partly on ideas of disfacilitation - 'The law, which cannot know the truth of his excuse [that he thought he was acting lawfully], and which perceives the advantage that might be taken of such gross pretences, for the indulgence of malice, presumes his knowledge of that which he is not excusable for being ignorant of' (Hume, i.26). This is not altogether satisfactory. To presume knowledge where none exists is to introduce the idea of constructive malice. The most we can say of the accused who acted under error of law is that he should have found out the law before he acted, but his failure to do so can hardly involve responsibility for more than recklessness or

negligence - recklessness if he neither knew nor cared that what he was doing was unlawful, negligence if he came to an erroneous conclusion about the law. How then are we to justify treating the accused as if he had acted intentionally?

The only answer seems to be that it just is the law that all citizens must always take the risk that their actions will turn out to have been unlawful, since if this were not so, the result would be anarchy, and every man would make his own law. Probably the most that can be done to recognise error of law as relevant is to allow it to rank in mitigation of the crime, since it negatives 'malice' in the old-fashioned sense of the word (cf. supra, 268).

Unreasonable mistake:

For a mistake to be relevant it must be reasonable (Dewar, supra). This means that mistake is treated objectively. It is not enough that the accused acted under a mistaken belief, he must have acted under a mistaken belief which it was reasonable for him to have made. This is because of the principle of dis-facilitation. As Lord Cooper said in Dewar, 'this would be a very convenient world for criminals of all kinds if a man were to be free to commit an offence or a crime of any nature and then to come forward and in this Court, say that he did not believe it was a crime at all' (Dewar, 1945 J.C. 5, 9). (It is true that this is expressed with reference to errors of law, but the rule of reasonableness applied to all error, and Dewar's error was tantamount to an error of fact - cf. supra, 249).

The meaning of 'unreasonable'. The meaning normally attached to unreasonable is 'such that the reasonable man would not have so acted', and if this were its

meaning in the law of mistake the result would be that all careless mistakes would be unreasonable and irrelevant. Hall thinks that this is the law in America and points out that it is 'inconsistent with the ethical rationale of ignorantia facti; it is opposed to the prevailing rule of the Civilian system' (Hall, pp. 331-2). In Swiss and German law a person who acts under the influence of careless error is punished for negligence, provided that the act is one which is punishable when committed negligently (StGB Art. 59, SchwStGB Art. 20). Thus a man who steals as the result of a careless error will be free from guilt, but a man who kills as the result of a careless error will be guilty of culpable homicide.

The Scots law is not explicit on this question, but it is submitted that so far as careless errors are concerned its attitude is the same as that of German law. There are a number of cases in which persons who killed because of careless errors were charged only with culpable homicide. In Williamina Sutherland ((1856) 2 Irv. 455) the accused killed a child by folding up a bed in which, unknown to her, the child was lying. She was charged with culpable homicide, and accordingly her ignorance of the child's presence was regarded as irrelevant, but it was said that it would have been of 'vital consequence' had she been charged with murder, (Lord Cowan at p. 457). Again, in Edmund Wheatley ((1853) 1 Irv. 225), the accused killed someone by carelessly dispensing French instead of English quantities of a medicine, and in Wood ((1903) 4 Adam 150) death was caused by a chemist who carelessly did not read the labels on his bottles and so dispensed strychnine instead of medicine. In these cases the accused were not charged with murder but only with culpable homicide.

(cf. also A.B. (1887) 1 Wh. 532 where the accused discharged a gun he believed to be empty, and similarly, David Buchanan, April 1817, Hume i. 192).

It seems clear, therefore, that careless mistake or ignorance excludes intention. What then is meant by unreasonable mistake? An unreasonable mistake is one that no reasonable man would make, but the reasonable man in this instance is not identified with the reasonable careful man. To succeed in a defence of mistake an accused must have arrived at his mistaken belief 'on reasonable grounds' (Owens, 1946 J.C. 119 Lord Justice-General Normand, at p. 125), but that means only that he must have had 'rational and colourable grounds for believing' what he did believe (Dewar, 1945 J.C. 5, Lord Justice-General Normand at p. 12). Provided he has such grounds, he is allowed to draw a mistaken conclusion from them. The only objective limitation is that there is excluded 'that sort of belief, if such it may be called, which is directly in the face of law, and grounded only in the violent passions of the man, or his blind prejudices in his own favour', as Hume said in talking of a thief's erroneous belief that the stolen goods were his as of right (Hume, i. 74).

It seems that a mistaken belief will only be excluded as unreasonable if it has been arrived at in spite of the facts, and is without any objective basis at all; and such a belief could probably not be entertained without a reckless disregard of the true facts. In Crawford (1950 J.C. 67) it was said that for a mistake to be relevant it 'must have an objective background and must not be purely subjective or of the nature of a hallucination' (Lord Justice-General Cooper at p. 71). If it is a hallucination it will probably

be dealt with as an insane delusion, so that the only error which is in practice excluded as unreasonable is one which is based on an idea the accused has got into his head for no reason at all, something founded on 'fantastic notions of his own devising' (T.B. Smith, p. 712).

In principle there is no more ground for rejecting such a belief when genuinely held, than there is for rejecting a reasonable belief genuinely held, although of course it will be much more difficult to convince a jury of the genuineness of the former type of belief. Indeed, there can be very few cases in which a jury would accept such a belief where the accused is sane, and even in these cases the belief would probably be the result of culpable recklessness. The exclusion of the small class of unreasonable errors from the general law of error is therefore unlikely to lead to any considerable injustice.

Chapter 8: InsanityI - INSANITY AS A DEFENCE.

The Scots law on insanity as a defence to a criminal charge is unsettled and, indeed, in modern times it is almost unstated. There is no reported decision of the Court of Criminal Appeal on the subject; the reported cases conflict with each other, and are very few in this century; the evidence given to the Royal Commission on Capital Punishment is very vague. The general tendency of the law is to wash its hands of the whole matter, and abide by the decision of medical experts. Lord Cooper told the Royal Commission that, 'However much you charge a jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retired is - "Is the man mad or not?" (R.C. Evid. of Lord Cooper, Q. 5479). Lord Cooper's own suggested test 'Is he not responsible for his actions by reason of a defect of reason?' (ib. Q. 5475) does focus attention on responsibility rather than on madness, but it is not more explicit than 'Is he mad?'. It asks a different question, but gives no help in answering it.

At the same time it is still felt that there is a legal criterion somewhere by which it can be determined whether or not a man is legally irresponsible as a result of insanity, that not all insane men are irresponsible; although no one can say what the criterion is, or just what types of insanity do render a man irresponsible. In this state of affairs I deal with the subject by discussing generally the problems raised by insanity, before turning to the Scots cases on the subject, and I conclude by giving some necessarily

very tentative indication of what the present law on the subject is.

Insanity and irresponsibility.

The basis of the defence of insanity.

Insanity is recognised in all advanced systems of jurisprudence as a factor which may prevent a person's being held responsible for his actions. Violent disputes have raged on the question of what degree or type of insanity is necessary or sufficient to free an accused from criminal responsibility for what would otherwise be crimes. These disputes have been intensified and very much complicated by the great advances made in our knowledge of the human mind and its motivations in the past half century or so, but they were present long before that. In 1800 in defending James Hadfield, who had shot at the King in order that he might be hanged and so obey Divine command to sacrifice himself without incurring the sin of suicide, Erskine said, 'It is agreed by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions; and that the deprivation of reason acquits him of crime. This principle is indisputable, yet so fearfully and wonderfully are we made,...so difficult is it to trace with accuracy the effect of diseased intellect upon human action, that I may appeal to all who hear me, whether there are any causes more difficult, or which, indeed, so often confound the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment' (Jas. Hadfield, (1800) 27 St. Trials, Col. 1281 at Col. 1309-10).

Legal and medical insanity. It has been said that criminal responsibility is 'purely an artifact of the law', and that it cannot therefore be directly affected by new psychological knowledge (cf. G. Ellenbogen, 'The Principles of the Criminal Law Relating to Insanity', (1948) J. of Cr. Sc. Vol. I, 178, 192). This view can lead to a sharp distinction between what are sometimes known as legal and medical insanity, though the distinction is really between legal responsibility and medical insanity. The law is concerned to know not just whether the prisoner was insane when he committed the crime, but also whether his insanity was such as to render him legally irresponsible. Just as a certified lunatic can make a good will in a sane interval, or a person suffering from delusions about his paternity contract a good marriage, so a certified lunatic may be responsible for committing a crime in a lucid interval, or the person suffering from delusions be responsible for his actions when these are concerned with something unconnected with the delusion. Insanity is simply a state of mind, a mental disease; what the law is concerned with is the accused's responsibility, and not his mental health.

But although the law asks 'Is he responsible?', and not 'Is he mad?', and although that is a legal and not a medical question, psychological knowledge may be of great assistance in answering the legal question, since it can tell us whether the accused's mental state was such that he fulfilled the requirements laid down by the law as sufficient to render a person responsible or irresponsible. The law is, of course, entitled to say 'We only hold a man to be irresponsible when, as a result of mental disease, certain conditions, a, b, and c, are satisfied', and then it would not matter if psychologists proved that certain people in whom these conditions were

not present, were insane, because of the presence of other conditions, d, and e. But if the law wishes to keep pace with medical knowledge, and to conform to certain general principles of responsibility, such as the necessity for freewill as a precondition of responsibility, it will not adopt this approach, and psychology may lead the law to recognise that conditions d, and e, also exclude responsibility because, for example, they negative freewill in whatever sense the law understands that term. It will not matter then that at one time the law said 'A man is irresponsible only if his mental disease produces conditions a, b, and c', since these conditions will not be a closed class, but be capable of extension in the light of later knowledge. It is only if the original conditions are treated as ultimate and self-justifying that development is impossible - if they are regarded as conditions which exemplify the general principles of responsibility, then there is nothing to prevent additions being made to them. And if later knowledge shows that one or more of the original conditions are not such as to exclude responsibility, there is nothing to prevent them being subtracted from, either.

Insanity and other kinds of irresponsibility. One can regard the fact that an accused's irresponsibility arose out of his insanity as unimportant, except from the point of view of deciding how to deal with him after his acquittal. To say that a man is irresponsible because of insanity is just to say that he is irresponsible, and that the cause of his irresponsibility is insanity. The insane man is not irresponsible because he is insane, but because he fails to measure up to the standards of responsibility, in just the same way as the somnambulist is irresponsible. A man who is rendered

incapable of knowing what he is doing, is irresponsible because of his incapacity, whether this incapacity is the result of mental disease, or of some other cause.

The peculiar case of Ritchie (1926 J.C. 45) offers an example of irresponsibility caused by a mental condition short of insanity. R was charged with culpable homicide by reckless driving, and his defence was that 'by the incidence of temporary mental dissociation due to toxic exhaustive factors he was unaware of the presence of the deceased on the highway and of his injuries and death, and was incapable of appreciating his immediately previous and subsequent actions'. Lord Murray told the jury that 'Irresponsibility need not be confined to what to us is the most familiar example, viz., the case of a person who is, in popular language "out of his mind"' (at p. 48). His Lordship went on to describe the general basis of the defence of irresponsibility as amounting to this, that 'owing to some disordered condition of the mind, which affects its working the affected person does not know the nature of his act, or, if he does know what he is doing he does not know that what he is doing is wrong'. Accordingly, said his Lordship, turning to the facts of Ritchie, 'Where the defence is that a person who would ordinarily be quite justified in driving a car becomes - owing to a cause which he was not bound to foresee and which was outwith his control - either gradually or suddenly not the master of his own action, a question as to his responsibility or irresponsibility for the consequences of his action arises, and may form the basis of a good defence' (ib.). The jury accepted Ritchie's defence, and he was acquitted and discharged in the normal way since, not being insane, he could not be detained under the legislation dealing with persons acquitted on the ground of insanity.

Again, the ultimate reason for acquitting the man who is irresponsible because of his insanity is the same as that for acquitting persons who are irresponsible for other reasons, such as intoxication (if that is ever a ground of acquittal - see infra, *ch/p*), or because they acted under error of fact. A person is treated as irresponsible, either because the law recognises that in the circumstances it would be unfair to regard him as morally to blame, or because there would be no point in punishing him. Bentham includes insanity among those cases where punishment is inefficacious, because it could produce no preventive effect (Bentham, XIII, 9). In the same way the Parliamentary Commissioners of 1839 included the insane among those to whom the principle that the object of the penal law is the prevention of injury through fear of suffering has no operation. (7th Report of Her Majesty's Commissioners on the Criminal Law, 1842, Parl. Papers, ix, p. 17). As Dixon, J. said in R. v. Porter ((1936) 55 C.L.R. 182), 'It is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment'. The various theories and the cases on insanity must be viewed in the light of two questions, which may be just two sides of the one question - 'Is it fair to blame the accused?', and 'Is there any point in punishing the accused?'

Cognitive insanity and the M'Naghten Rules.

It was recognised comparatively early that madmen are subject to delusions - they saw things, or heard voices, they might believe that the devil was pursuing them (e.g. Robt. Thomson, June, 1739, Hume, i. 40), or that they had received Divine commands to sacrifice

themselves (e.g. Jas. Hadfield, (1800) 27 St. Trials, 1281). The simplest way to approach this problem was to treat insane delusions as analogous to errors of fact, with this difference, that the insane man, being ex hypothesi unreasonable, might successfully plead unreasonable error, and might plead error of law if he was incapable of knowing the law. If the accused killed a man in the belief that he was killing the devil he was entitled to be acquitted since it is, presumably, no crime to kill the devil.

The rules regarding the application of the law of error to the insane were schematised in the notorious M'Naghten Rules. These rules were set out by the English Judges in answer to questions asked by the House of Lords following the acquittal of Daniel M'Naghten on the ground of insanity, after he had killed the Prime Minister's secretary - whom he took for the Prime Minister - because he had an insane belief that the Government were persecuting him ((1843) 10 Cl. & F. 200). Despite their unusual origin they are regarded in England almost as if they were part of a statute; they are followed in Canada, New Zealand, India, Pakistan, Ceylon, and in parts of Australia and of the United States (see R.C. App. 9, paras. 3-5). They have been said to be the law of Scotland (Jas. Gibson, (1843) 2 Broun 332), although today they are probably not law in Scotland, or at any rate are not the whole Scots law on insanity. They set out clearly and definitely a particular legal attitude to what might be called insanity of the intellect, insanity affecting the patients' capacity of knowledge, and as such they merit consideration. They, or something like them, are almost bound to form part of any law which lays down detailed rules for judging the responsibility of the insane. In any

event, it is impossible to consider the subject of insanity in the criminal law in an English-speaking country without discussing them, although there is nothing new that can be said about them. They may be accepted, criticised, or rejected, but they cannot, perhaps unfortunately, be ignored.

The Rules. The essential parts of the Rules are as follows:

1. Persons who labour under partial delusions only, and are not in other respects insane, and who act under the influence of an insane delusion, of redressing or revenging some supposed grievance or injury, are nevertheless punishable if they knew at the time of committing the crime that they were acting contrary to the law of the land.
2. Every man is presumed to be sane until the contrary be proved.
3. To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the accused was labouring 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. If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.
4. A person labouring under a partial delusion only and not in other respects insane must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. (see 2 Broun App. 1).

The strength of the Rules lies not only in their similarity to the rules of the ordinary law of error, which makes them easily comprehensible to lawyers, and easy to use in legal contexts, but also in their apparent coincidence with ordinary moral judgment.

The core of the rules is the requirement that the insane person did not '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'. This seems to be in accord with moral thinking - if a man knows what he is doing and knows it is wrong, it seems proper to blame him for doing it. (I am not here concerned with the controversy whether wrong means morally wrong, or contrary to law - that difficulty can be left to Anglo-American lawyers - see R. v. Windle [1952] 2 Q.B. 826). 'You knew what you were doing and you knew that Mummy said you weren't to do it' is a familiar enough justification for punishment.

Indeed the rules might be thought to be quite indulgent to the criminal in some cases. They appear to adopt a subjective attitude to right and wrong, and allow the defence that the accused did not know he was doing wrong: if Himmler had suffered from a mental disease which led him to believe that it was right and proper to exterminate certain people, he would be entitled to be regarded as morally irresponsible for his actings, were our moral judgments to be based on the same principles as are enshrined in the Rules. What more, it might be asked, can be demanded in the way of consideration for the mentally ill? Surely someone who knowingly does wrong must be regarded as blameworthy, and in adopting the Rules the law is merely reflecting this.

The weakness of the rules. The Rules rest however on assumptions now rejected by all psychologists. They depend on the view that a man can be insane with regard to one matter and perfectly sane in regard to everything else. They assume that while a man's judgment may be so warped that he believes his neighbour

is trying to make his impotent by black magic, he may yet be sane enough to be responsible for killing that neighbour (cf. Taylor's Principles of Medical Jurisprudence, 11th edn. pp. 577-8). But 'a delusion is never an isolated disorder, but is, in fact, merely an indication of a more deepseated widespread disorder. It is for this reason that the subject of delusional insanity cannot ever be regarded as fully responsible for anti-social acts; it was a failure to appreciate this that led to the M'Naghten Rules' (Smith & Fiddes, Forensic Medicine, 10th ed. p. 379).

The Rules concentrate entirely on knowledge, and assume that the knowledge of an insane man is the same as that of a sane man; that the sufferer from delusions who knows that it is wrong to kill his imagined persecutor knows this in the same way as a sane man knows it is wrong to kill his real enemy. The Rules say that the test of responsibility is knowledge of right and wrong, and that therefore an insane man who knows right and wrong is responsible. But it is not possible to treat this knowledge in isolation from the diseased part of the accused's mind, or to regard it as sane knowledge. It is tempting to say that 'However mad he was, he was sane enough to know he was doing wrong', but to do so is to forget that his knowledge will have been tainted by his insanity.

The strict application of the Rules leads to some peculiar results. Hadfield, for example, was so clearly insane that after the defence evidence had been led the Judge advised the Crown to accept a plea of insanity, but he knew he was doing wrong - that was why he did it, he wanted to be hanged. M'Naghten himself might not have been regarded as irresponsible in terms of the

Rules, for had his delusion been real, had the Government really been persecuting him, that would have been no excuse for murdering the Prime Minister. Cases like Hadfield ((1800) 2/ St. Trials, 1281) show how ridiculous the Rules can be in operation. As Maudsley said of a similar case in which the Judge applied the rules, and said the accused's desire to be hanged showed that he knew the nature and consequences of his act, 'He was in due course executed; the terrible example having been thought necessary in order to deter others from doing murder out of a morbid desire to indulge in the gratification of being hanged' (Maudsley, *Responsibility in Mental Disease*, 159).

Even if we leave aside the Utilitarian aspect of the matter, and concentrate on the idea of blameworthiness, the Rules will clearly not do. An example of this is the case of Straffen who killed little girls to annoy the police, i.e. in the knowledge that it was wrong to do so. A medical witness said of him that 'He might be likened to a child who burns some very valuable documents because he likes to see them blaze, but who does not appreciate that they are valuable, although he knows it is wrong to do it' (Trials of John Thomas Straffen, ed. Fairfield and Fullbrook, p. 182). It seems clearly wrong to blame Straffen for what he did in the same way as one would blame a sane man who went about killing little girls.

'Sane understanding'. This objection to the Rules can be met without fundamentally altering them, and without recognising any form of insanity other than intellectual insanity. All that is needed is to recognise that an insane man cannot reason properly, and thus can never know the nature and quality of his act, or its wrongness, in the way a sane man would. The result of this would probably be to make it the law

that to be responsible a man must have 'a sane understanding of the circumstances of his act', with the corollary that no certifiably insane person could have such an understanding. This would be in line with the Faculty of Advocates' view of the modern Scots law as expressed in their Memorandum to the Royal Commission (R.C. Evid. Memorandum of Faculty of Advocates, para. 12). It would also accord with the views expressed by Dixon, J. in his dissenting judgment in the Australian case of R. v. Sodeman ((1936) 55 C.L.R. 182, at pp. 189-90), where he said, 'In general it may be correctly said that, if the disease or mental derangement so governs the faculties that it is impossible for the particular accused to reason with some moderate degree of clearness in relation to the moral quality of what he is doing, he is prevented from knowing that what he does is wrong'.

The same result could perhaps be achieved by concentrating on the need for the accused to know the quality of his act. It could be said that an insane man cannot know the quality of his act, because he cannot have a sane appreciation of its nature. Straffen, for example, knew he was killing, but did not know the quality of his act, in the sense that he did not appreciate the seriousness of what he was doing. (He was nonetheless convicted, but that may have been because he had done the same thing before and succeeded in a plea of insanity in bar of trial, and public feeling ran high. He was not hanged but reprimanded and sent back to the mental hospital from which he had escaped.)

Volitional insanity and irresponsible impulse.

If the Rules are regarded as a complete statement of the law on insanity, and not merely as a formulation of the rules regarding delusional or cognitive insanity,

they are open to a much more fundamental objection than their failure to recognise that knowledge of right and wrong is insufficient unless accompanied by a sane understanding of the circumstances of the crime. They are open to the objection that they treat man as a purely cognitive being, and ignore the volitional and emotional aspects of human nature. Modern psychology recognises that a man may be sufficiently disturbed emotionally to be insane and yet have his intellectual faculties unimpaired as such. Henderson and Gillespie point out in their textbook that 'There is no mental disorder, however partial in appearance, that does not have its reverberations throughout the rest of the affected mind. Consequently, the purely intellectual criterion of responsibility falls to the ground, for the intellect as intellect may be unimpaired, but an emotional disturbance will alter or impede or nullify its effect on conduct. Conversely, intellectual defect means deficient emotional control' (D.K. Henderson and R.D. Gillespie, Textbook of Psychiatry, 7th edn. p. 713). Since the criminal law is not concerned with thought but with conduct, any rules regarding responsibility which ignore volition cannot be satisfactory.

The obvious solution to the problem is to add to the Rules a statement that where an accused is incapable of controlling his actions as a result of mental disease, he shall not be regarded as responsible. This seems to follow from the general rule that a person cannot be blamed for failing to do the impossible; and also from the Utilitarian consideration that punishment or the threat of it will no more persuade a man to resist an irresistible impulse than it will persuade a one-legged man to win an Olympic race. Irresistible impulse is

accepted as a defence in parts of Australia, in South Africa, in Germany, and in Switzerland. (See R.C. App. 9, paras. 3-12; StGB art. 51. Incidentally it is not accepted in France. Although Art. 64 of the Penal Code, which deals with insanity, also talks of 'contraint par une force a laquelle il n'a pu resister', this has been interpreted so as to apply only to external compulsion - Donnedieu de Vabres, p. 200). The defence is normally given expression by reference to a disease which renders the accused incapable of acting according to his knowledge of the wrongness of the act (e.g. StGB Art. 51 - Eine strafbare Handlung ist nicht vorhanden, wenn der Täter...unfähig ist, das Unerlaubte der Tat einzusehen, oder nach dieser Einsicht zu handeln'). It is probably accepted in Scotland (see infra), although it has been rejected in England as 'fantastic' (R. v. Kopsch, (1925) 19 Cr. App. Rep. 50, Lord Hewart, C.J. at p. 51); it has, however, the support of the Royal Commission on Capital Punishment (R.C. Recommendation 18).

The objections to the acceptance of irresistible impulse. Two difficulties face any attempt to incorporate the defence of irresistible impulse in the law. The first is the very fact that it is a defence of a volitional nature. The law is familiar with defences based on faults of cognition, but irresistible impulse 'introduces a volitional exemption from liability which is unknown to law' (G. Ellenbogen, op.cit. p. 271). Motive is always regarded as irrelevant to responsibility - it does not matter whether A steals out of greed or to save his starving baby - and irresistible impulse is a defence that the motive of the crime was the desire to commit the crime. It should be obvious, however, that where this desire is the result of insanity,

the question of motive does not really enter at all, unless insanity is to be described as a motive. And if we say the motive was insanity, it should be obvious that that means that the accused was not responsible, since, so to speak, 'Twas not Hamlet wronged you but his madness'.

The second difficulty is one of proof. Psychiatrists find irresistible impulse an unsatisfactory concept (cf. A. M'Niven, 'Psychoses and Criminal Responsibility' in *Mental Abnormality and Crime*, p. 8, at pp. 68-71; R.C. Evid. of D.K. Henderson, Q. 6481). It is very difficult for a doctor to say that a given impulse was irresistible, even if it can be said in general that 'there are cases of mental disorder where the impulse to do a criminal act recurs with increasing force until it is, in fact, uncontrollable', a view which was accepted by the Atkin Committee in 1923 (*Report of Committee on Insanity and Crime, 1923, Comd. 2005, p. 8*). For most lunatics are capable of submitting to some sort of control - as Maudsley said, that is why asylums are quiet places. (Maudsley, op.cit. p. 271). Even if the impulse in question was uncontrollable, punishment may assist the control of future impulses of a like nature, and imprisonment will almost certainly remove the temptation which provoked the impulse, and render satisfaction impossible.

Judges who are opposed to the defence of irresistible impulse use the difficulty of proof in order to employ the principle of disfacilitation to counter any attempt to introduce the defence. As usual, the use of the principle is not conducive to sound thinking. In opposing a Bill intended to introduce the defence into English law, Lord Hewart said that it was impossible to distinguish irresistible impulse from the desire for gain or revenge (Hansard,

House of Lords, 15 May 1924, Vol. 57, Col. 468); Lord Haldane said it should not be made a defence, and assured the House that no-one who killed under such an impulse was likely to be hanged (ib. col. 472); while Lord Dunedin said that the defence was not countenanced by Hume (since Hume was last edited in 1844 this is neither relevant nor surprising; it may not even be correct, see infra), and that it would 'open the door to subterfuge and impede the proper carrying out of the criminal law' (ib. col. 475). Lord Dunedin did not tell the House that the defence had been introduced into Scots Law at least as early as 1853 without any notable impediment being created. Again, in his charge to the jury in the case of Neville Heath, Morris, J. said 'an inability to resist temptation is not of itself insanity...The plea of insanity cannot be permitted to become the easy or the vague explanation of some conduct which is shocking merely because it is also startling' (Trial of Neville George Heath, ed. Macdonald Critchley, p. 218).

The need to recognise the defence. Unless the law is prepared to say that there is no such thing as irresistible impulse it is difficult to see how it can refuse to accept it as a defence, at any rate where it is 'so irresistible as to leave the accused in no better position to withstand it...than if some physically stronger person had by mechanical compulsion directed his hand' (Gardner and Lansdowne, South African Criminal Law and Procedure, 5th edn. Vol. I, p. 68). The existence and strength of any insane impulse must be regarded as a question of medical fact, just as the existence and strength of mechanical compulsion is regarded as a question of physical fact. To adopt any other attitude is to insist that the dogma of freewill

means that everyone is always free to do or refrain from any action in any circumstances, and that is a very extreme view. The fact, if fact it be, that no act can be responsible unless it is free no more entails the fact that all facts are free than does the fact that every husband must have a wife entail the fact that all men are married (cf. Hume, Treatise on Human Nature, I, iii, 3).

The only other approach which excludes irresistible impulse is a naive religious one, such as was adopted by Lord Hope in Scotland, when he told a jury that they might be sure that the accused was not tempted beyond what he was able to bear. But even Lord Hope recognised that an accused might be 'unable, by the visitation of God, to do what his duty to God requires - to struggle and overcome his passions, which every man possessed of reason may' (Geo. Lillie Smith, (1855) 2 Irv. 1, 62, cf. Jas. Gibson, (1844) 2 Broun 332, 361).

The defence of irresistible impulse may be described as the orthodox volitional addition to the Rules. It involves merely that in addition to the Rules, which remain the principal criterion, the law will recognise the defence of impulse. And the defence may be limited to cases of a single impulse operating on the accused at the time of the crime. Such an impulse is comparable to cases of extreme physical compulsion and so, like the Rules themselves, has an analogy in the law regarding the responsibility of sane persons.

The Causal Approach.

The best modern view on the problem of insanity and crime is that the question cannot be decided by reference to rules or formulae. This view is reflected in the recommendation of the Royal Commission on Capital Punishment that the Rules should be abrogated,

and the jury left to decide if the accused was 'suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible' (R.C., Recommendation 19). This is perhaps too vague, but the suggested position can perhaps be described by saying that wherever the accused's crime was caused by his insanity he should be treated as irresponsible. If the accused's conduct is caused by insanity, in the sense that it can only be explained, or can best be explained, in terms of his insanity, punishment would be pointless, because it would not affect the cause of the crime. Alternatively, it can be said that where the accused's crime is caused by disease, it is caused by something for which he is not to blame - unless he lives in Erewhon. If the answer to 'Why did he do it?' is 'Because he was mentally diseased', there can be no responsibility. And because every mental disease affects a person's whole personality this will always be the answer when an insane man commits a crime. Where the accused is mentally diseased, but not to the extent of being certifiably insane, it will be a question for the jury, on the medical and other evidence, to decide whether the disease was advanced enough to be accounted the cause of the crime - but this raises the question of diminished responsibility and is discussed infra (49). Thus the distinction between medical insanity and legal irresponsibility is blurred, and the rule becomes simply that the mad are not responsible.

Unless this type of approach is adopted it is probably impossible to include among the irresponsible those who act not on sudden impulse, but after long brooding on imagined wrongs, or on their own miserable condition, like the man who kills his family to save them

from the result of his poverty (cf. Sharp, 1927 J.C. 66) or the depressive who finally kills the girl he has seduced, or the woman who kills her child while suffering from puerperal insanity. This approach is implicit in present Scottish practice, but it is not expressly the law of Scotland.

Of the many countries whose laws were considered by the Royal Commission on Capital Punishment, only New Hampshire expressly adopted the view that insanity is to be decided on the facts without reference to any special tests. The law there is that 'Neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognise acquaintances, nor to labour or transact business or manage affairs, is, as a matter of law, a test of mental disease; but...all symptoms and all tests of mental disease are purely matters of fact, to be determined by the jury...Whether the defendant had a mental disease, and whether the killing of his wife was the product of such disease, are questions of fact for the jury' (State v. Pike, (1869) 49 N.H. 399, Doe, J.; R.C., App. 9). A similar view seems now to be taken by the Federal Courts in the District of Columbia where it has been held that an accused is not responsible if his crime was the product of mental disorder. This was said to be because 'The legal and moral traditions of the Western world require that...where [criminal] acts stem from and are the product of a mental disease or defect...moral blame shall not attach, and hence there will not be criminal responsibility' (Durham v. U.S. (1954) 214 Fd. 2d. 862, cited in H. Weihofen, *The Urge to Punish*, pp. 7-8).

The onus of proof. This broad view is open to the objection that it overturns the legal presumption that every man is responsible unless he establishes the contrary, since it presumes that where an insane man commits a crime the crime is the result of his insanity. The Medical Psychological Association suggested to the Atkin Committee that the proper direction to a jury should be that if the accused was insane they should acquit unless it was proved that the crime was unrelated to the mental disorder; But they agreed that this could never be proved, and suggested as an alternative that the Crown should have to prove that 'the mental disorder was not calculated to influence the commission of the act' (Report of Committee on Insanity and Crime, 1923, Cmd. 2005, pp. 4, 5). But if in fact there is a presumption that an insane person's crime was 'wholly or largely caused' by his insanity, then the law must take this fact into account (R.C., Recommendation 16, cp. R.C. para. 286). This means that once the accused has proved that he is insane, the Crown must displace the strong presumption that his crime was produced by his insanity. After all, there is no reason why the Crown, who must prove that an accused did not act in self-defence or under provocation, if the accused puts forward either of these pleas (Woolmington v. D.P.P., [1935] A.C. 462; Owens, 1946 J.C. 119), should not have to negative irresponsibility once the accused has not merely pleaded but actually proved the fact of his insanity. Indeed, if the presumption of fact is overwhelmingly strong, the onus probably is on the Crown in practice. For the accused need only prove his defence on a balance of probabilities, and it seems that on balance it will always be prima facie more probable that the crime was the result of the insanity, than that it was

unconnected with it. This might not be as favourable to the accused as the more logical rule adopted in parts of the United States, that it is enough for the accused to raise a reasonable doubt as to his sanity for the onus to be shifted (Weihofen, op.cit. p. 104), but it would probably work out well enough in practice, and it avoids the necessity of a frontal attack on the rule that the accused must displace the presumption of responsibility.

The advantages of the causal approach. The greatest advantage of the causal approach is that it enables the law to separate those whose crimes are committed from motives which are amenable to punishment, from those who require not punishment but medical treatment in order to prevent a recurrence of their crime - an advantage which is increased by the consideration that treatment of the insane is more likely to be effective than punishment of the sane. Strict adherence to any set of rules may result in the subjection of the insane to punishments designed to deter the sane, but useless when applied to the insane.

The causal approach has the further advantage that it avoids the difficulties of attempting to define what is probably indefinable - the relation between mental disease and responsibility. It is a flexible approach, and is sensible enough to leave the decision on the matter to those who know something about it - the medical experts. Only the doctors can know whether an accused is insane, and only the doctors can know whether he requires treatment or is amenable to punishment. Lawyers and doctors have always been suspicious of each other, especially in matters regarding insanity and irresponsibility.

Lawyers tend to throw up their hands in horror at the idea of questions of legal responsibility being decided by doctors. But this is a misleadingly naive attitude. The doctors do not decide responsibility; they only tell us whether the accused was sane or not, and if he was insane, whether his insanity affected his conduct. If it is the law that all insane criminals are irresponsible, this is a legal principle, just as much as the Rules are legal principles. All the doctors do is tell us if in fact the accused was insane, a fact the lawyer is incapable of discovering for himself. We may all consider ourselves amateur psychologists, and in the old days when only raving lunatics were regarded as insane (except under the Rules!) it might have been easy for a lawyer to know if a particular accused was mad or not, but today only an expert can pronounce on someone's mental health. The doctor who says the accused committed the crime because he was a certifiable lunatic suffering from paranoia is no more answering a legal question than is the doctor who says the deceased died from poison, or the handwriting expert who says a particular signature is forged; all they do is to give the law the facts to which the relevant legal principle is to be applied. And this is so whether that principle is about responsibility and insanity, or about the criminal nature of poisoning or forgery. It is only when the law leaves the criterion of responsibility to the doctors, either expressly, or because it is incapable of forming its own criterion (as may be the case in Scotland today) that we can talk of doctors deciding the law for us. The New Hampshire rule is no less a legal criterion than the Rules, although it is more intelligible -

even under the Rules it is usually necessary to call medical evidence to discover whether the accused knew that what he was doing was wrong.

The Scots cases.

From Hume to Lord Hope.

Hume states that for the plea of insanity to succeed there must be 'an absolute alienation of reason... such a disease as deprives the patient of the knowledge of the true aspect and position of things about him - hinders him from distinguishing friend or foe - and gives him up to the impulse of his own distempered fancy' (Hume, i. 37). It is interesting that this definition, written before M'Naghten was heard of, is typical of what may still be the Scots approach to the problem. We start off by setting a very high standard - absolute alienation preventing the patient from knowing not merely what he is doing, but what is going on around him, and then we tack on a remark which may or may not be capable of wider interpretation - that he should be activated wholly by the impulse of his own distempered fancy. Hume later distinguishes between 'want of temper' and 'alienation of reason', pointing out that 'To teach men to withstand the impulse of sudden rage, is one great object of criminal justice; and a person cannot be considered as incapable of this discipline, who lives at large, as a member of society, and gains his bread by the exercise of an ordinary profession' (*ib.* 41n.). We know now that as a statement of fact this is too wide, but it might be inferred from what Hume says that where someone is in fact incapable of this discipline, he is not a fit object of punishment. At any rate it seems to be going

too far to say, as did Lord Dunedin, that nothing in Hume countenances a defence of irresistible impulse (cf. supra, 339).

So far as the specific subject of delusions is concerned, Hume seems to take a rather broader view than that taken in the Rules. Hume says,

'And though the pannel have that vestige of reason, which may enable him to answer in the general, that murder is a crime, yet, if he cannot distinguish a friend from an enemy, or a benefit from an injury, but conceives every-thing about him to be the reverse of what it really is, and mistakes the illusions of his fancy in that respect for realities,...these remains of intellect are of no sort of service towards the government of his actions, or enabling him to form a judgment of what is right or wrong on any particular occasion. If he..is possessed with the vain conceit that his friend is there to destroy him, and has already done him the most cruel wrongs, and that all about him are engaged in a conspiracy to abuse him, as well might he be utterly ignorant of the quality of murder. Proceeding, as it does, on a false case, or a conjuration of his own fancy, his judgment of right and wrong is, as to the question of responsibility, truly the same as none at all. It is therefore...only as relative to the particular thing done, and the condition of the man's belief and consciousness on that occasion, that an inquiry concerning his intelligence of moral good or evil seems to be material - to the issue of his trial' (ib. 37-8).

It is not altogether clear what this means, but it could be argued that Hume is seeking for a criterion like that of a 'sane understanding' of what the accused is doing; a view supported by his earlier remark that insanity must be such as to exclude a 'competent understanding' of what the accused is doing (ib. 37).

Most of the cases of insanity which Hume cites with approval concern epilepsy or something like it, and the epileptic in a fit is a clear case of an irresponsible,

raving madman. (Sir Archibald Kinloch, 29 June, 1795, Hume, i. 39; Robert. Spence, 19 June, 1747, ib; Jean Blair, 14 March 1781, ib. 40. cf. Robt. Thomson, June, 1739, ib., who was subject to fits and who believed his victim was the devil). In David Hunter (13 March, 1801, Hume, i. 38) the accused believed his victim had smothered his mother, and was said accordingly to have been 'incapable of judging the propriety of his actions, or of reasoning with propriety upon them', which again sounds more like a criterion of 'sane understanding' than the stricter criterion of the Rules. Hume also seems to recognise the defence of puerperal insanity (ib. 41-2, and case of Agnes Crockat, 23 Jul. 1756, in which the accused was convicted, apparently, in Hume's view, because of the weak evidence regarding insanity, and reprieved), in which case he is in advance of the Rules and of Lord Hope (cf. Eliz. Yates, (1847) Ark. 238).

The first case after those in Hume reported at any length is that of William Douglas ((1827) Syme 184), who was found insane on a charge of wilful fire-raising. He had formerly been in a mental institution, and was said to be in such a condition that his disease could be rekindled by drink, and to have been unconscious of what had happened. The question of drink does not seem to have worried the Court, and the case contains no discussion of principle.

Eugene Whelps ((1842) 1 Broun 378) believed that he was a son of the Duke of York, and was the heir to the throne; he was also addicted to walking about bare-legged and bearded. The Lord Justice Clerk, Lord Hope, accepted the view that monomania of the kind the accused suffered from 'may proceed to such an extent as to amount to general insanity', but added that the insanity must be shown to have led to the crime, and that unless the accused was so insane 'as not to have been able to

distinguish between right and wrong! he was responsible (at p. 381).

The last case in this group is that of Adam Sliman ((1844) 2 Broun 138). He knew the distinction between right and wrong, but could not apply his knowledge to the particular case since he believed that there was a conspiracy to injure him by supernatural means. Apparently also he did not realise that his victim was dead. He was found insane.

Up to the time the Rules were promulgated in England it cannot be said that they formed the law of Scotland, for although the Scots law seems to have proceeded on similar lines, it had no rigid formula and, its operation, like that of the English law, seems to have been wider than would be allowed by the Rules.

Lord Hope and the Rules.

The introduction of the Rules as such into the law of Scotland was the work of Lord Hope, who was Lord Justice-Clerk from 1841 to 1858, and of whom it has been said that 'from the impetuous and despotic character of his will, and his total incapacity for philosophical inquiry' he should have avoided such difficult subjects as insanity (C. Scott, 'Insanity in its Relation to the Criminal Law', (1898) 1 Jur. Rev. 237, 241). He certainly seems to have taken a much narrower view of insanity than any other Scots Judge, and the driving force behind his attitude seems not to have been any psychological or legal principle, but a firm religious view that freewill was absolute, and that people must not be allowed to escape punishment for their sinfulness on the excuse that they were not responsible for their acts.

Lord Hope declared the Rules to be part of the law of Scotland in the case of Jas. Gibson ((1844) 2 Broun

332). Gibson set fire to a mill under the delusion that he was employed by a local aristocrat to punish monopolists, and that the Queen would herself set fire to the mill if he did not do so (see C. Scott, op.cit.). He also believed that he was acting under Divine command. Lord Hope told the jury that before they could find the prisoner insane they must be satisfied that there was an absolute alienation of reason. He then put the Rules into his own words as follows:

'The man must believe, not that the crime is wrong in the abstract (for most madmen do admit murder to be wrong, and punishable in the abstract) but that the particular act committed under the influence of the motive which seems to have prompted it, was not an offence against the law... [The question for the jury is] if the delusion really went to that extreme length that he thought the particular act was not only praiseworthy in itself (for that is not by any means sufficient) but not a crime against the law, for which he could be punished' (ib. 356-7).

As an example of what would be sufficient Lord Hope gave the case of a man believing insanely that his victim was going to kill him - i.e. an error which if reasonable would result in the acquittal of a sane man.

Gibson is also authority for the view that there can be a partial insanity which is irrelevant to the question of responsibility:

'The law does not recognise partial insanity in the ordinary sense of the term...if it appears.. that the panel, in reference to the particular act charged, and the motives which are thought (on the notion of insanity) to have prompted its commission, still well knew that he was punishable for his act, because it was an offence against the law, that is enough to negative insanity according to the rules of law' (at pp. 359).

Gibson also contains an explicit rejection of the defence of irresistible impulse -

'No such principle is recognised in law, as that a man, allowing a fancy or morbid feeling to get possession of his mind and temper, although it disturbs reason, while it does not overthrow it, will escape punishment, because, instead of resisting the temptations of such ill-regulated, morbid, distempered, and ungovernable feelings, passions, and prejudices, (whether called delusions or not) he gives way to them, and indulges in their gratification and satisfaction... The man chooses to commit the act, he gives way to the suggestions and temptations which are strong, only because he has long indulged in such thoughts. Rely upon it, he was not tempted above what he was able to bear' (ib. pp. 360-1).

The 'religious' attitude is prominent in all Lord Hope's pronouncements on insanity. He is convinced that the existence of temptation, however overwhelming, is only the result of the patient's own wickedness. He gave strong expressions to this view in the case of Eliz. Yates ((1847) Ark. 238), where a distracted and destitute girl drowned her ten-month old illegitimate child after the father had refused to support it. The jury were told,

'You are not...to allow yourselves to be led away by the false notions of what is insanity, which seem to be creeping if not into courts of justice, at least into moral discussions elsewhere. The gambler who destroys himself, because ruin is staring him in the face, is a responsible agent, and violates the laws of God. It is not insanity that is the cause of his crime, - it is the distempered and disordered workings of a depraved nature within him... There are many cases arising from moral depravity and moral wickedness, which pass in the ordinary language of life as acts of insanity which are nevertheless acts of a mind rebelling against the decrees of God' (ib. pp. 240-1).

It is interesting that the suggestion, which is hardly more than implicit in these directions, that insanity which is the result of the accused's own evil ways is irrelevant, was never taken up by the law - there

is no difference in legal responsibility between the man whose insanity is the result of syphilis, or even of drink, and the man whose insanity is the result of a wound received on the battlefield.

Lord Hope expressed views similar to those in Gibson (supra) in the case of George Lillie Smith ((1855) 2 Irv. 1 - the plea succeeded in this case), and the Rules were followed in at least two later cases, although without the religious overtones. They were followed by Lord Boyle in Geo. Bryce ((1864) 4 Irv. 506), where the accused, who was mentally subnormal, had killed a girl he believed to have been calling him a dirty blackguard. The test put in Bryce was whether he really believed 'something had occurred which would be a ground for taking away the life of this unfortunate girl' (at p. 526) - i.e. the test of error.

The Rules were also followed in Andrew Brown ((1866) 5 Irv. 215) by Lord Inglis who spoke of knowledge of the act committed, or of its nature, more or less in the words of the Rules (at p. 217).

The movement away from the Rules - 1852-69.

Although the Rules were being followed as late as 1866, there had been cases before then in which a broader view had been taken. This may be said to have begun as early as 1852 in the case of Isabella Blyth ((1852) J. Shaw, 567), where Lord Cockburn stopped the trial of the accused for matricide because he was satisfied of her insanity. It appears that she believed she was wasting away and going mad, and that she sometimes knew right and wrong and sometimes not. Nothing seems to have been said of her knowledge regarding the murder, and the case seems to be one of murder following on a period of depressive brooding, so that it cannot be brought within the Rules (no attempt was made to bring

it in) nor within the ambit of irresistible impulse.

In Denny Scott ((1853) 1 Irv. 132), in the following year, Lord Cockburn gave as one of the classes of insanity the case 'where the accused was under an impulse, so irresistible to him, that he was not a free agent. A man cannot be punished for doing an act, which, from mental disease, he could not avoid doing' (at p. 142).

Again, in John M'Fadyen ((1860) 3 Irv. 650) Lord Cowan told the jury that the law was as laid down in Gibson (supra), but went on to say that they must ask the question, 'Did the pannel possess intellect enough to know the distinction between right and wrong... Or, if he did know that distinction, was he under disability from want of sufficient rational power, to govern his actions, and to control his emotions and desires?' (at p. 665).

Finally, in this group, comes the case of Alex. Milne ((1863) 4 Irv. 301), in which Lord Inglis, after citing the Rules, said 'If you are once satisfied that this man was under the influence of insane delusions at the time this act was committed, you have no occasion to inquire farther, whether he knew what was right from what was wrong...because the law at once presumes that he cannot appreciate what he is doing' (at p. 343). This, of course, is an acceptance of the modern medical view that acts of an insane man must be presumed to be caused by his insanity, although it is restricted in its terms to cases of delusional insanity.

By the 1860's, therefore, there were at least two laws of insanity in Scotland, and whether or not an insane person was convicted was likely to depend more on what Judge happened to try him, than on any accepted legal principle. The conflict could only be

resolved by the reference of a case to the High Court, but naturally in a sphere where opinions were held as strongly as they were by Lord Hope, for example, the Judges preferred to apply their own ideas.

Lord Moncrieff and the causal approach.

In a series of cases in the early 1870's Lord Moncrieff, who was Lord Justice-Clerk from 1869 to 1888, attempted to clarify the law of insanity, mainly by rejecting any rigid criterion, and by emphasising that the law must keep up with the advances of science. If it is the law today that the only question a jury need ask in deciding the responsibility of an accused who pleads insanity, is 'Is he mad?', we owe that law to Lord Moncrieff.

The first case in which Lord Moncrieff discussed the question of insanity was Eliz. Clifton ((1871) 2 Coup. 73), who cut her two children's throats and then her own; the children died and she was charged with murder. Lord Moncrieff said,

'When the doctors speak of a person doing a thing from uncontrollable impulse, they do not mean an impulse which his mental constitution is not strong enough to combat, or an impulse which the individual will not control; but one which through mental disease he has not the power of controlling, and, in the doctors' view also, before a case can be brought under that category, mental disease must be proved to have been present... The question here is whether the unsoundness of the prisoner's mind prevented her from having the power to resist the impulse to kill her children when it occurred. It is certainly amply proved that there is such a form of insanity recurrent on pregnancy and lactation, and which is sometimes accompanied with homicidal and suicidal paroxysms. And if you can find that the pannel at the time of the commission of the crime, was labouring under such a paroxysm, I know of nothing in the shape of a legal proposition that can possibly prevent you from finding that she was of unsound mind' (at p. 93).

The whole tenour of this charge is in violent contrast to that of the charge in Yates (supra): on this matter Lord Hope and Lord Moncrieff belong to different worlds.

On the test of knowledge of right and wrong Lord Moncrieff said,

'I doubt this test will not advance us far; for the definition of what constitutes the knowledge of right and wrong, may be as hard as [the definition of her mental condition]. It must be in a sane knowledge'. (at p. 91).

In Archibald Miller ((1874) 3 Coup. 16) Lord Moncrieff gave the following direction:

'It is entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligation, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and may yet know well enough that an act which he does is forbidden by law...It is not a question of knowledge, but of unsoundness of mind. If the man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden. If a man has a sane appreciation of right and wrong, he is certainly responsible; but he may form and understand the idea of right and wrong, and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead' (at p. 18)

Lord Moncrieff again expressed his dislike of tests of insanity in the case of Jas. Macklin ((1876) 3 Coup. 257) where he said,

'It may be asked, what are the indications from which unsoundness of mind may be inferred? I can lay down no general test which can be applied to solve such a question. At one time lawyers were apt to avoid all difficulties by enquiring whether a prisoner knew right from wrong; and as, in point of fact, except in acute mania or idiocy, there are very few lunatics who do not know right from wrong in the sense of being capable of appreciating and even acting on the distinction,

much unreasoning inhumanity has been the result of this unscientific maxim. If it be said that a man is sane if he can form sound judgments on the subject of moral duty, that is only stating the problem in another form, and is not solving it; for a sane judgment on right and wrong can only be formed by a man of sound mind' (at pp. 259-60).

Lastly, in the case of Thos. Barr ((1876) 3 Coup. 261) Lord Moncrieff stressed that the problem was one of medical fact, and more or less expressly stated the causal criterion adopted in New Hampshire and the Federal Courts of the United States (cf. supra, 342). His Lordship said,

'A man is said to be of unsound mind when his mind is diseased, so that, in some at least of the ordinary relations of life, he is incapable, by reason of disease, of controlling his conduct and actions...

The question is, was this man's mind diseased - was he the victim of unsound thought - thought which was the product of the working of an unsound mind...

If the prisoner was acting under a conclusion that was not only unsound in the sense of not being well founded, but that it was a conclusion he had formed because his mind was insane, that, no doubt... would amount to evidence of insanity (at pp. 264-5).

The effect of these cases is to make the Rules quite irrelevant to the problem, and to replace them with the very general rule that the insane are not responsible for acts which are the product of their insanity. Lord Moncrieff's views accord with the views of modern psychologists and criminologists. Whether or not they accord with the view of the modern law of Scotland is a very difficult question. Judges have been loth to discard the misleading attempts at definition of which Lord Moncrieff spoke, and seem still to be attached to the Rules. Indeed, Lord Moncrieff may be regarded as an eccentric in this

branch of the law - a view which seems to have been adopted by Lord Keith when he said of the cases quoted, 'one Judge... a long time ago... more or less gave the go-by to the M'Naghten Rules' (R.C. Evid. of Lord Keith Q. 5190), which rather suggests that Lord Keith thought it was so long ago that little heed need be paid to it.

The modern cases.

The later cases are few and by no means clear. It seems that when a brief direction of a more or less formal nature was required, the Rules were treated as the best way of expressing the law (e.g. Alex. Dingwall, (1867) 5 Irv. 466, 476; Thos. Ferguson, (1881) 4 Coup. 552, 557; in both of which the live issue was one of diminished responsibility) but where insanity was dealt with in any detail, the common approach was by way of the Rules together with irresistible impulse. There is much to be said for the view that at any rate in the early part of this century the law was as stated by Lord Cockburn in Denny Scott in 1853 (1 Irv. 132, 142) - that insanity was relevant if it deprived the accused of the capacity to know he was doing wrong, or to know the nature and quality of his act; or if it deprived him of 'the power of controlling his actions, impelling him irresistibly to commit certain actions'. (This was said to represent the developed law in an article in 1916 'Insanity in its Relation to Crime', by H.H. Brown, (1916) 28 Jur. Rev. 119, 138. It seems still to be the law in about fifteen of the United States - see J. Soshnick, 'Insanity as a Defence' in 'Mental Illness and the Law', (1956) 36 Boston Univ. Law Rev., 254, 255.) Sometimes, however, as in M'Clinton ((1902) 4 Adam 1) the Judge

added to Denny Scott a reference to Miller (supra) without apparently realising that Miller represented a wholly different approach to the question, and could not just be tacked on to the Rules as could irresistible impulse.

There are a number of unreported modern cases which suggest that the influence of the Rules is still strong. It seems that many Judges start off with the Rules as the basic law of insanity, and then say something which sounds not unlike an admission of the defence of irresistible impulse, after which they may or may not add a reference to Miller (supra). As a result the only clear impression given is that the Rules are the law, though in some cases they may not be the whole law.

Macdonald is typical of this approach. He begins by stating the Rules, and gives the case of the man who believes he is acting in self-defence or killing an evil spirit as an example of someone irresponsible through insanity, and then quotes from Miller. (He also gives the impression that not only Gibson ((1844) 2 Broun 332) but also Milne ((1863) 4 Irv. 301) support the Rules (Macdonald, p. 9).)

In the case of Savage (Edinburgh High Court, 21 May 1923, reported on another point in 1923 J.C. 49) Lord Alness approved the passage on insanity in the third edition of Macdonald, which is in the same terms as that in the present edition. In Newall (Glasgow High Court, 18 and 19 Sep. 1927), Lord Alness adopted the same 'package' approach. He quoted Macdonald's statement of the Rules, and then quoted Milne, Dingwall, and M'Clinton, giving the general impression that the test was the Rules, and indeed he seems to have referred to M'Clinton in order to support the 'nature and

quality' test (Transcript of Proceedings, pp. 186 ff.).

Again, in 1933, in the case of Muir (Dumfries High Court, 11-13 April, 1933, reported on another point in 1933 J.C. 46), Lord Moncrieff said

'The old definition which has been again and again adopted is this - a man shall be released from the consequences of his criminal acts as not being responsible for them if he was insane in the sense of not being able to understand the nature or quality of the act... [or] if so insane that although he understands...the nature, or quality, of the act, he does not know that what he is doing is wrong... for example... one who knew that he was taking a human life but thought that he was a messenger from heaven to do so, and was obeying a divine order. That is an overmastering impulse associated with disease which makes a man no longer responsible for his actions' (Transcript of Proceedings, pp. 266-7).

This appears to confuse the second branch of the Rules with irresistible impulse, but is at least an improvement on Stephen's remark that 'If a special Divine order were given to a man to commit murder, I should certainly hang him unless I got a specific Divine order not to hang him' (2 H.C.L. p. 160n.).

The Rules die hard, but there are a number of cases in which they have been dispensed with. Perhaps the most important of these is Sharp (1927 J.C. 66). The point at issue was insanity in bar of trial, but the test was treated as being the same as that for the plea of insanity at the time of the crime. In Sharp the accused was intelligent and sane in most matters, but obsessed with the idea that the only way out of his poverty was to kill two of his children so as to relieve his wife of the burden of their support. He knew that this was criminal, but regarded it as a necessary sacrifice. Sharp was clearly suffering

from depressive insanity (cf. A. McNiven, op.cit. p. 15; W.C. Sullivan, Crime and Insanity, p. 41), but was equally clearly not insane in terms of the Rules. Nor could he be said to have acted under irresistible impulse - there was no sudden impulse forcing him to commit the crime at a particular time, but a course of brooding which culminated in murder. But his plea of insanity was sustained.

In Brown ((1907) 5 Adam 312), where the real question was again fitness to plead, Lord Dunedin dealt with the question of insanity at the time of the crime by 'telling the jury that they could acquit the accused on the grounds of insanity if they found that he was not 'really responsible for his actions' (at p. 346). In Cameron (Perth High Court, 11-12 June, 1946, see 1946 S.N. 74), where there was again a question of unfitness to plead as well as one of insanity at the time of the crime, Lord Birnam directed the jury on the latter point by merely telling them that if on the evidence they came to the conclusion that the accused had been insane at the time of the crime they should find accordingly. These cases are to some extent authority for the view that there is no legal test of insanity in modern Scots law. This view gains further support from the only recent reported case, although the defence there was that the crime had been committed during an epileptic fit, which is fairly clearly a state of irresponsibility on any view (Mitchell, 1951 J.C. 53). Lord Thomson, the Lord Justice-Clerk, said that in the circumstances there was no need for any detailed direction on insanity, and told the jury merely that since in a seizure, 'when the patient is subject to the attack, his consciousness is so clouded that he does not know what he is doing and consequently cannot be responsible

for his actions' (at 54), they need only ask themselves if in fact he was in a fit when he committed the crime.

The modern law.

On these authorities it is impossible to formulate any definition of the insanity which will be sufficient to render an accused legally irresponsible. It was suggested by the Faculty of Advocates in their evidence before the Royal Commission on Capital Punishment that the law would hold a man responsible if he had 'a sane understanding of the circumstances of his act' (R.C. Evid. Memorandum of Faculty of Advocates, para. 12), but this is question-begging, unless it means that all insane persons are irresponsible, in which case it should have said so. It also ignores the question of volition, and indeed the Faculty gave it as their view that 'internal compulsion was not a defence' (ib. para. 6).

The Rules loom large in the evidence of Lord Cooper and of Lord Keith. But it is not clear if this was because the Rules were regarded as a concise expression of the law of cognitive insanity, and adopted to that extent in Scotland, or whether it was just that they were a natural starting point for any discussion, especially in the comparative absence of modern Scots authority. Lord Cooper said at one point, '...if you had the whole fourteen Scottish Judges here and asked them to produce the M'Naghten formula they would probably not be able to because it is not part of our law. We talk about it, but we do not use it as an authoritative formula' (R.C. Evid. of Lord Cooper, Q. 5506), but neither Lord Cooper nor Lord Keith could produce such a formula.

Lord Keith said that '...the M'Naghten Rules would

be considered, but my impression is that the law is perhaps developing and is rather more flexible in that matter than it used to be, and that more regard would probably be paid to the actual evidence that was led by specialists on insanity, and that the jury would be directed in the circumstances of each particular case' (Q. 5189), which seems, with respect, to sum up the present unsatisfactory situation, although it gives little weight to the views of Lord Justice-Clerk Moncrieff.

Lord Cooper's evidence was that, if he had to direct a jury

'I am not prepared to say that I would charge in the exact terms of the M'Naghten rules...I would take as a broad rule only the third one, that insanity arises when a person is labouring under such defect of reason from disease of mind that he does not know the nature and quality of the act he is doing, or if he does know it, he does not know he is doing wrong...I would embroider and elaborate that a bit and not leave it as if the last word of the decalogue had been uttered in the M'Naghten rules, which are not part of the law of Scotland. You will appreciate my difficulty in answering more specifically because the question so rarely arises and in fact has never arisen in my judicial experience' (Q. 5465).

..However much you charge a jury as to the M'Naghten Rules or any other test, the question they would put to themselves when they retired is 'Is the man mad or not'' (Q. 5479).

The nearest Lord Cooper came to committing himself to any definite statement was to enlarge the Rules into a tautology when he said that in directing a jury,

'I would certainly have to give...an explanation of the essence of what is in the M'Naghten Rules, probably with some embroidery to the effect that the matter for their consideration was whether, on the expert testimony and the factual evidence the accused had shown the probability to be that he was not responsible for his actions by reason of a defect of reason' (Q. 5475).

But this, with respect, really tells us only that the burden is on the accused to establish his irresponsibility, and that he must do so not quite by reference to the Rules, but yet in some way by reference to the Rules, which, it is submitted, takes insufficient notice of Lord Justice-Clerk Moncrieff's rejection of the Rules altogether. (The Crown Office, incidentally, said that the Rules as laid down in Gibson (supra) represented the law, and here as elsewhere their Memorandum merely followed the inaccuracies of Macdonald - R.C. Evid. Memorandum of Crown Agent, App.(d) para. 2. This statement is sufficiently belied by Crown Office practice to lose all value, and the Crown Agent was constrained in his oral evidence to admit that the rules had been modified in some Judge's charges - Q. 1998).

Conclusion. All that can be said in conclusion is that although the Rules are not the law of Scotland, most of what is in them is the law; that anyone who would be irresponsible under the Rules would be irresponsible under Scots law; that there may be cases where a person though not irresponsible under the Rules, would be irresponsible in Scotland, and that these cases include irresistible impulse, and may include persons suffering from extreme depressive insanity, and probably include persons incapable of a sane understanding of the situation; and that as Lord Cooper said, anyone who is 'not responsible for his actions by reason of a defect of reason' is not responsible for them; and that it does not matter anyway since the jury will ask merely if the accused is mad. So far, therefore, as 'our friend the bad man' is concerned, the law is that if the jury think he is mad they will acquit him on the ground of insanity, and

that the Judge will leave them free to do so, either expressly, or by reason of the vagueness, inconsistency, or tautological nature, of whatever directions he gives on insanity.

II. INSANITY AS A PLEA IN BAR.

One reason for the absence of authority on the defence of insanity is the great use which is made of the plea of insanity in bar of trial. This is a plea that at the time of the trial the accused is, though insane, unable properly to instruct his defence. On such a plea the merits of the charge are not usually considered at all, and the only evidence led is evidence of the accused's mental state. If the plea is upheld the accused is not tried, but is ordered to be detained to await Her Majesty's pleasure, although he can be tried at a later date if he recovers his sanity (Bickerstaff, 1926 J.C. 65). It is thus distinguishable from the plea of insanity as a defence in three ways:- (a) it is concerned with the accused's mental state at the time of trial and not at the time of the alleged offence, and is quite independent of any question of the accused's responsibility for the offence; (b) a finding that the accused is unfit to plead tells one nothing about the circumstances of the alleged offence, and is quite neutral on the question of whether the accused committed the act charged; (c) it does not prevent the trial of the accused at a later date - except perhaps in the unusual case where the question of fitness to plead is decided by a jury (infra, 366).

The procedure.

The plea that the accused is unfit to plead may be stated by the defence or by the Crown, or may be raised by the Court ex proprio motu. Normally the plea is entered by the defence on information supplied by the Crown. Whenever there is any doubt as to the mental condition of a person charged with a serious offence the Crown authorities have him examined by mental specialists, and the result of these examinations, if they show that the accused is unfit to plead, are made available to the defence. (This procedure is not unlike that adopted in Massachusetts under the Briggs Law - R.C. App. 9, para. 19(c).) The doctors concerned are then led as defence witnesses. Their evidence is heard by the Judge alone, before the jury is empanelled, and is usually not challenged by the Crown, or indeed by the Court. The Judge then finds the accused unfit to plead and no trial takes place (cf. Renton and Brown, pp. 435 ff.).

This is the usual procedure, and is very common. Occasionally, however, things are not so simple. Where there is any dispute as to the fitness of the accused to plead, the practice may not be uniform. In one case where the accused maintained that he was fit to plead while the Crown offered evidence of his unfitness to do so, the matter was dealt with by the Judge in the ordinary way, and the accused found unfit to plead (Robertson, (1891) 3 Wh. 6). This procedure was declared to be competent by the High Court in Brown ((1907) 5 Adam 312), but the procedure actually adopted in Brown is the more normal one in such a case. That is to leave the matter to be decided by the jury who hear the whole evidence, and not merely that relating to insanity. This procedure has since been adopted in

two cases - that of Wilson in 1942 (1942 J.C. 75), and that of Cameron in 1946 (Perth High Court, 11-12 June, 1946, see 1946 S.N. 74).

Where the Judge is dissatisfied with the evidence, led in support of the plea at the preliminary enquiry, then, even where the plea is offered by the accused and not opposed by the Crown, he may reject the plea, and in that event the jury are precluded from considering it, although they may of course still consider whether the accused was insane at the time of the crime (Russell, 1946 J.C. 37, 45, where the Appeal Court criticised the trial Judge for allowing the plea in bar to go to the Jury after he had rejected it). It is probably also open for the Judge to decline to decide the question, in which case it may go to the jury, or the matter may be continued to enable further information to be obtained for a subsequent additional preliminary enquiry. (Cf. Cameron, supra, and the Report of Proceedings at Perth High Court on 21 May 1946.)

The trial of the plea in bar by a jury. Where the question of the accused's fitness for trial goes to the jury they must decide whether the accused is fit to plead, whether he committed the acts charged, and if so, whether he was insane at the time of the crime. They hear all the evidence, and must decide the questions in that order, so that if they find that the accused was unfit to plead, they make no finding regarding his guilt or innocence (Brown, Wilson, Cameron, supra). This has the advantage that the accused is not judged in a trial at which he was unfit to plead, but it is open to two serious objections. In the first place it seems to be patently illogical and to be a waste of time, to have a trial before it is known

whether the accused is fit to be tried. (The Scots procedure is different from any procedure, such as is adopted on the Continent, for the purpose of preserving evidence against the accused's possible recovery - cf. T.B. Smith, 'Mental Abnormality and Responsibility in International Criminal Law' (1952) 37 Transactions of Grotious Society, 99, 105. In Scotland there is a proper trial, and any further trial is probably precluded).

Secondly, as Mr. J.R. Christie pointed out in an article in 1907 ('Insanity in Recent Criminal Practice', (1907) 19 Jur. Rev. 165) to which I am indebted for much of the material in this part of this chapter, if the accused is found unfit to plead he is detained as a criminal lunatic. Mr. Christie says that in the case of Brown (supra) the verdict would have been at least not proven had the accused been fit to plead. In other words the accused was denied his right to an acquittal, and was treated in the same way as if he had committed the act charged while insane. His position is worse than that of the person whose unfitness to plead is determined by the Judge in the normal pre-trial procedure. In the latter case it is clear that there is no question of any decision having been reached on the merits of the charge, but in the former case the facts have been put before the jury, and the man in the street may well regard the accused as having committed the act charged since he has been dealt with as a criminal lunatic after trial by jury.

Whether the position of the person found unfit to plead by a jury is, in addition, 'legally' worse than that of someone found unfit to plead by a Judge depends on whether there is any possibility of the former's being retried and so having a chance to assert his complete innocence of the acts charged. According

to Renton and Brown the course to be adopted when a jury find the accused unfit to plead is to desert the diet pro loco attempore as is done when a Judge decides the matter, so that a later trial remains possible (Renton and Brown, p.440). But in Brown ((1907) 5 Adam 312, 346) the diet was deserted simpliciter, so that any retrial was rendered impossible, and Brown was deprived of any chance of his asserting that he had nothing whatever to do with the murder.

The meaning of the plea.

In the normal case where the plea is disposed of without a jury, the Court accepts the expert evidence that the accused is unfit to plead. (Exceptions to this are very rare, but one occurred in the case of Cameron - Perth High Court, 21 May, 1946, see 1946 S.N. 73 - where the diet was deserted pro loco et tempore after the Judge had expressed himself dissatisfied with the medical evidence. The plea in bar was withdrawn at the subsequent diet, and a plea of not guilty entered. The evidence of the accused's mental condition was none the less left to the jury who held that he was fit to plead. The evidence of insanity at the earlier diet was slight being based on the accused's lack of awareness of his position, which was said to be pathological, and on his having attempted suicide. He was able to offer an account of the killing which he said was accidental and he subsequently gave evidence to that effect. Nevertheless his plea of insanity was sworn to by the superintendent of Perth Criminal Lunatic Asylum, and Lord Cooper's refusal to find at any rate without further enquiry, that the statutory requirements had been satisfied, or to take 'the extreme step' of ordering the accused's detention, may have been due to the fact that one expert had read the other's report before giving

his own. Lord Cooper expressly refrained from commenting on the medical evidence.) No questions of law are raised, and the witnesses are usually asked if they think the accused is capable of instructing counsel or of understanding evidence. As a result, as Lord Cooper told the Royal Commission on Capital Punishment, 'If Sir David Henderson and one or two other alienists are satisfied that he is inane, then the thing is finished' (R.C. Evid. of Lord Cooper, Q. 5491). If the accused is unfit to plead, the whole question of responsibility is sidetracked, and as every insane person is regarded as unfit to plead, the question of the responsibility of the insane for their 'criminal' acts arises in practice only in the very few cases in which an accused who is sane at the time of his trial offers a defence of insanity at the time of the offence. The medical witnesses who support pleas in bar do not usually give evidence that the accused is insane in terms of the M'Naghten Rules or of any other criterion, but merely that he is unable to instruct a defence. Again, in Brown ((1907) 5 Adam 312, 346) Lord Dunedin told the jury simply that they must decide whether the accused could 'maintain' in sober sanity his plea of innocence and instruct those who defend him as a truly sane man would do'. In Cameron (Perth High Court, 11-12 June, 1946 discussed supra) Lord Birnam told the jury merely that they must decide whether the accused was sane or not (Transcript of Judge's Charge, pp. 24-6). The law of insanity is therefore very flexible in practice, and is bound to develop along with the development of psychological medicine.

It cannot be said definitely what standards the medical profession adopt with regard to pleas in bar of trial. There seems little doubt that anyone who is certifiably insane, or is grossly defective mentally, will be regarded as unfit to plead (R.C. paras. 254, 342), and it can be said that, whatever the law, no certifiable lunatic is ever convicted of a crime in Scotland. It is probably also true that something short of certifiable insanity may in some circumstances be sufficient to set up a plea of insanity in bar of trial, but it is impossible to lay down rules or even definite standards. (Cf. e.g. Edwards High Court, Edinburgh, 6 Feb. 1958, unrepd. where the evidence of unfitness to plead seemed to amount, if my memory is correct, to little more than the evidence of psychopathic personality. The accused was a young man who had shot a policeman, and who was found unfit to plead.)

The general principle of unfitness to plead. The general principle behind the plea in bar extends to cases other than those of mental disease - in particular it may extend to deaf-mutes, or perhaps to people who speak a language for which it is impossible to find an interpreter. The basic principle involved is that everyone is entitled to a fair trial, and that the exercise of this right presupposes that the accused is capable of instructing a defence and of understanding the proceedings (cf. T.B. Smith, opcit. p. 104). A man who is 'unable either from mental defect or physical defect, or a combination of these, to tell his counsel what his defence is and instruct him so that he can appear and defend him; or if, again, his condition of mind and body is such that he does not understand the proceedings which are going on...and cannot

intelligibly follow what it is all about', is not in a fit state to be tried (Wilson, 1942 J.C. 75, Lord Wark at p. 79). Insanity is thus, in theory, only one of a number of conditions which may render a person unfit to plead, and there is no necessary connection between the insanity required to substantiate a plea in bar and that required to substantiate a defence of irresponsibility. In fact, however, there is no reported case of a successful plea of unfitness to plead founded on anything other than mental disease amounting to or approaching insanity.

The case of Russell. The nature of the plea in bar was considered in the case of Russell (1946 J.C. 37) which is the most recent authority on the question. The accused was charged with a series of frauds allegedly perpetrated between 1940 and 1943, and when she came to trial in 1946 she lodged a plea in bar of trial on the ground that she had suffered from hysterical amnesia for the period from 1937 to 1944, and could not remember anything about the alleged frauds, so that she was unable properly to instruct a defence. It was agreed that she was sane at the time of the trial. The Crown were initially prepared to accept the plea in bar, but after medical evidence had been led Lord Sorn rejected it. The accused was then tried by the jury on the plea in bar, a plea of not guilty, and a special plea of insanity at the time of the offences and was convicted.

Lord Sorn rejected the plea because, he said, the accused 'could undoubtedly understand the charge, and [the plea] involves her capacity to appreciate the proceedings and there is no doubt of her capacity to appreciate them and to communicate with her counsel in the course of the proceedings' (at p. 39). The Court of Criminal Appeal supported these views and

refused to apply as a general rule Lord Dunedin's statement in Brown ((1907) 5 Adam, 312, 344) that an accused who cannot clearly remember what happened at the time of the offence is unfit to plead. Lord Cooper, then Lord Justice-Clerk, said that the only effect of the accused's amnesia would be to increase the onus of proof on the Crown, so as to prevent the jury founding on the absence of any explanations by the accused (1946 J.C. 37, 45).

The ratio of Russell is that so long as a person can follow a trial and appreciate the nature of the charge made against him, he is fit for trial, even though he cannot, because of mental disease short of insanity, remember anything of what happened at the time of the alleged offence. It was pointed out that to allow the plea would mean that anyone who had committed a crime while drunk might escape trial by claiming that he could not remember what had happened (Russell, supra at p. 48). It may be, however, that a distinction can be made between persons whose loss of memory is due to drunkenness, and those whose loss of memory is due to mental disease; and it may also be that a distinction can be made between cases in which the facts are simple and easily ascertainable from third parties, as, for example, in cases of drunken assaults, and cases, like fraud, where the facts are complex and it is very difficult for counsel to defend the accused without having her explanation of the circumstances. It must be said that in Russell most of the evidence was documentary and not capable of innocent explanation, but although this was adverted to it does not seem to form part of the ratio decidendi.

Although the result of Russell seems inescapable, especially because of the unsatisfactory nature of the alternative, it is none the less a little disturbing. Acceptance of Russell is made more difficult because the decision proceeds in part upon the principle of disfacilitation. Lord Cooper said that two considerations were involved in deciding a plea in bar - 'fairness to the pannel, who should not be tried if and so long as he is not a fit object for trial', and 'the public interest which requires that persons brought before a criminal Court by a public prosecutor should not be permitted to purchase complete immunity from investigation into the charge by the simple expedient of proving the existence at the diet of trial of some mental or physical incapacity or handicap'. (Russell, supra, at p. 47).

It is submitted, with diffidence and respect, that the important thing is the nature of the handicap, provided it be a genuine one; an accused person should not be put on trial if the handicap is such as to prevent the trial being fair, just because this may encourage other people to pretend to unreal handicaps. There is a tendency, perhaps based on the justified reputation of the Crown Office for fairness, to regard the accused person in such a position as guilty, and as 'getting off' by means of the plea in bar. It would be more logical, even if less often true, to regard him as an innocent person deprived by his handicap of the opportunity of establishing his innocence. These considerations, however, lead to a discussion of the way in which persons unfit to plead are dealt with.

III - THE DISPOSAL OF INSANE ACCUSED.

The procedure for dealing with insane accused is laid down in the Lunacy (Scotland) Act, 1857, (20 & 21 Vict., c.71) sections 87 and 88. Section 87 provides that a person found unfit to plead shall be detained 'until Her Majesty's pleasure be known' (i.e. at the disposal of the Executive), and in a criminal lunatic asylum, now known as a State Mental Hospital (Criminal Justice (Scotland) Act, 1949, 12, 13 & 14 Geo. VI, c.94, s.63(2)). Section 88 provides that where a person is tried and found to have been insane and irresponsible at the time of the crime, the jury shall find that he committed the acts charged but that he is not guilty by reason of insanity (see Mitchell, 1951 J.C.53). He is thereupon ordered to be detained in the same way as the person found unfit to plead. These provisions raise difficulties and are open to a number of objections to which I now turn. (Cf. J.R. Christie, 'Insanity and Recent Criminal Practice', (1907) 19 Jur. Rev. 165, which deals with most of these objections.)

Where the accused is acquitted on the ground of insanity.

The requirement that an accused who is acquitted because of insanity shall be sent to a State Mental Hospital presumably rests on the assumption that such a person is insane at the time of his acquittal - an assumption which is contrary to the provisions of section 87 which prevent his trial if he is insane. As a result the person who is ex hypothesi presently sane is ordered to be detained in a State Mental Hospital because he was insane at an earlier date. (It is very much as if acquittal on the ground of insanity is only regarded as a partial acquittal, and as if detention in a criminal lunatic asylum is regarded as

the type of punishment appropriate to such an 'acquittal', just as imprisonment rather than death is regarded as the appropriate punishment for persons committing homicide when of diminished responsibility; the illogicality of this is obvious, but that does not mean that it does not represent a prevalent legal attitude.) No doubt if he is sane at the time of his detention he will be immediately released, but this is a matter over which the Courts have no control, although their order could no doubt be produced to defeat any attempt made by the patient or his friends to secure his release.

In any event, what the Court is doing under section 88 is committing someone who has just been declared free of guilt to a criminal lunatic asylum and to the mercy of the authorities. The reductio ad absurdum of the whole procedure is seen in the case of Maclelland (Edinburgh High Court, 21 May, 1907, see J.R. Christie, op. cit. at p. 171). Maclelland was found unfit to plead in 1899 and committed to a criminal lunatic asylum: in 1907 he had recovered sanity and he was brought to trial so that he might have the benefit of a verdict of acquittal on the ground of insanity. The jury found him not guilty on the ground of insanity, and this man, who had just been declared innocent, was promptly returned to the place whence he had been discharged as sane! And his release therefrom depended just as much on the goodwill of the Executive as it had done during his first confinement. (The only result of this demonstration, so far as reported cases show, is that the Crown have not again adopted this course of action but have left the accused to bear the stigma of the charge, and liable to retrial.)

Since the person who is acquitted as insane is innocent, the justification for detaining him in an

asylum must be the same as that for detaining anyone else in an asylum - that it is necessary for his health and safety, and for that of the public. It may be that where the accused is a serious danger to society detention in an ordinary institution is insufficient and it is necessary to provide for his detention in a place specially designed for such persons, in a State Mental Hospital. (Cf. Donnedieu de Vabres, p. 206 where Professor de Vabres disapproves of the French system of treating insane criminals in the same way as ordinary insane people, because of the social danger and the special supervision necessary in the case of the criminal.) Such detention should be restricted, however, to the case of lunatics who are so dangerous that their detention in such an institution is necessary for the safety of society. (Cf. StGB Art. 42b, Schönke-Schröder, p. 164). Where the accused is not dangerous he could be released into the care of his relatives, as was sometimes done before 1857 (Hume, i. 44-5), or be certified in the ordinary way.

At present the criminal law takes note of the distinction between dangerous lunatics and others only with regard to summary procedure. Section 23 of the Criminal Justice (Scotland) Act, 1949 (12, 13 & 14 Geo. VI, c. 94) provides that where the summary Court is satisfied that an accused committed the offence charged, but is of unsound mind, and is a proper person to be detained, it shall order his detention in a mental hospital, or, if he is dangerous, and cannot be suitably detained in a mental hospital, in a State Mental Hospital. It is further provided that detention under this section shall be similar in effect to detention under sections 14 and 15 of the Lunacy (Scotland) Act, 1862 (25 & 26 Vict., s.54) respectively. These sections provide

respectively for the detention of ordinary insane persons, and of insane persons found by the Fiscal in a state dangerous to the lieges or offensive to public decency. (Section 15 is somewhat confusing in itself, and may be regarded as at any rate quasi-criminal. But it does provide for enquiry into the patient's condition and for representations by any of his relatives who object to his committal - see M'Knight v. Ramsay, 1935 J.C. 94).

These provisions, it is submitted, are preferable to those of the 1857 Act, since they do not treat the insane accused as a criminal, but as an insane person who happens to be brought before the Court and so can be conveniently dealt with there; and also because they allow the detention only of dangerous persons in State Mental Hospitals. There seems no good reason why these provisions should not be applied to solemn procedure.

Where the accused is unfit to plead.

The same considerations apply to persons found unfit to plead. Section 15 of the 1862 Act is sometimes used to deal with such persons, but in serious cases, the usual practice is to bring them before the Court and apply the 1857 Act.

The objections to dealing with persons unfit to plead under the 1857 Act are even greater than the objections to dealing under the Act with those acquitted on the ground of insanity. At least the latter have been shown to have committed an act which would be criminal if committed by a sane person; the person found unfit to plead is treated as if he were a criminal lunatic, and sent to an institution specially designed for criminal lunatics, there to remain at the discretion of the Executive - all without trial.

It seems clear that dangerous lunatics who are unfit to plead should be dealt with under section 15 of the 1862 Act.

Where the accused is not dangerous there is no reason for not leaving him in the care of relatives, or having him certified in the usual way. In Walsh (1922 J.C. 82) an accused who became insane during his trial was handed over to his relatives. It is difficult to see why the accused who is never brought to trial at all should be in any worse position.

The objections to the present system appear even stronger when we consider the case of the sane person who is unfit to plead. The sane person who is acquitted on the ground of irresponsibility caused by a mental disease not amounting to insanity, is apparently discharged in the normal way (Ritchie, 1925 J.C. 45; cf. R. v. Kemp, [1957] 1 Q.B. 399); he is not detained in an asylum or anywhere else. According to Russell (1946 J.C. 37) the sane person who is unfit to plead cannot walk out of Court free with an absolute discharge which is reasonable enough so far as it goes, since an absolute discharge would mean that he could not be tried if he later became fit to plead. But it seems to have been assumed in Russell that he must therefore be detained, albeit not necessarily in an asylum, apparently indefinitely and at the whim of the Executive without recourse to the Courts. This is very high punishment indeed for being a deaf-mute suspected by the Crown Office of a serious crime. The reason for the attitude of the Court in Russell was the principle of disfacilitation - something must be done to discourage people from advancing unfounded pleas in bar of trial, and the way to do this is to make it plain that success in such a plea does not mean that the accused

'gets off'. (The obvious way of discouraging unfounded pleas is to reject them - as was done in Russell, rather than to behave harshly to those whose pleas are well-founded, but that is by the way) Lord Cooper said 'When fairness to the accused requires that the trial should not there and then proceed, the public interest equally requires that the accused should not there and then be virtually acquitted untried' (at p. 47). But surely it does not require that he be there and then virtually convicted untried, or at least treated as if he had committed the offence charged while insane.

It is submitted that the best course to adopt with regard to persons unfit to plead who are not dangerous or certifiable - whether as insane or as mentally defective - is to release them on bail, like any other untried accused; then they would be neither acquitted nor convicted without trial, nor would they languish in detention untried. The only objection I can see to this course is that murder is not aailable offence, but that can easily be remedied, especially as most murders are no longer capital offences. In any event, it should not be beyond the ingenuity of a willing legislature to make provision for the cases of murder and capital murder.

Chapter 9: Diminished Responsibility.The general principle.

The doctrine of diminished responsibility has been said to be so simple that 'it can be mastered by a simple morning's comfortable reading' (A. Koestler, *Reflections on Hanging*, p. 83), but it is not quite so easy to describe its precise status and scope. Essentially, the doctrine is that there are states of mind which, while they do not amount to insanity, are yet serious enough to affect a person's responsibility, so that, while not insane, he cannot be regarded as responsible to the same degree as a mentally normal person.

Is it illogical?

The doctrine has been criticised as being illogical because it offends against the principle of non-contradiction which requires that a man be either responsible or not responsible. 'The defence of impaired responsibility' said Lord Normand, then Lord Justice-General, 'is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and, if not sane, is not responsible' (Kirkwood, 1939 J.C. 36, 40). In a later case Lord Normand described the doctrine as 'anomalous' (Carraher, 1946 J.C. 108, 118). The result of this attitude which, incidentally, takes no account of the fact that the doctrine is recognised in, e.g. Germany, France, and Switzerland (see StGB Art 51, *Donnedieu de Vabres*, p. 208, SchwStGB Art 11), has been a tendency to treat the doctrine as a peculiar rule without any basis in general principle, and to refuse to extend its ambit beyond those particular types of examples of

diminished responsibility which have been recognised in the past. These examples are regarded, not as a species of a genus, but as each an ultimate type of diminished responsibility (or perhaps as examples of one type of diminished responsibility which is regarded as the only possible type), and the class of cases, like that of relatives entitled to sue for solatium (cf. Laidlaw v. N.C.B., 1957 S.C. 49), is considered to be closed. That at any rate is the purport of the leading case on the subject, the case of Carraher (supra), which will be discussed in detail later.

This approach to the subject fails to take proper account of the psychological basis of the rule, or of its place in the legal system. There is ample medical authority for the existence of states in which it is reasonable to talk of diminished responsibility. Degrees of mental illness produce degrees of culpability (cf. Norwood East, Society and the Criminal, pp. 37-9). Again, it is easy to appreciate that there may be cases of impulses which exert such an influence on the patient that he cannot be considered to be as much a free agent as the normal man, even although they may not be irresistible impulses. We are familiar at the present time with many serious mental illnesses which do not amount to insanity, and where these lead to crime, or influence the criminal's actions, it seems only reasonable to take regard of that fact.

So far as the legal system is concerned, diminished responsibility is only illogical if it is accepted a priori that a person must be characterised as responsible or as irresponsible, and that no further distinction can be made. This seems plausible, but if we substitute 'blameworthy', or 'punishable' for

'responsible', its plausibility diminishes, and the place of the doctrine becomes clearer. There is nothing illogical in distinguishing the degrees of blameworthiness or of liability to punishment of two persons who have joined together to commit the same crime. If A and B steal £1,000, A because he is greedy and wants a holiday in Monte Carlo, and B because he needs the money to pay his rent and save the life of his tubercular child, both are equally responsible in the sense that both are guilty of theft, but there would be nothing illogical in giving A a much heavier punishment than was given to B.

Diminished responsibility operates as a mitigating factor which justifies the Court in imposing a punishment which is less than the normal punishment for the particular crime, in the same way as does any other mitigating factor. The doctrine has come into prominence because it may operate to reduce a charge of murder to one of culpable homicide, so that a person who would be convicted of murder were he normal is only convicted of culpable homicide if he is of diminished responsibility. But this is just a particular application of the more general doctrine - in murder cases the Judge cannot reduce the sentence unless the jury first reduce the crime to culpable homicide, because the penalty for murder is fixed. This use of the doctrine 'is not anomalous, but was introduced to correct an anomaly in the law regarding punishment' (T.B. Smith, p. 728). It is merely a special case of the rule that personal factors mitigate sentence. (R.C. Evid. Memorandum of Faculty of Advocates, para. 13).

Were it not, however, for this peculiarity of the law of murder, it would have been unnecessary to have a doctrine of diminished responsibility. There are no legal rules on which a Judge must rely in deciding the amount of good character, or the number of dependent children, or years of distinguished service, a criminal must have before he is entitled to be treated with leniency. And diminished responsibility relates to the question of penalty. (Cf. SchwStGB Art 11, which empowers the Judge to 'impose a less severe penalty', where there is diminished responsibility - verminderte Zurechnungsfähigkeit.) The difficulty arises because murder and culpable homicide are thought of as different crimes, and it is thought therefore that diminished responsibility, which 'transforms' the one into the other, must be clearly definable. A similar situation exists with regard to provocation. But voluntary culpable homicide, and we are not here concerned with involuntary culpable homicide, is just another name for 'murder under mitigating circumstances' and so is no more different from murder than is assault committed under provocation from premeditated assault, or theft by a starving man from theft by a greedy one.

Diminished responsibility and the mens rea of murder.

None the less it must be recognised that the doctrine grew up in the context of the law of homicide, and that with a few exceptions it has not been expressly applied outside that context. It is unnecessary to have a doctrine for other crimes because normally there is no limit to the discretion of the Court in passing sentence for common law crimes; and conversely the fact that murder was until recently capital led Judges to seek a way of avoiding the death penalty in cases of mental weakness short of insanity. (Cf. what is

apparently the contrary situation in Germany. There diminished responsibility operates in general to allow a lesser scale of penalties to be applied than the scale set down for the given crime in normal circumstances. But since the punishment for murder is fixed, the doctrine cannot apply to it - Schönke-Schröder, pp. 285-6. If we start with a general idea, it is possible to restrict it to cases where the sentence is discretionary; but if we start with homicide or any crime with a fixed punishment, it does not seem logical to restrict it to homicide.) As a result it has sometimes been wrongly thought that the doctrine was in fact restricted to homicide (R.C. para. 413. It is so restricted in England - where it is statutory, Homicide Act, 1957, 5 & 6 Eliz. II, c11, s.2), and attempts have been made to explain it by reference to the law of murder.

This is usually done by pointing to some particular requirement necessary to constitute the mens rea of murder, and showing that a state of diminished responsibility excludes this requirement. Lord Ardmillan suggested in John Tierney ((1875) 3 Coup. 152, 166) that 'The man's control over his own mind might have been so weak as to deprive the act of that wilfulness which would have made it murder'. Again, Lord M'Laren in Abercrombie ((1896) 2 Adam, 163, 166) said that 'the accused may have been guilty of an attack... which was illegal and criminal, and yet may have done so without realising an intention of taking life'. But what is lacking in the case of a killing committed by someone of diminished responsibility is not mens rea in the strict sense of intent to kill - if that were absent there would be no need to have recourse to the doctrine in order to avoid a murder conviction - but

mens rea in the old sense in which it meant depravity of mind, or malice, the sense I call 'general mens rea' (supra 266). But the absence of malice cannot affect guilt; since it is only a question of motive, it can only operate as a mitigating factor.

The approach by way of mens rea of murder in the strict sense of mens rea is possible only in systems which define murder so as to include a particular element which is inconsistent with diminished responsibility. Where, for example, there are different degrees of murder, and the first degree - capital murder, so to speak - is defined so as to require 'wilful, deliberate, malicious and premeditated killing' (Hopt v. People, (1881) 104 U.S. 631), it may be possible to define diminished responsibility strictly, as a state of mind excluding these factors, and accordingly to class all homicides by persons of diminished responsibility as at most second-degree murders. Although voluntary culpable homicide is the Scots equivalent of second-degree murder, there is no definition of first-degree murder in Scots law, which includes any necessary element of malice or premeditation, or any other element which is lacking in the case of diminished responsibility. The concept of murder is to a large extent defensible, and murder can be defined as 'intentional homicide (or perhaps also reckless homicide) except where the killing is committed under provocation, or by someone of diminished responsibility, or...'. The positive mens rea of murder is present in cases of diminished responsibility; what makes these cases culpable homicide is the presence of another factor, the 'defeating' factor of diminished responsibility, and this factor must therefore be defined independently of the definition of murder. It follows also that this factor does not

operate to exclude guilt of murder since it is not inconsistent with the definition of murder, but only to mitigate the penalty of murder.

The doctrine is humanitarian. The ultimate basis of diminished responsibility is much broader than any legal inference whether from the law of murder or from the law of any other crime. The doctrine exists and is used because, as has been said of provocation, the law shows 'a tenderness to the frailty of human nature' (Comwth. v. Webster, (1850) 5 Cush. 296, Sayre, p. 785 at p. 788). In its particular application to homicide it is, in the words of Lord Keith, 'probably a reaction against imposing the capital sentence in all cases of murder, or what might be treated as murder if the defence of diminished responsibility did not prevail' (R.C. Evid. Q 5206). In a word, it is based on human sympathy with the mentally ill.

The development of the doctrine.

Its development up to 1900.

Before Dingwall. The idea of diminished responsibility occurred to Sir George Mackenzie who wrote:

'It may be argued, that since the Law grants a total Impunity to such as are absolutely furious, that therefore it should by the Rule of Proportion, lessen and moderate the punishments of such, as though they are not absolutely mad, yet are Hypochondrick, and Melancholy to such a Degree, that it clouds their Reason' (Mackenzie, Laws and Customs of Scotland in Matters Criminal, I, 1, 8, 2).

But although the idea was present in 1699 its development can only be traced from a later date. It seems to have started in practice with an understanding that certain cases of mental weakness should be dealt with

by way of a conviction accompanied by a recommendation to mercy. The earliest example of this practice offered by Hume is the case of Robt. Bonthorn (Nov. 29 1763, Hume, i, 38), a case of assault by a smuggler on a revenue officer, in which the jury found 'that the intellects of the pannel are most remarkably weak, irregular and confused, and therefore recommend him to the mercy of the Court'. This form of verdict was approved of by Hume, who also approved of the exercise of mercy in cases of weak intellect even where the jury had not specifically made any recommendation to mercy (Alex. Campbell, 18 Dec. 1809, Hume, i. 38; Susan Tinny, 11 March 1816, Hume, i. 41; Robt Thomson, June, 1739, Hume, i.40; Agnes Crockat, 23 July, 1756, Hume i. 42 - both the latter earlier, it will be noted, than Bonthorn - which suggests that the verdict with recommendation followed on a practice of exercising mercy in cases of weak intellect). That this was a recognised way of dealing with the mentally weak also appears from Hume's comment on the acquittal on the ground of insanity of Jas. Cummings who killed a fellow-soldier apparently when under the influence of melancholia and drink. Hume, who disapproved of treating drunkenness like insanity, said, 'It may be questioned whether, under the whole circumstances of this case, it would not have been a more correct and a more salutary judgment to convict him of the murder and recommend him to the royal mercy' (Hume, i. 40-1).

Bell's Notes to Hume state that 'In offences inferring arbitrary pains, weakness of intellect is a relevant plea to use in mitigation' (p. 5), and the cases cited in support of this statement (Wm. Braid, 12 March, 1835; Thos. Henderson, 13 March, 1835; Jas. Ainslie, (1842) 1 Broun 25) were said by Lord Normand

in Kirkwood (1939 J.C. 36, 39) to be the origin of the doctrine. This reference is useful in showing that the plea was regarded as mitigatory and as having nothing to do with the specialties of the law of murder, but the cases in Hume make it clear that it was not confined (except formally) to 'offences inferring arbitrary pains', i.e. to non-capital offences.

The law is made explicit, so far as capital offences are concerned, by Alison who states that, 'If it appear from the evidence that the pannel, though partially deranged, was not so much so as to relieve him entirely from punishment, the proper course is to find him guilty; but, on account of the period of infirmity of mind, which he could not control, recommend him to the royal mercy' (Alison, i. 652). Alison takes the view that there are cases where the law more or less requires that there be mitigation, and so requires a recommendation to mercy, since the only way of mitigating the capital penalty was by means of the Royal prerogative of mercy.

In two mid-19th century cases the jury were more or less directed to bring in a recommendation to mercy on the ground of the accused's weakness of intellect. In Denny Scott ((1853) 1 Irv. 132) Lord Cockburn told the jury that 'a conviction, though obstructed in its result by a recommendation, was the safest for the public, and the least opposed to the truth of the case' (at p. 143). In John M'Fadyen ((1860) 3 Irv. 650) Lord Cowan said that 'the safest verdict would probably be one of guilty, accompanied by such recommendation as the undoubted weakness of the panel's intellect might appear to them to justify' (at p. 666). In both cases the recommendation was accepted.

Dingwall and after. From this it was but a short step to ask the jury to bring in a verdict of culpable homicide instead of a verdict of murder with a recommendation. A culpable homicide verdict obviated any risk that the recommendation might be rejected, and also left the treatment of the accused in the hands of the Judge who could impose what he considered to be a suitable sentence, giving what weight he thought proper to the accused's mental state. This step was taken (although not expressly for these reasons) by Lord Deas in 1867 in the case of Alex. Dingwall ((1867) 5 Irv. 466) which is generally recognised as the origin of the modern law on the subject. Although the doctrine was recognised by the High Court in the non-capital case of John M'lean in 1876 (3 Coup. 334), it owes its existence in its modern form almost entirely to Lord Deas who delivered the observations of the Court in M'Lean, and who was the Judge in six of the nine cases between 1867 and 1882 in which the application of the doctrine to homicide was evolved. (His influence, like that of Lord Moncrieff in the case of insanity, shows how a single Judge, if he happened to preside at appropriate trials, could influence the law and create a body of authority by repeating his views in a number of cases.)

The accused in Dingwall was an alcoholic who stabbed his wife on Hogmanay after a quarrel which was caused because she had hidden his liquor and his money. He was kind to her when he was sober; he had suffered from occasional attacks of delirium tremens; he was sober at the time of the killing but remembered nothing about it. In suggesting to the jury that they might bring in a verdict of culpable homicide Lord Deas mentioned the accused's mental condition as one among

a number of mitigating factors. He set out the grounds which would justify a verdict of culpable homicide as being '1st, the unpremeditated and sudden nature of the attack; 2d, the prisoner's habitual kindness to his wife, of which there could be no doubt, when drink did not interfere; 3d, There was only one stab or blow, this, while not perhaps like what an insane man would have done, was favourable for the prisoner in other respects; 4th, the prisoner appears not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease... The state of mind of a prisoner might be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity' (at pp. 479-80).

The next case, that of John Tierney, in 1875, (3 Coup. 152) is of interest only because the question of diminished responsibility was raised by the Crown and not the defence, and was left to the jury by Lord Ardmillan, although he said he did not see much ground for it in the evidence. No reference was made to Dingwall, and Tierney suggests that that at least by 1875 the climate of professional opinion was not unfavourable to reducing murder to culpable homicide on the ground of mental weakness. Lord Deas' views gained ready acceptance, it would appear, from his contemporaries, and were not seriously challenged until the twentieth century.

The most important case after Dingwall is that of John M'Lean ((1876) 3 Coup. 334). The accused was an imbecile who had been weak-minded from childhood, and had at one time been a certified lunatic. He was charged with housebreaking and was convicted with a recommendation to leniency because of the medical evidence given at the trial regarding his 'weak intellect'.

The case was reported to the High Court on the question of sentence, and another medical report was obtained. The sentence of the High Court was imposed by Lord Deas in a speech in which he pointed out that it was quite proper for a Judge to take mental weakness into consideration in passing sentence, whether or not there was a recommendation to leniency. He went on to say that,

'without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity, which may make it both right and legal to take that state of mind into account, not only in awarding the punishment but in some cases even in considering within what category of offences the crime shall be held to fall' (at p. 337).

Lord Deas then referred to Dingwall and said 'It would be dangerous to lay down rules which should limit the discretion of the Judge in the matter of arbitrary punishment' (at p. 339).

It seems clear from M'Lean that diminished responsibility was regarded, primarily if not wholly, as a mitigating factor - Lord Deas seems to consider its use in determining the category of the offence as secondary to its use in awarding punishment, and this, as has been submitted, is the logical way of approaching the situation. The matter did, however, later become less discretionary, less a matter of human sympathy than of legal categorisation. There are signs of this later approach in statements which compare the situation with the rather more rigid state of affairs subsisting in countries with different degrees of murder. Lord Deas said in the case of Thos. Ferguson ((1881) 4 Coup. 552, 558) that the doctrine was 'founded on a principle of natural justice which recognised a distinction between

what in other countries equally enlightened as ours was termed murder in the first and in the second degree, and which under our own humane system we could act upon better and more conveniently by the distinction between murder and culpable homicide'. (Cf. Helen Brown, (1882) 4 Coup. 596, 597. Ferguson was said to be a less suitable case for diminished responsibility than Dingwall because there was deliberate preparation and great ferocity in Ferguson, not specifically because of any difference in mental condition - another pointer to the idea of diminished responsibility as one among a number of mitigating factors. Ferguson was convicted of murder with a recommendation to mercy, presumably because the jury were influenced by these factors and yet felt that the accused did not deserve to hang.) But there is still in the 19th century cases an emphasis on humanity, and a feeling that the Scots system of general mitigating factors is preferable to the logical definition of degrees of murder.

The other 19th century cases (John Wilson, (1877) 3 Coup. 429; John Small, (1882) 4 Coup. 388; Ferguson, (1893) 1 Adam 517 - none of these cases was capital - and Andrew Grainger, (1878) 4 Coup. 87 and Margt. Brown, (1886) 1 Wh. 93 which are really concerned with intoxication) add little to the law, and only the case of Smith ((1893) 1 Adam 34) requires special mention. Smith was a farm-worker who was charged with murdering a fellow-worker and pleaded insanity. He was a sensitive man, much given to brooding. His fellow-servants had subjected him to a campaign of continual annoyance, and eventually he lost control when the deceased said 'Boo' to him, and he shot him. Lord M'Laren applied the law of diminished responsibility saying, with reference to Dingwall (supra),

'Now, if it were the law that a state of mental disturbance brought on by a man's own fault, by his own intemperance, going the length of producing a physiological disturbance of the brain, might to that extent excuse him, it seems to me that the same result must follow when the disturbance of the mental equipoise was not due to a man's own fault, but to his being subjected to a system of incessant persecution' (at p. 50).

Lord M'Laren laid stress on physiological disturbance, and also relied on evidence that the accused had been 'physiologically unable to resist' (at p. 52) the provocation offered by the deceased. It is not clear just what 'physiological' means here. It may be a sign of a tendency to distrust merely 'mental' conditions which cannot be shown to have any physiological foundation, in which case it foreshadows the modern attitude. On the other hand if the accused was in fact 'physiologically unable' to resist, his plea of insanity should have succeeded, since a man physically incapable of controlling his actions cannot be convicted of a common law crime.

The 20th century cases.

Aitken to Carraher. The 20th century cases show an increasing distrust of the concept of diminished responsibility. The judicial approach to the plea, which was favourable in the 19th century, becomes affected by the fear that it will lead to many murderers escaping their just deserts, and by the view that the doctrine is illogical and anomalous, attitudes adopted by Lord Cooper and Lord Normand respectively, and as a result the doctrine has been restrictively interpreted in this century. The modern approach is due partly to the fact that modern psychology has discovered many abnormal conditions unknown in the 19th

century, which doctors consider as creating a state of diminished responsibility. Lawyers are afraid of these 'new fangled' notions (cf. R.C. Evid. of Lord Cooper, Q. 5468), and are also afraid that if they allow psychologists to determine the question of diminished responsibility, they will find that all criminals will be characterised as being of diminished responsibility. (The law is in part a reaction to the extreme claims made by some psychiatrists. In Braithwaite Edinburgh High Court, 30th Nov. 1944, repd. at 1945 J.C. 55, one witness said that all persons who committed crimes of violence were not fully responsible - Transcript of Evidence, p. 98; and in Carraher, Glasgow High Court, 28 Feb. - 2nd March, 1946, 1946 J.C. 108, a witness said that 2% of the population were not fully responsible - Trials of Patrick Carraher, ed. Blake, p. 225.) Such a result would destroy the doctrine entirely because there would then be no norm against which to measure diminution.

It should also be remembered that diminished responsibility is in practice usually an alternative to a plea of insanity in murder cases, and the main reason for pleading insanity, at any rate until 1957, was to escape hanging. This result can be achieved more easily by a plea of diminished responsibility, and can in that way also be achieved without any risk of incarceration in a criminal lunatic asylum for an indefinite period, so that diminished responsibility is thought of as a way out of the difficulties of insanity, as a means of escape for the criminal who is not insane, and who should really be convicted of murder. Viewed in this way, it is naturally not regarded by Judges with much favour.

Signs of this tendency appear earlier than the spread of modern psychiatric ideas. The restrictive outlook is present in the first reported 20th century case on the subject, the case of Aitken ((1902) 4 Adam 88). The charge was one of murder and a plea of insanity was lodged, but the defence asked only for a verdict of culpable homicide on the ground of diminished responsibility. Lord Stormonth Darling said that the doctrine of diminished responsibility 'required to be applied with great caution', that the jury must be satisfied of the presence of 'something amounting to brain disease', and that the accused's mind must have been 'morbidly affected' (at pp. 94-5). The insistence on brain disease and the reluctance to apply the doctrine are indicative of the later law. The reluctance amounted in one case, that of Higgins ((1913) 7 Adam 229) to a complete refusal to recognise that diminished responsibility could ever operate to reduce murder to culpable homicide. Such a refusal, fifty years after Dingwall (supra) was only possible because of the absence of any Court of Criminal Appeal, but in any event the remarks of Lord Johnson in Higgins are not merely idiosyncratic, but also obiter, since there was no evidence of diminished responsibility in the case.

The most important case on the whole subject since Dingwall(supra) is that of Savage (1923 J.C. 49). This is not because of the circumstances of the case - the accused was a confirmed drunkard and a methylated spirits addict, and his defence was really one of intoxication although he pleaded insanity: the evidence regarding his state of mind at the time of the crime was conflicting, and he was in fact hanged (see transcript of evidence, Edinburgh High Court, 21 May, 1923) - but

because the directions which the Lord Justice Clerk, Lord Alness, gave on the question of diminished responsibility have been adopted as the basis of the modern law, and come near to being the M'Naghten Rules of diminished responsibility. Lord Alness first told the jury that

'That there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of his act from murder to culpable homicide, is, so far as I can judge from the cases cited to me, an established doctrine in the law of Scotland. It is a comparatively recent doctrine, and, as has at least twice been said from the bench to a jury, it must be applied with care. Formerly there were only two classes of prisoner - those who were completely responsible and those who were completely irresponsible. Our law has now come to recognise in murder cases a third class...who, while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide' (at p. 50).

Thus, before defining the meaning of the term 'diminished responsibility' Lord Alness set out his attitude to it, an attitude which is typical of that adopted by his successors. We start off by regarding the doctrine as an upstart, something new and therefore to be regarded suspiciously: this although a doctrine at least as old as 1867 was not all that new even in 1923 in a legal system which only began properly in 1797 - with the first edition of Hume. Then we talk of the doctrine as doing something to the 'quality of the act' as if it were a form of exculpatory plea like self-defence or necessity, and not a plea in mitigation of sentence; and we go on from this to regard it as something special to homicide, and so as something which must be capable of definition since it takes the accused's act out of one legal category into another. Moreover, one has the impression, an impression given more strongly by

Lord Normand in later cases, that if older Judges had not been so rash as to recognise the doctrine as often as they did, the modern law would dispense with it altogether.

After his introductory remarks Lord Alness went on to define the doctrine in a passage which has become the locus classicus of the subject. He said,

'It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must only be partially accountable for his actions. And I think one can see running through the cases that there is implied...that there must be some form of mental disease' (at p. 51).

The only authority quoted by Lord Alness for this definition is Aitken (supra), but the definition, which might be called the Savage formula, has itself become the authoritative origin of the modern law independently of its consistency or otherwise with the 19th century cases. It was accepted by a Full Bench of the High Court in Carraher (1946 J.C. 108), and before that had been adopted by Lord Cooper, who was not of the Court in Carraher, in Braithwaite (1945 J.C.55) so that it has the authority both of Lord Normand and of Lord Cooper; the recognised way of directing juries on diminished responsibility is to quote the Savage formula to them.

In Braithwaite Lord Cooper also described the doctrine in his own words, which were approved in Carraher. He said,

'Our law does recognise - although it is only latterly that it has done so - that, if he was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence' (1945 J.C. 55, 56-7).

These words echo the Savage attitude, even to repeating twenty years later the allegation of arrivisme. Lord Cooper went on to emphasise the stress laid on 'weakness of intellect, aberration of mind, mental unsoundness, partial insanity, great peculiarity of mind and the like' (at pp. 56-7). He also spoke in terms of disfacilitation, saying that,

'It will not suffice in law...merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control. The world would be a very convenient place for criminals and a very dangerous place for other people, if that were the law...there must be something amounting or approaching to partial insanity and based on mental weakness or aberration' (at pp. 57-8).

It is at once the merit and the defect of the Savage formula that it is largely tautologous. (It is not, however, as tautologous as the question put to the jury in Muir - Dumfries High Court, 11-13 April, 1933, see 1933 J.C. 46, 48, - 'was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide?'.) As Professor Weihofen says of Lord Cooper's summary in Braithwaite, it is 'somewhat amorphous and even circular, for it seems to say only that he is not to be held fully accountable if he was not fully accountable' (The Urge to Punish, p. 192 - note 22 to Chapter IV). The only significant parts of the formula are those referring to the type of mental state which is relevant,

and they consist of phrases like 'mental weakness', 'mental aberration', and 'unsoundness of mind', which are all very vague. Even 'mental disease' is capable of wide and varying interpretations. 'Disease' just means 'illness', except when it is used to distinguish infectious diseases from other forms of illness, a use which is irrelevant here. Even 'partial insanity' is a rather vague phrase, and if what is required is only 'something...approaching to partial insanity' (Braithwaite, supra), the vagueness is increased.

But although it is tautologous and may thus be thought to have the effect of making the law of diminished responsibility as open a matter as that of insanity, the formula is regarded as restrictive, and does operate restrictively to some extent. The requirements of disease and a condition bordering on insanity probably exclude mental defect and psychopathic personality, since neither condition is a disease, and neither is likely to develop into insanity, which is presumably what is meant by 'bordering on insanity'. (Despite the formulae serious mental defect is in fact regarded as a form of diminished responsibility - R.C. para. 343.) However, if there is to be a formula at all, and there is no warrant in the earlier cases for a 'formulistic' approach, the Savage one is fairly innocuous, since its denotation is wide and flexible. Unless the requirement of disease or that of borderline insanity is unduly stressed, it would probably allow the doctrine to keep pace with medical science. What must be guarded against is any tendency to treat it as if it were the M'Naghten Rules of diminished responsibility.

The case of Carraher. The case of Carraher ((1946 J.C. 108), a Full Bench case (Lord Justice-General Normand, Lord Carmont, Lord Jamieson, Lord Stevenson, and Lord Birnam) may, however, have had the effect of making the law of diminished responsibility, at any rate in theory, rigid, and incapable of further development. It is the most important of all cases on diminished responsibility - it is a Full Bench case, it is as recent as 1948, and it purports to say the last word about diminished responsibility.

The case appears to have decided

(1) That 'the plea of diminished responsibility, which...is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions' (Lord Normand at p. 118);

(2) That, in particular, persons suffering from the condition known as psychopathic personality are not to be regarded as of diminished responsibility.

I say 'appears to have decided' for the following reasons which cast doubt on the authority of the case.

(a) As Professor T.B. Smith points out, the case proceeds on the false assumption that the doctrine of diminished responsibility is anomalous (T.B. Smith, p. 728). Moreover, the history and purpose of the doctrine show that it is incapable of being confined within a list of closed categories. As Professor Smith says, it is too protean for that (ib. p. 727). It seems to be accepted that the law regarding insanity must keep pace with scientific developments (ib. pp 727-8; cf. Brown (1907) 5 Adam 312, 343); and if the categories of diminished responsibility are closed, the strange result is reached that a system which has no rigid criterion for distinguishing the sane from the insane,

the guilty from the innocent, has such a criterion for deciding whether an accused's mental condition is such as to merit some mitigation of punishment. And the criterion it has is the worst possible - nothing can ever amount to diminished responsibility in the future unless there is an example of its having done so in the past. Moreover, Carraher would adopt this criterion at a time when the legislature is taking modern psychological knowledge more and more into account in dealing with criminals (cf. Criminal Justice (Scotland) Act, 1949, 12, 13 & 14 Geo.VI, c.94).

For substantially these reasons Professor Smith takes the view that Carraher does not in fact close the categories of diminished responsibility, and that, 'the Judges will be prepared to recognise the consensus prudentium in matters of science' (T.B. Smith, p. 727). It is to be hoped that this is so, but it must be pointed out that psychopathic personality was not something new in 1946, but was as well recognised as it was a few years later when the Royal Commission on Capital Punishment cast doubt on the wisdom of Carraher, and accepted that at any rate some psychopaths could properly be regarded as of diminished responsibility (R.C. para.401).

The decision in Carraher was not, in any event, confined to the special case of the psychopath, which is admittedly a difficult one. The Court in Carraher set itself against any extension of the doctrine because it disapproved of the doctrine itself and not merely of some advanced psychiatric views. So far from being interested in the consensus prudentium the Court refused to appoint a psychiatric assessor for fear of substituting trial by doctors for trial by jury.

(b) It is not clear how much of the judgment

in Carraher is obiter. The trial Judge had left the question of diminished responsibility to the jury, and the appeal was concerned with the relation between intoxication and diminished responsibility. The Court suggested that it would not have disapproved had diminished responsibility been withdrawn from the jury but these remarks are obiter. In particular the position of psychopathic personality in general was not before the Court; it was enough for them, having dealt with the drink question, to accept that on the evidence the jury were entitled to hold that Carraher was not a psychopath, or was not of diminished responsibility. The suggestion that a psychopath can never be of diminished responsibility is obiter. Indeed it could be said that the statement that the categories of diminished responsibility were closed was also obiter. But it must be conceded that the case has been regarded as containing general authoritative pronouncements on diminished responsibility and on psychopaths (cf. R.C. para. 382; T.B. Smith, 726-8).

(c) The case was decided in an atmosphere of fear - fear that violence would reach alarming proportions in Glasgow unless the Courts took a firm hand, and fear that psychiatrists were undermining the whole structure of the criminal law.

The case was decided only a short while after the first execution in Scotland for seventeen years, and belonged to the same class of crime as that for which hanging had been reintroduced. (The first case was that of John Lyon, one of the accused in Crosbie and Ors. - Glasgow High Court, 11-15 Dec. 1945, unrepd. discussed supra, 182ff. It is in point to note that the main reason for the lack of executions between 1929 and 1945 was the readiness with which the Crown and juries

reduced charges of murder to culpable homicide.) Carraher was a much worse and older criminal than the hanged man, and it would have been difficult for the Court to hold that Carraher, a lifelong criminal who had killed a man on an earlier occasion (cf. R.C. App. 4, para. 14) was not wholly responsible. To have allowed him to 'escape hanging' would have looked like giving a licence to habitual criminals to continue the sort of gang warfare the authorities had rightly determined to stamp out. It may therefore have been thought important to impress upon criminals that the defence of psychopathic personality was not open to them.

This attitude was also due to fear that psychiatrists were coming to the conclusion that all habitual criminals were psychopaths, and that to allow psychopathic personality to count as diminished responsibility would mean that the worse a man was the less punishment he would receive. Lord Cooper told the Royal Commission on Capital Punishment that, 'At the time of the Carraher judgement the lawyers had become alarmed at a flood of psychological or psychiatric evidence introducing, or attempting to introduce, as new special defences, all kinds of psychological and mental abnormalities with names which were unknown to us and to the man in the street. It was in reaction to that, I think, that the Carraher decision was pronounced' (R.C. Evid. of Lord Cooper, Q. 5468). As Professor Smith puts it, the Court was anxious about 'the danger that unverified hypotheses of individual psychiatrists might lead to abuse of the defence of diminished responsibility' (T. B. Smith, p. 727).

(d) Carraher must now be regarded as quite out of date so far as the problem of the psychopath is concerned,

or rather, it is now clear, as it should then have been, that Carraher was out of date about this even in 1946. This is abundantly shown by the evidence given to the Royal Commission on Capital Punishment which makes it plain that psychopathic personality is by no means an unverified hypothesis of a few crack-brained psychiatrists, but is a condition recognised by those same eminent medical men whom Lord Cooper was prepared to accept as proper judges of an accused's fitness to plead (see R.C. para. 398; cf. R.C. Evid. of Lord Cooper, Q. 5491). The psychopath is about to receive statutory recognition in England (Mental Health Bill, 1959, s. 4(4), and the Committee on Mental Health Legislation set up the Department of Health for Scotland recognised the need for special penal institutions for psychopaths although they were averse from creating a special statutory class of psychopaths (Report of Committee of Scottish Health Services Council on Mental Health Legislation, 1958, paras. 8-9).

The case also proceeds on a general view of the whole problem which, it is submitted, is becoming outmoded. It regards diminished responsibility as something whereby a criminal 'gets away' with a crime, instead of regarding the separation of criminals into the wholly responsible and the partially responsible as an important step in safeguarding society from people like Carraher who are not amenable to ordinary punishment.

Psychopathic personality

The problem of the psychopath is one of the most difficult and important in modern criminal law and penology. Although I am not concerned with penology as such, the problem is important enough on its own account to merit consideration.

Psychopaths were described by Sir David Henderson, in his evidence before the Royal Commission on Capital Punishment as follows: (There are various types of psychopaths, but we are concerned here only with the potential criminals, usually aggressive psychopaths, although inadequate psychopaths may turn to fraud and similar crimes - see R.C. para. 396; Neustatter, Psychological Disorder and Crime, 88.)

'They are social misfits in every sense of the term, persons who have never been able to adapt themselves satisfactorily to their fellow-man, and appear to be entirely lacking in altruistic feeling...They are the "sports" of the human race...they are persons who have failed in the psycho-biological development. Such a failure...is essentially constitutional, something which is inborn, something which is akin to the lack of intellectual development which characterises the mental defective... they remain at an immature, individualistic, egocentric level...they fail to appreciate reality, they are fickle, changeable, lack persistence of effort and are unable to profit by experience or punishment. They are dangerous when frustrated. They are devoid of affection, are cold, heartless, callous, cynical, and show a lack of judgment which is almost beyond belief. They may be adult in years, but emotionally they remain as dangerous children whose conduct may revert to a primitive, subhuman level...If our ethical code feels justified in sending them to the gallows then let it be so, but at the same time let us clearly understand that such persons are driven by what may be called their collective unconscious to deeds of violence which are as uncontrollable as a tidal wave' (R.C. Evid. Memorandum of Sir D. K. Henderson, para. 17).

This is plainly a difficult type of person to define with legal exactitude, or to place in a legal pigeon-hole. He is not 'insane, neurotic or mentally defective' (R.C. para. 396), his condition exhibits no physical symptoms, except that his electro-encephalograph readings may be abnormal. (The electro-encephalograph, -

EEG - is a means of recording electrical impulses given out by the brain. There is a normal graph for such impulses in various states, e.g. calm, anger, etc. The EEG of a person in an epileptic fit is clearly abnormal, and persons subject to epilepsy may show abnormalities even when not having a fit. According to Neustatter the EEG of more than half the aggressive psychopaths show abnormalities - Neustatter, Psychological Disorder and Crime, p. 90. Cf. R.C. para. 399) The psychiatrist must rely on the general impression he derives from the patient's history and attitudes for his diagnosis of psychopathic personality. Neustatter points out that 'in the psychopath there are no other sufficiently distinctive abnormalities, as there are in the insane, to help substantiate the patient's contention that he has really been unable to resist his impulses'. But he adds immediately, 'But...it is my personal belief that some psychopaths, especially those with abnormal electric rhythms of their brains genuinely cannot resist their urges, for otherwise - why should they incessantly get themselves into needless trouble in spite of repeated punishment' (op.cit. p. 96). This, of course, would be enough to support a finding of insanity if irresistible impulse arising from a mental condition is regarded as coming under the defence of insanity. It is not necessary to go that far to allow psychopaths to be dealt with as persons of diminished responsibility.

Because of the vagueness of the concept of psychopathic personality - although it hardly lies in the mouth of the lawyer to complain of the vagueness of other experts' concepts, and because of the distrust and fear of psychiatry which is common to lawyers and laymen, the whole idea of psychopathic personality is distrusted. The lawyer

can no more be expected to understand the technical phraseology of a psychiatric conclusion than can a disappointed legatee or taxpayer be expected to understand or sympathise with the technicalities of succession or revenue law. And in each case the layman thinks that the expert, doctor or lawyer, is 'putting something over' him. But the psychopath is not as new to the law as Carraher suggests. He is only a modern version of the moral imbecile who is defined in the Mental Deficiency Act of 1913 as someone 'who from an early age display[s] some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect' (3 & 4 Geo. V c.28, s.1(d)). The main difference between the statutory moral imbecile and the psychopath is that the former is thought of as being mentally deficient, but this is the result of bad psychology. It is now recognised that the 1913 definition is outmoded, and that 'moral imbeciles' are really psychopaths (R.C. para. 358). 'Moral insanity' is a psychological phenomenon, and moral imbeciles are often highly intelligent (cf. Trial of Neville George Heath, ed. M'Donald Critchley, Introdn. p. 39). The leading characteristic of such a person is 'the early appearance of vicious and mischievous tendencies, their persistence in spite of the repeated experience of the unpleasant results to the moral imbecile himself which follow their indulgence, and the absence of any sort of moral feeling in relation to them....Viewed as a whole, his conduct is patently absurd; his life is not only evil, it is foolish' (W.C. Sullivan, Crime and Insanity, pp. 198-9). Psychopaths have been defined in the English Mental Health Bill of 1959 as persons suffering from 'a persistent disorder of personality (whether or not accompanied by subnormality of intelligence) which results in

abnormally aggressive or seriously irresponsible conduct' (s.4(4)).

The psychopath and the habitual criminal. Lawyers usually ascribe their difficulty in dealing with psychopaths to the similarity between the description of the psychopath and that of the ordinary habitual criminal. As the representatives of the Faculty of Advocates told the Royal Commission with reference to Carraher, 'A man who acts habitually without any self-control is just a man who exhibits gross abnormality in social behaviour and emotional reaction...the difficulty there was to find anything in the medical evidence that could be distinguished from the ordinary description of a criminal' (R.C. Evid. of Faculty of Advocates, Q. 5626). Cross-examination of an expert witness who is giving evidence that an accused is a psychopath is child's play. Counsel simply puts to him severally the indiciae of the condition and asks of each - 'Is a man like that a psychopath?'. He may ask, 'Is a man of diminished responsibility because he likes getting his own way?'. 'Is he a psychopath because he is liable to lose his temper? 'Is he to be immune from punishment because he is an egoist, or because he will not brook contradiction?' 'Because he is "casual and jaunty about the whole thing, about his whole life indeed"?' (The last phrase was used by Dr. M'Niven in the Carraher case - Trials of Patrick Carraher, ed. Blake, p. 220). The expert is then usually asked the irrelevant question, 'Does he know right from wrong?', and has to admit that he does, whereupon counsel sits down with an air of triumph.

This sort of cross-examination is unfair and ill-directed - it only sets up and knocks down a lot of Aunt Sallys. (For typical examples see Trials of

Patrick Carragher, ed. Blake, pp. 215-225; Trial of Neville George Heath, ed. M'Donald Critchley, pp. 147-158). What the doctors are trying to say is that there may be a combination of these and other factors - a syndrome present throughout a man's life, constantly recurring, and present to such a degree that the man must be considered abnormal, and not just a normal man who happens to be bad-tempered or selfish. The real difficulty on this aspect of the matter is that the psychopath does not differ from the normal person in kind but only in degree and that among psychopaths themselves there is a great variation in degree of abnormality. 'The abnormality is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively' (R.C. para. 396). It is true that 'If an aggressive psychopath, for example, is regarded simply as a person of exceptionally violent and ungovernable temper differing only in degree and not in kind from other hot-tempered and impulsive persons, there may be no justification for considering that his criminal responsibility is negatived, or even diminished, by his mental condition', but as the Royal Commission's Report goes on to say 'It seems clear, however, that those who have had most experience in dealing with aggressive psychopaths regard them as significantly less able to control their actions and restrain their violent impulses than a normal person' (R.C. para. 398). If that is so, it is difficult to see any reason for denying that such a significant deviation can constitute diminished responsibility. (It is no doubt true that the insane only differ from the sane in degree, but the difference would have been regarded as one of kind in the days when the law of insanity developed. It is no doubt also arguable that all differences in kind are, or can be viewed as, merely extreme differences in degree.

But it is possible to talk of the psychopath as 'significantly' different from the normal, whether the difference is regarded as being one of degree or of kind. Of course 'significant' is vague, but mathematical precision of terminology is not possible in any of the sciences of human behaviour.)

It follows from the descriptions of psychopathic personality set out above that a person cannot be classified as a psychopath on the evidence of one act only. The fear that anyone who commits a particularly horrible or motiveless crime will be able to plead mental abnormality, and that murderers will therefore deliberately make their killings as horrible as possible, has no application to the case of the psychopath. Psychopathic personality can only be discovered by reference to the accused's whole history and outlook. 'The more widely a man displays a lack of moral sense or a lack of social responsibility the more inclined you would be to classify him as a psychopathic personality' (Dr. A. M'Niven, agreeing with the cross-examiner, in *Trials of Patrick Carragher*, ed. Blake, p. 216). There is a difference between a man like Braithwaite who 'although he has had an unfortunate upbringing, has since he attained adult life apparently been able to discharge the duties and responsibilities of an ordinary person in an ordinary way' (Braithwaite, Edinburgh High Court, 30 Nov. 1944, Transcript of Judge's Charge, p. 11 - the passage, in which Lord Cooper summarised the medical evidence, does not appear in the report at 1945 J.C. 55), and a man like Carragher who spends his whole life in and out of prison. The law's dislike of psychopathic personality rests partly on the fact that a large number of habitual criminals are alleged to be psychopaths, and partly on the fact that the more crimes a man commits the

more likely he is to be classed as a psychopath. But this amounts to no more than saying that a man who is not cured of his criminal tendencies by ordinary punishment is not amenable to ordinary punishment, which is self-evident. The whole basis of the lawyer's attempt to distinguish the habitual criminal from the psychopath, and his claim that he cannot make any distinction, rests on the belief that all habitual criminals are normal and amenable to normal punishment. This belief rests on the glib assumption that all bad people are bad because they have deliberately and rationally chosen to be so, which is as objectionable as the view that all bad people are bad because they are mentally abnormal.

The treatment of persons of diminished
responsibility.

From the sociological point of view the most important problem in the law of diminished responsibility is the problem of what to do with persons who are in that condition. They are ex hypothesi not to be treated exactly as ordinary offenders; they are not insane and so cannot be treated under the Lunacy Acts; and it seems that they are not altogether unamenable to punishment, for they can at least understand and foresee the effects of punishment (cf. Donnedieu de Vabres' discussion of the problem of the fou moral, at p. 201).

The original idea of diminished responsibility suggests that the answer to the problem is very simple - punish them in proportion to their responsibility. As Alison put it, 'In such cases there is a mixture of guilt and misfortune; for the former he should be severely punished, for the latter the extreme penalty

of the law should be remitted' (Alison, i. 652). This naive approach may be satisfactory from the point of view of retribution, but even if we confine ourselves to the question of punishment it is unsatisfactory from the point of view of deterrence. It fails to take account of Bentham's point that 'The quantum of the punishment must rise...with the strength of the temptation' since a strong temptation cannot be offset by a slight degree of threatened harm (Bentham, XIV, 9). It can therefore be said that in at any rate some cases the person of diminished responsibility should be punished more severely than the normal person.

So far, we have been concerned with the treatment by punishment of the responsible part of the criminal, so to speak, and that is a difficult enough problem. But the important problem, one which does not seem to have concerned the older authorities, is the problem of what to do about the irresponsible part of the criminal. This problem, it is submitted, only arises when the accused is a danger to society, when because of his diminished responsibility he is more likely to commit other crimes than he would be were he normal. This, of course, strictly speaking, has nothing to do with punishment. It has been dealt with under the head of punishment because there is no other kind of machinery for dealing with it at present, but like the detention of the dangerously insane, or preventive detention, or the disqualification of a dangerous motorist from driving, it is a matter of the protection of society, and requires to be dealt with, not by punishment, but by what are known in France as mesures de sureté (Donnedieu de Vabres, p. 201), and in Germany as Massregeln der Sicherung und Besserung (StGB Art. 42a). Whether such measures are called for depends on the dangerous character of the criminal,

and is thus quite separate from the question whether he should also or instead be punished in the ordinary way according to the extent of his responsibility for the crime.

The propriety of dealing in this way with persons of diminished responsibility was asserted in the case of Kirkwood (1939 J.C. 36). In that case a man who had been charged with murder succeeded in a plea of diminished responsibility and was sentenced to life imprisonment for culpable homicide. He appealed against his sentence on the ground that it failed to take into account the diminution of responsibility. In dismissing the appeal Lord Normand said that to maintain that 'although an insane person might properly be detained indefinitely, a person who was not insane, but whose responsibility was impaired in a high degree, should be leniently treated without regard to the safety of his fellows...is...the reductio ad absurdum of the argument that the punishment should be measured by the responsibility of the criminal to the exclusion of other considerations' (at 40). It was pointed out in Kirkwood that the accused's ultimate release would depend on the state of his mental health, and the best way of dealing with cases of diminished responsibility may be to detain them until they are sufficiently cured to be no longer a danger to society.

Such an approach is, however, open to serious objections. These objections are perhaps stronger if the detention is regarded as a form of punishment than if it is regarded as a mesure de sureté since, at any rate in theory, the conditions of detention should be different in the latter case and should not involve the more unpleasant features of imprisonment; but even if we regard the detention and treatment of

the person of diminished responsibility as a form of treatment or security measure, we must recognise that we are depriving him of his liberty and/or subjecting him to forced treatment, and that therefore, as was impliedly recognised in Kirkwood, we cannot leave retribution out of the question altogether. To impose an indeterminate sentence on a criminal is to place his liberty in the hands of the State; to combine that detention with psychological treatment is to place his mind at the disposal of the State. At present the State has such powers with respect to the insane, but they have always been regarded as a special class and any attempt to extend compulsory detention to persons not insane would meet with strong opposition. This will be especially so if the 'sentence' is to depend solely on the mental state of the criminal, without reference to the gravity of the offence. Such a course would abandon the retributive approach completely, and reduce punishment to Erewhonian terms. The retributive theory is perhaps the citizen's main defence against the power of the Executive to incarcerate him, brainwash him, sterilise him, remove his prefrontal lobes, or otherwise reduce him to a condition of social acceptability. Public opinion would not stand for a long period of compulsory treatment in cases where the normal offender gets only a short sentence.

In practice, therefore, the indeterminate sentence could be imposed only in cases of homicide or other very serious crimes, or in the case of very persistent offenders. But it is submitted that in such cases it should be made clear that the indeterminate sentence is not a punishment, but a mesure de sureté. The importance of keeping the two distinct is not just a theoretical one, nor even a matter of fairness to the

accused. The position today is that in most homicide cases persons of full responsibility can and must be sentenced to life imprisonment, i.e. receive an indeterminate sentence. What then is to be the position of the person of diminished responsibility who is convicted of culpable homicide on a charge of non-capital murder? Kirkwood recognises that there must be some diminution of penalty, and in non-capital cases the result may now be that the person of diminished responsibility cannot be given an indeterminate sentence, since to do so would be to ignore the fact that the jury have found him not fully responsible. It is therefore important that in such cases the Court should have power to commit the accused to a special institution for treatment or detention, if it is shown that he is dangerous.

It may be that so far as murder charges in general are concerned the position does not represent a serious danger. The Royal Commission on Capital Punishment were averse from the introduction of an indeterminate sentence in such cases, because they did not think that the statistics regarding the after-conduct of persons imprisoned for culpable homicide because of diminished responsibility showed that there was any danger to society warranting such a course. (cf. R.C. paras. 403-7).

Where the position is serious, and very difficult to deal with, is in the case of the psychopath. Psychopaths appear to begin with small crimes and work up to bigger ones, and as the law is at present they cannot be properly dealt with until they have committed a very serious crime, usually murder; and by that time public opinion is so incensed against them, and their character has so few redeeming features that, if possible, they are hanged. Whatever the solution to the problem

of the psychopath is, it is not the present one, which consists in imposing a succession of fairly short sentences. The best illustration of the complete futility of the present law is the case of Carraher himself. By the time he was hanged he had fourteen previous convictions including one for culpable homicide on a charge of murder in 1939, and indeed, he was on licence at the time of the murder following on a sentence for serious assault. He had also led a prison riot (cf. R.C. App. 4 para. 14). In the course of his life he had had the benefit of every form of treatment then available for persuading a man to give up crime - he had been cautioned, he had been sent to Borstal, to prison, and to penal servitude, and with each effort the State made he became a more hardened criminal, until, after having permitted him to kill two people, the State killed him. One cannot help feeling that it might have been better even to have killed him at an earlier stage - it would at least have been an honest admission of defeat. (Cf. J.G. Wilson, *The Trial of Peter Manuel*, pp. 235-8).

What, then is to be done with the psychopath? The obvious answer is to provide separate institutions for such people, especially as it appears that most of them can be rendered less dangerous to some extent, given time and the proper facilities (R.C. para. 402). The only difficulty is that of sentencing a man to a long period of detention for a comparatively trivial offence. But this is done in the case of preventive detention, and it should be possible to provide for it in the case of psychopaths who have committed a given number of crimes, or crimes of a certain type, even although they are not eligible for preventive detention. Such a course of action can perhaps be justified retributively

by the consideration that a man is only characterised as an aggressive psychopath because of his tendency to commit crimes. It should be possible to balance the safety of society against the right of the individual by reference to the type and number of the particular psychopath's crimes in the same way as is done in awarding sentences of preventive detention.

This, of course, would only apply where the criminal is a danger to society because of his condition. Where he is not dangerous, or not sufficiently dangerous to warrant this type of treatment, diminished responsibility would still operate to reduce his punishment in rough proportion to the diminution of his responsibility. And it may be that even where he is dangerous he should receive an ordinary sentence of imprisonment in addition to or alongside his period of treatment. This may seem to be an unnecessary piling of Pelion upon Ossa, but if the doctrine is to be given scope and the Courts to be encouraged to adopt means other than imprisonment for dealing with abnormal prisoners and particularly with psychopaths; it is important to make it clear that by so doing they are not making the world easy for criminals and dangerous for other people (cf. Braithwaite, 1945, J.C. 55, 58), but in fact are doing precisely the opposite, and doing it more effectively than is possible under the present system.

Chapter 10: Intoxication.

Introduction.

The law regarding intoxication as a defence to a criminal charge is an unsatisfactory compromise among a number of attitudes and principles. On one hand it is felt that intoxication should never be taken into account in ascribing responsibility for crime, because intoxication is a voluntary condition, and is, moreover, a reprehensible one. Drinking is a vice and it is a man's own fault if he commits a crime under the influence of drink. As Hume says, 'One cannot well lay claim to favour, on the ground of that which itself shews a disregard of order and decency' (Hume, i, 45-6). On the other hand, the man who gets drunk and commits a crime sometimes arouses sympathy rather than indignation. Take, for example, the young man who commits a crime, say rape, or indecent assault, as a result of drinking too much at his first alcoholic party. Talk of vice and wickedness seems out of place in such a situation, and it seems unduly harsh to treat him as if he were a deliberate criminal. This feeling is strongest where the crime he commits is a capital one, and indeed it is only with regard to capital offences that the law takes it into account, and then only grudgingly.

The law is further confused by its occasional recognition of the logical necessity of acquitting someone who acted without mens rea, whatever the reason for the absence of mens rea. Where such recognition would involve the acquittal of the accused and his consequent discharge, the consideration that drunk men are dangerous, and must be punished and placed under

restraint prevails over the logic of the matter. But where the accused has been rendered permanently and not merely temporarily insane by drink (or by any other vice, such as syphilis), it is recognised that he must be acquitted. This is partly because insanity is always regarded as an overriding consideration, and partly because an accused who is acquitted on the ground of insanity does not 'get off scot free', but is detained as a criminal lunatic. (And this is still true even if he is called a State Mental Patient instead - Criminal Justice (Scotland) Act 1949, 12, 13, & 14 Geo. VI, c.94, s.63(2)).

These, briefly, are the factors which must be taken into account in dealing with the law of intoxication. The law itself is easy to state, but it is so self-contradictory and illogical - one feels tempted to say meaningless - that it is difficult to discuss it coherently. Before trying to do so, I wish to make some introductory observations of a general kind which will, I hope, provide some sort of background for an analysis of the present law.

(1) The intoxication must be the cause of the crime.

In discussing intoxication as a plea in defence to a criminal charge we are concerned only with gross intoxication. It is not suggested that the fact that a criminal was merely under the influence of drink at the time of the crime is relevant to the question of his legal responsibility. We are concerned only with those cases in which the crime would not have been committed but for the drink. Drink is relevant only where it can be said that the crime was produced by it, in much the same way as a plea of insanity may be relevant where the crime was the product of the insanity. Naturally, this can only be said where the intoxication was extreme.

(2) Intoxication as an exculpatory factor.

Actus non facit reus nisi mens sit rea - if there is no mens rea there is no crime, whatever the reason for the absence of the mens rea. If A is too drunk to intend to commit theft, but goes about a room gaily pocketing any object he sees, or even taking things out of other people's pockets and putting them in his own, he cannot be guilty of theft. Similarly, if he does not intend to kill he cannot be guilty of murder, whether the absence of intention is due to drink or to error. It may be possible to take this further, by analogy with insanity: if irresistible impulse caused by insanity is a defence, then irresistible impulse caused by drink should also be a defence. If A forms the intention of committing a crime only because he is drunk, and is too drunk to resist the promptings of that drunken impulse, he should, by analogy with insanity, be acquitted. This means only that temporary insanity caused by drink - i.e. a state of gross intoxication - should be regarded as the same as permanent insanity caused by drink, at any rate, for the purpose of the ascription of responsibility.

(3) Intoxication as a mitigatory factor. An

accused who is not so drunk as to be comparable to an insane person may be drunk enough to be comparable to one of diminished responsibility. If the main reason for his crime is drink, the element of malice, of general mens rea, may be absent, in which case it would be proper to reduce his punishment accordingly, and, in the case of murder, to convict him only of culpable homicide. Although a man who kills under provocation kills intentionally, with mens rea, he does not kill maliciously but because he was provoked, and so he is convicted of culpable homicide only.

In the same way it can be said of the drunk man that he did not kill maliciously, but because he was drunk, and so is guilty only of culpable homicide.

(4) The treatment of drunk criminals. One important difference between the drunk and the insane is that the drunk are clearly responsible for their own condition. Moreover, the drunk are not liable to undergo the protective measures which can be applied to the insane. These differences can, however, be recognised without encroaching on the general principles of criminal responsibility by punishing the drunk for something for which they are not responsible - their drunken crimes. That they should be punished for is getting drunk.

(5) Actio libera in causa. Judges who do not wish to give effect to a plea of intoxication sometimes try to justify their refusal to do so by saying that if intoxication were a valid plea, '...if anybody was going to commit a crime, all he would need to do would be to take sufficient liquor and commit it, and then say "Oh, you can't hold me for this, because I had drink"' (Kennedy, 1944 J.C. 171, Lord Carmont at p. 172). But a distinction can be easily made between the man who gets drunk and then decides to commit a crime, and the man who decides to commit a crime and then gets drunk to give himself Dutch courage. The latter situation is described on the Continent as one of actio libera in causa (cf. Schönke-Schröder, pp. 286, 1106-7). It is clear that in such a situation the accused is guilty of an intentional crime, since he formed a sober intention of committing

the crime. If A decides to kill B and then takes drink in order to steal himself to commit the deed, he is guilty of murder, whatever his state of intoxication at the time of the killing.

The concept of actio libera in causa is also applied in relation to negligence, so that where the ultimate crime is one that can be committed negligently the accused will be guilty of its negligent commission if it was foreseeable that his becoming drunk would lead to the crime. If A ought to know that he will become violent when drunk - if, for example, he has done so on prior occasions - but nonetheless gets drunk and kills someone, he will be guilty of culpable homicide or of murder, depending on whether he is regarded as negligent or as reckless. But if A knows he is liable to steal things when drunk, and gets drunk and steals something, he will not be guilty of theft, because theft can be committed only intentionally. If, of course, he at any time formed the intention to steal, it will be necessary to consider whether that intention was so affected by drink as to be nullified, or as to entitle him to mitigation of penalty.

The law of Scotland.

Chronic and acute alcoholism. The effect of the law is to distinguish between chronic and acute alcoholism, and a brief description of these states may be helpful. The distinction is the same as that between what are sometimes called industrial and convivial drinking (W.C. Sullivan, Crime and Insanity, p. 59). The chronic alcoholic gradually drinks himself to death or madness over a period of years, without necessarily ever being at any time drunk in the ordinary sense of the word; acute alcoholism is just the ordinary state of drunkenness. The man who gets mad

drunk on occasions but is quite normal otherwise is a convivial drinker; the man who is never mad drunk (or only so very rarely that this can be discounted in an analysis of his condition), but is a drink-addict, an alcoholic, who is never wholly sober, and who cannot live without drink, is an industrial drinker. The industrial drinker drinks frequently and in small doses, and so accumulates and maintains in his blood stream a steadily growing amount of alcoholic poison, until he eventually goes mad and/or dies. The convivial drinker never gets into this poisoned condition. The law is that the state of the industrial drinker may be taken into account when he is charged with a crime; but that that of the convivial drinker who commits a crime in one of his drunken moments is irrelevant. This distinction in treatment is due at any rate in part to the fact that the chronic alcoholic is not 'drunk' when he commits his crime, and it is drunkenness itself rather than the long term effects of drink which the law abhors.

The distinction appeared very clearly in the American case of U.S. v. Drew ((1828) 5 Mass. 28; Fed. Case. 14993; Sayre, p. 521). D. was a sailor who while suffering from delirium tremens killed a man five days after all the alcohol on the ship had been thrown overboard. Story, J. said,

'In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason, which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct....But the crime must take place and be the immediate result of the fit of intoxication, and while it lasts; and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness' (at p. 522).

Lord Deas made a similar distinction in discussing the case of Alex. Dingwall ((1867) 5 Irv. 466) in the later case of John M'Lean ((1876) 3 Coup. 334, 338). He pointed out that although Dingwall's diminished responsibility was the result of alcoholism he had been sober at the time of the crime, and that had he been drunk that would have afforded neither excuse for nor palliation of his crime.

Insanity caused by chronic alcoholism. It is accordingly clearly recognised that insanity caused by drink is as good a defence to a criminal charge as any other insanity. 'If the mind is diseased...then that is insanity, which will take away criminal responsibility. If there be such insanity, it matters not...what was the exciting cause.. It may be drunkenness or it may be indulgence in any other vicious propensity - it is of no consequence which it is, if insanity is actually produced and is present at the time' (Alex. Milne, (1863) 4 Irv. 301 Lord Justice-Clerk Inglis at p. 244). The reason for the rule was given by Lord Macdonald as being that 'to hold him responsible for that which he does when his mind is overthrown by disease would be to visit him with the consequences of an act which he could not estimate when he did it, because the presence of an actual disease prevented his having sane control of his actions' (M'Donald, (1890) 2 Wh. 517, 521). This is straightforward and in itself unexceptionable; what is puzzling is that no one has explained why it should not equally be the law that one cannot hold a man responsible for what he does when his mind has been overthrown by one bout of drinking instead of by a long and deliberate indulgence in this vicious habit.

Diminished responsibility caused by chronic alcoholism. Although strictly speaking the analogy with insanity is not exact since insanity is exculpatory and diminished responsibility merely a plea in mitigation, it is clearly the law that if a man drinks himself into a permanent state which is just short of insanity, and so is classifiable as a state of diminished responsibility, then, despite the general view that drink can never palliate an offence, he is treated as being of diminished responsibility without any regard to the cause of his condition (Dingwall (1867) 5 Irv. 466; Thos. Ferguson, (1881) 4 Coup. 552).

Acute intoxication.

The law before 1921. It is difficult to say just what the law was on this matter prior to the case of Campbell in 1921 (1921 J.C.1), but there are indications that acute drunkenness was regarded as a relevant mitigating factor, in the same way as provocation or diminished responsibility. Indeed intoxication and diminished responsibility are almost inextricably mingled in a number of cases. Even Hume, who was no friend to the plea of intoxication, seems to have accepted that the proper course to adopt in cases of homicide committed under the influence of drink was to convict the accused of murder and recommend him to mercy, in the same way as in diminished responsibility cases. (Cf. James Cummings, 12 Jan. 1810, Hume, i. 40-1. The accused seems to have been somewhat melancholic and apt to be quarrelsome in liquor. He killed a man apparently when drunk, and was acquitted on the ground of insanity. Hume criticised the verdict because 'a constitution that is liable to violent and sudden irritation from liquor, is no defence', and suggested that he should

have been convicted with a recommendation.) Alison took the view that this was 'the proper way of resolving those cases, unhappily too numerous, in which a fatal act has been committed in the course of a temporary fit of insanity, arising from excessive drinking', provided of course that the accused did not know that he was liable to be maddened by drink (Alison, i. 654).

As we have seen, Lord Deas drew a distinction between chronic and acute alcoholism with reference to diminished responsibility, but even Lord Deas allowed the plea of diminished responsibility to operate in the case of Andrew Grainger ((1878) 4 Coup. 552) in which the accused had committed homicide while suffering from delirium tremens caused by a drinking bout, but was perfectly sane and harmless when not actually under the influence of drink.

The question of drink as a mitigating factor arose in three late nineteenth century cases, independently of the general question of diminished responsibility. In two of these (Macdonald, (1890) 2 Wh. 517, 524; Kane, (1892) 3 Wh. 386, 388) Lord Macdonald, the Lord Justice-Clerk, expressed the law as being that drink could be taken into account in considering whether or not the accused was actuated by malice. In other words, if the crime was caused by drink this might show that the element of malice necessary for a conviction of murder was absent, and so the jury could return a verdict of culpable homicide only.

The possibility that a person might be so drunk as to be completely lacking in mens rea does not seem to have been considered at all in these cases, nor even in the case of Margt. Brown ((1886) 1 Wh. 93) in which

one would expect it to have been raised acutely. The accused was an old woman who had been left in charge of her grandchildren. She got drunk, and in a 'momentary hallucination' put the children on the fire where they were burned to death. She was charged with murder and pleaded insanity or somnambulism. The jury were directed that if her hallucination was caused by insanity they should acquit her, but that if it was caused by drink they might reduce the crime to culpable homicide since there would then be an absence of the 'malice which was essential to the constitution of the crime of murder' (Lord M'Laren at p. 104). But if the accused acted under a hallucination she cannot have had any mens rea at all, and her conviction for culpable homicide can logically be based only on the view that it was culpable for her to get drunk while in charge of the children, i.e. on the principle of actio libera in causa. Something like this may have been in Lord M'Laren's mind when he spoke of the death having been caused by the accused's 'fault' (at p. 105), but it is nowhere made explicit, and the case gives the general impression that the possibility of exculpation because of drink was not considered, because the view was taken that drink could never operate in exculpation.

The modern law. The modern law has no connection with the cases just discussed. It stems entirely from the English case of D.P.P. v. Beard ([1920] A.C. 479), which laid down the rule that intoxication could not operate either in exculpation or in mitigation, except that where it was shown that a person charged with murder had been so drunk at the time of the crime as to have been incapable of forming an intention to kill or do serious bodily harm he should be convicted

of culpable homicide - Angl. manslaughter. This rule was adopted in Campbell (1921 J.C. 1) and was approved by a full bench of the Court of Criminal Appeal in Kennedy (1944 J.C. 171). It now apparently represents the whole law of acute intoxication in Scotland. Even a plea of diminished responsibility will now fail if the position is that the accused is not of diminished responsibility when sober, but only when drunk (Carraher, 1946 J.C. 108; M'Leod, 1956 J.C. 20), contrary to the older view which seems to have allowed for cases where diminished responsibility was due to a combination of mental weakness and acute intoxication, as in Grainger ((1878) 4 Coup. 552; cf. Alison, i. 654).

The rule in Beard is replete with difficulties which can be summed up by saying that it just does not 'add up', does not make sense. This makes it difficult to discuss, but I would offer the following observations.

(1) The rule falls into two parts. The first part is exculpatory - persons who lack the mens rea of murder are not to be convicted of murder. The second part is perhaps best described as punitive - persons who kill when incapable because of drink or intending to do so will be convicted of culpable homicide. The rule is not a whole, and cannot be regarded as a whole. In particular it cannot be regarded as a version of the earlier Scots idea that drink can mitigate the penalty of murder. For Beard only operates when mens rea in the strict sense of intention or recklessness is absent. Where it is present, but general mens rea, or malice, is absent, the rule does not operate to reduce the crime from murder to culpable homicide. Since the rule is regarded

as representing the whole law, drink can never operate in mitigation of the penalty of murder. The conviction for culpable homicide must therefore logically be a conviction for involuntary, and not for voluntary, culpable homicide - someone incapable of intending to kill cannot kill voluntarily.

(2) The formula may be meaningless. The formula set out in Beard as a test of drunkenness is an artificial one, based on the legal definition of the mens rea of murder, and not on any empirical tests of the actual or possible effects of overdrinking. It assumes, for example, that a man may be incapable of intending to do serious injury, and yet be capable of doing it: it seems more likely that anyone so drunk as to be incapable of intending serious injury would not be capable of standing on his feet, far less of killing someone. The formula may be empty of content, or there may be only a very few cases in which it can arise, but neither of these considerations affected its formulation. The formula also suggests that incapacity to intend serious injury may co-exist with intention to cause lesser injury, which again seems unlikely, and no doubt any jury which was satisfied that there was an intention to do some injury would go on to hold that the accused was capable of intending serious injury.

There is the further point that the formula talks of incapacity to intend, and not of absence of actual intention. This is probably because of the evidential position regarding proof of intent. Beard is unnecessary if it is clear on the evidence that the accused did not intend to kill or seriously injure, since in that event he cannot be convicted of murder whether he was drunk or sober, sane or mad, and the

rule does not allow of anything less than a conviction for culpable homicide. The rule is designed for cases in which the jury would have believed that serious injury was intended, but for the evidence of drink. That being so, they will only change their minds about intention if they are convinced that the accused could not have had such an intention, because he was too drunk to be capable of it. Thus, in Campbell (1921 J.C. 1) the jury were told by Lord Scott-Dickson that 'evidence of drunkenness which renders the accused incapable of forming the specific intent required to constitute the crime...should be taken into consideration with the other facts proved in order to determine whether or not he had that intention' (at p. 4).

(3) Beard and exculpation. The first half of the rule faces up to the principle that a person cannot be convicted of a crime in the absence of mens rea, and applies to acute intoxication the same reasoning which is used to allow alcoholic insanity to operate as a defence. As Lord Normand said in Kennedy, 'The essence of the thing is, not the intoxication, but the resulting incapacity to form the intent' (1944 J.C. 171, 177).

(4) The conviction for culpable homicide. The obvious difficulty about the rule is its imposition of an automatic conviction for culpable homicide. In Beard itself Lord Birkenhead said that the reason for this was not clear, that it might be because the accused had committed 'unlawful homicide without malice aforethought', or it might be because of an older view of the law that 'in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself' ([1920] A.C. 479, 500).

The automatic nature of the rule suggests that the latter is the reason. It should be noted at the outset, however, that both these suggested reasons are drawn from English law.

There are three conceivable justifications for conviction of culpable homicide in a given case, but none of these is a good reason for an automatic conviction in all cases. They are:

(a) The concept of actio libera in causa. That would require an enquiry in each case into the foreseeability that the accused's becoming drunk would lead to serious injury to others, and there is no suggestion in Beard or the cases which follow it that any such enquiry is necessary or even relevant. The question of the actio libera in causa was mentioned in Campbell (1921 J.C. 1), strangely enough, by the defence, who pleaded the accused's unusual susceptibility to alcohol. Lord Scott Dickson dealt with this by saying 'That is in law no excuse whatever for a man. It may be a good reason for his taking the advice given to the accused more than once, that he should not indulge in drink at all, but it would be a dangerous view to set afloat that, in the case of a man who knows that drink has that effect on him, it is to be an excuse for anything he does after he has wilfully and wittingly put himself in the position of having too much drink' (at p. 3). But it was not suggested that it was because of this knowledge that it was open to the jury to convict of culpable homicide. The question was not raised in Kennedy (1944 J.C. 171) at all.

(b) By showing that the accused was negligent at the time of the crime. But again, enquiry is not made into this. In any event negligence requires some deliberate act and some minimal capacity on the

part of the accused to appreciate the risks involved (cf. supra 297) and it is unlikely that either of these would be present in a man who was so drunk as to be incapable of intending to do serious injury.

(c) By reference to the rule that any death following on an assault is culpable homicide (Rutherford 1947 J.C. 1). But again this requires a deliberate assault, and it is unlikely that a man incapable of intending serious injury would be capable of any sort of deliberate assault.

The 'reason' for the conviction in Scotland, insofar as it is not just that the law parrots the English rule, is that the rule has become confused with the earlier law which allowed drink to operate to reduce murder to voluntary culpable homicide. The law has developed as follows: drunkenness can reduce the charge because it is a plea in mitigation; this drunkenness was never defined in the Scots cases; drunkenness which reduces murder to manslaughter was defined in Beard; therefore drunkenness so defined is the drunkenness which operates to reduce murder to culpable homicide. The flaw in this argument is clear once it is appreciated that the Beard formula rests on the idea of the absence of intent, and once one appreciates the distinction between the two types of culpable homicide. These factors have not, however, been fully appreciated by the Scots Courts.

(5) The exclusiveness of the rule. The failure to distinguish exculpation and mitigation has led to the rule in Beard being regarded as the whole law of Scotland on drink as a defence to a criminal charge. It would have been possible to adopt the first half of the rule as the test for exculpatory intoxication, and to retain a rule that a lesser degree of intoxication

could operate in mitigation, but Beard appears to have been treated as universally applicable, and no attention has been paid to the question whether the conviction for culpable homicide is for voluntary or involuntary culpable homicide. The practical result of this is that drink cannot operate in mitigation except in one case, that in which logically it should operate in exculpation.

(6) Drunkennes in crimes other than homicide. The question whether "Beard drunkenness" exculpates or only mitigates is not of practical importance in homicide, but it is important in other crimes. Suppose A commits theft or assault - both of which can be committed only intentionally - when he is incapable of forming the intention to commit them. If Beard drunkenness exculpates he must be acquitted and discharged, since there is no procedure for reducing assault to culpable and reckless wounding, or theft to culpable and reckless taking. (There is a crime of culpable and reckless wounding but it appears that it must be specifically libelled before a jury can convict of it as an alternative to assault - Macdonald, p. 115, cf. infra, 576; there is no such crime as reckless theft.) But if Beard drunkenness is mitigatory, A's state could only be taken into account in sentencing him - he would be convicted but receive a lesser sentence than he would have done had he been sober at the time of the crime. Any drunkenness of a lesser degree than the Beard kind would be of no effect at all, since Beard is exclusive, whatever its meaning.

There is very little authority on this matter. In one old case an accused who was charged with 'cursing and beating of parents' - a capital offence at the time - was convicted of common assault, although the assault,

in which he scratched his father's lips was described as just the waving of a drunk man's hand (John Alves, (1830) 5 Deas and Anderson, 147). A logical application of Beard would result in acquittal where an accused charged with assault proved that he had been too drunk to be able to form the intention of assaulting the victim, and Lord Hill Watson gave a direction to this effect in the case of Alex. Winchester (Glasgow High Court, 31 Oct. 1955, unrepd. - I am indebted to Mr. A. A. Macdonald, defence counsel in the case, for this information). It is submitted that this direction represents the law, but there is no binding authority on the question.

In Jas. Kinnison ((1870) 1 Coup. 457), the matter was decided in favour of exculpation without any doubt at all, but the case involved a statutory offence, and of course, was heard long before Beard. The accused was a registrar who was charged with making false entries in his register, and his defence was that he had been drunk when he made the entries. The statute required the false entries to have been made wilfully for an offence to be committed, and Lord Moncrieff told the jury that the question for them was '...not whether the prisoner did wrong in being in the state in which he was when he was required to attend to that business; nor that he did wrong in the error which he made in filling up the register, but that when he made these errors he meant not to make a true entry, but meant to make a false one' (at p.462), and the accused was acquitted. The application of this logic to common law crimes would have resulted in something very different from the confusions of Beard, but it is more difficult to apply logic in crimes like homicide where the result of its application might be the acquittal of the accused, than it is to apply it to

achieve the same result in the case of statutory offences of a minor character.

Proposals for reform.

Any consideration of what the law should be on this matter must take into account two matters - the advisability of having rules which are logical and consonant with general principles of responsibility; and the necessity of satisfying the public indignation which is aroused by the commission of a serious crime by a drunk man, and of protecting the public against drunken criminals. Alison pointed out in 1832 that 'such is the tendency to this brutalising vice, among the lower orders in this country, that if it were sustained as a defence, three-fourths of the whole crimes in the country would go unpunished; for the slightest experience must be sufficient to convince everyone, that almost every crime that is committed, is directly or indirectly connected with whisky' (Alison, i. 662). Allowing for modern social class-attitudes, and for the price of whisky, this statement is probably still true so far as crimes of violence are concerned, and it is a matter to which the law must have regard in dealing with the defence of drunkenness. The great advantage of Beard is that it satisfies the desire to punish drunk criminals, while appearing to satisfy the maxim actus non sit reus; and while also making a concession to the humanitarian outlook by declining to hang drunkards. But, as has been pointed out, Beard will not do. And one reason for this is perhaps that Beard is trying to do two things at once. The problem of making provision for the effect of drink on mens rea is in a way separate from the problem of dealing with the drunken criminal, and should be separately dealt with. If this is

accepted, then it should be possible to construct a law which is consistent with itself and the nineteenth century cases, and at the same time protects the public and satisfies their indignation.

It is submitted that the effect of drink on a man's responsibility for what he does when under its influence can be treated as follows. Where a crime is wholly the product of intoxication, i.e. where it can be shown that but for drink the accused would never have considered committing it, then whether or not he was capable of intending to commit it, and whether or not in his drunken state he did intend to commit it, he should be acquitted of that crime. Where a man is very drunk and his criminal actings have been influenced by drink to a great extent, although he has not completely lost control of himself, it should be open to the Judge or jury to treat this as an element in mitigation, if in the whole circumstances of the case it seems just to do so.

It is submitted that the analogies with insanity and diminished responsibility provide authority for such an approach to the question. I would also pray in aid the observations of a South African Judge who said,

'Our law does not take a sufficiently human view of the effect of liquor on the mind of a person where it is laid down that when one in a state of drunkenness kills another, the offence will not be reduced from murder to culpable homicide unless the drunkenness was of such a nature as to deprive him of the power of appreciating what he was doing and of realising the probable consequences of his act, so that he could not be said to have the intention to kill.

A person who is very much under the influence of liquor cannot be said to be in full command of his reason; his mind is bound to be affected by it...it can only be in a vague, blurred and confused way that he can appreciate or realise what he is doing or the probable consequences

of his act. He cannot be said to be fully capable of appreciating and realising what he is doing' (R. v. Ngobese, [1936] A.D. 296, Curlewis, J.A. at p. 300).

The public interest. What then of the public interest? There are at least three ways in which this can be protected, and they can be adopted cumulatively.

(1) By using the concept of actio libera in causa. This would satisfy the fear that men might deliberately get drunk in order to commit crimes with impunity. It would also allow the Beard rule to operate in cases where the accused should have foreseen the possibility that he might do violence when drunk. It would permit a conviction for culpable homicide in such a case whether or not the accused was incapable of intending to do injury; and if a man ever did drink himself into a Beard condition with the intention of killing someone and succeeded in killing him, he would be guilty of murder on this view, though on the Beard rule he would be guilty only of culpable homicide.

(2) The concept of the actio libera in causa is probably not sufficient in itself to meet the claims of public feeling and public safety. For one thing, it may lead to unpopular acquittals, and it was partly for this reason that German law created the offence of deliberately or negligently drinking oneself into a state of irresponsibility and then committing a crime. This is a specific offence in itself, and is independent of the ultimate crime which is ex hypothesi not punishable. If A gets so drunk as to be irresponsible, and then kills B in circumstances not covered by the concept of actio libera in causa he cannot be convicted of homicide, but he is guilty of the crime of becoming drunk and then committing a criminal act. There would

appear to be nothing in principle to prevent the creation of such a crime in this country by means of legislation. (The relevant section of the StGB - Art. 330a - provides 'Wer sich vorsätzlich oder fahrlässig durch den Genuss geistiger Getränke oder durch andere berauschende Mittel in einen die Zurechnungsfähigkeit ausschliessenden Rausch versetzt, wird... bestraft, wenn er in diesem Zustand eine mit Strafe bedrohte Handlung begeht'. H. Mannheim cites a case in which a man who was unusually susceptible to drink committed a brutal murder when drunk. He had once, years before, been involved in a drunken brawl, since when he had not taken alcohol, but on the night of the murder he had been persuaded by a friend to have a small quantity of drink. In the circumstances the authorities did not prosecute him, and he was forced to seek police protection - Group Problems in Crime and Punishment, pp. 293-6. StGB 330a is designed to deal with this sort of situation.)

(3) Although the German solution takes public indignation into account, it does not provide any degree of public protection, since it only operates when a crime has been committed. It is submitted that the best way of protecting the public from drunk criminals is, as Glanville Williams suggests (Gl. Williams, para. 112), by creating a crime of being drunk and dangerous. The analogy with the crime of being drunk in charge of a vehicle is obvious, and sufficient to show that there is no great difficulty in creating such an offence. There might be some practical difficulties - it cannot be assumed that every drunk man is dangerous in the way in which it is assumed that every drunk driver is dangerous, but it should not be difficult to set up a practice whereby only men of known violent

character where charged with this crime. The advantages of such a course are obvious, since it would enable the police to arrest such a man - if only to take him into the cells till he cooled down - before he did any harm. A man arrested on such a charge would, of course, be more severely dealt with if he had a record of violence, than if he had not.

Involuntary intoxication.

So far we have been concerned only with voluntary intoxication, and most of what has been said cannot be applied to cases in which a person has become drunk involuntarily, for example, where someone else has given him drink without his knowledge. It seems inevitable that a state of involuntary intoxication must operate either as a defence or in mitigation when it produces a state of mind generally recognised by the law as excluding or reducing responsibility.

In the absence of authority it is impossible to say what amounts to involuntary intoxication. It is likely, however, that the limits of involuntariness will be strictly defined, and that, as was said in a case in Oklahoma, 'involuntary intoxication is a very rare thing and can never exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion' (Perryman v. State, (1916) 12 Okla. Cr. App. 500, 159 Pac. 937, Hall, pp. 439-40). The emphasis too may be laid on the voluntary nature of the drinking rather than on its viciousness or lack of viciousness. In one American case it was held that drink taken to relieve toothache was to be regarded as taken voluntarily, and that its effects could not be

pleaded in defence to a charge, at any rate where it was taken without medical advice (Johnson v. Cmwth., (1924) 135 Va. 524; 115 S.E. 673; 30 A.L.R. 755). This case was decided in the period of prohibition, but its ratio is generally applicable - 'no man may be allowed to expose the public to the danger of harm of violence caused by his own misconduct in voluntarily rendering himself dangerous' (at p. 760). In other words, whoever drinks does so at his own risk, and must just take the consequences if he commits a crime as a result. 'He, and not others, must take the risk' (ib. p. 761). The similarity between this and the Beard attitude is sufficient to enable one to say that the ratio of Johnson would probably be accepted in Scotland.

Addiction. The problem of the addict is allied to that of involuntary intoxication. There seems to be no authority in support of the view that his drinking is involuntary, and the ratio of Johnson is against such a view, but compulsive drinking can hardly be regarded as voluntary. The nearest the law comes to recognising this is by way of its recognition of the effects of chronic alcoholism as a relevant defence. But it makes no effort to distinguish between the habitual voluntary drinker and the addict whose drinking is involuntary and indeed the symptom of his disease. (But see Wm. Wylie (1858) 3 Irv. 218, in which Lord Cowan observed, obiter, since the case was one of insanity that 'Drunkenness, caused by his own act, would be no defence. But the peculiarity of the present case, even had such a point been raised by the proof, was, that according to the medical evidence, the prisoner's drinking habits were not the cause, but the effect, of his insanity' - at p. 234.) It was assumed in Campbell (1921 J.C. 1) that the

accused, who had been rendered peculiarly susceptible to alcohol as the result of an accident, was able to control his desire for drink, and to control it as effectively as a normal healthy man. It was not suggested that if the accident had made him an addict he could have pleaded that as a defence or in mitigation.

The problem of the 'self-made' addict is even more difficult than that of the man whose addiction is the result of accident or disease. Sullivan states that most drunken killers are pathological drunkards, suffering from nervous instability which predisposes them to pathological drunkenness, although this predisposition may itself be the result of chronic intoxication (W.C. Sullivan, *Insanity and Crime*, pp. 66-7). If the effects of chronic alcoholism are relevant when they produce insanity or diminished responsibility, they should also be relevant when they lead to an inability, or to a diminished ability, to keep away from drink, and so render the accused's drinking wholly or partly involuntary. It may not be easy to distinguish the habitual drinker from the addict, but if the distinction exists an attempt should be made to recognise it, if only because the appropriate way of dealing with the addict is not by punishment but by some form of treatment.

Chapter 11: Necessity, Coercion and
Superior Orders.

In the context of the criminal law the word 'necessity' has rather a loose meaning. The law is concerned only with voluntary actions, and, strictly speaking, no voluntary action is ever necessary. Where the agent is totally deprived of volition so that his acts are wholly the result of causes other than his will, there is no occasion to advance the plea of necessity or coercion, since in such cases there is no 'act' at all. The plea of necessity or coercion arises where A does something, intentionally and voluntarily, which, unless it can be justified or excused by the plea, is punishable. It applies to acts done in situations where the accused's defence is 'I did it, because I had to; I had no alternative': and where 'I had no alternative' means, 'The only alternative was one I was not obliged to adopt'.

Necessity is therefore necessity for something. It is not the necessity of physical causality which, for example, makes it necessary that water will boil at a certain temperature under certain pressure, but is teleological necessity (cf. Hall, p. 388). In situations of necessity the accused is faced with a choice between two courses of action, and he is required to choose by reference to the relative value attached by the law to each course of action and its result. The essential feature of the situation is the conflict of values; and it is the accused's duty to choose that course of action which will realise the greater value (cf. Schönke-Schröder, p. 270; Donnedieu de Vabres, p. 218).

These situations may arise independently of the will of any person whose life or property is involved in the balance of values, or they may be created by one of the persons so involved. Hall describes teleological necessity as implying 'voluntary conduct in the face of serious danger threatened by the impact of physical forces' (Hall, loc.cit.), but this is too narrow if it excludes situations contributed to by human action, or treats them as essentially different from those caused solely by physical forces. Coercion, where the choice is forced on the agent by someone whose interests are not involved in the value calculation, is essentially the same as necessity occasioned by natural events. When a man has, for example, to choose between his own life and that of others, the situation is governed by the same principles whether it is the result of a natural disaster such as a shipwreck caused by storm, or of the coercive action of a human being. The important distinction is that between situations which can be accepted as 'given', because none of those whose interests are threatened is responsible for them, and situations where the person who created the situation is involved in the value-conflict, so that it is necessary to take his responsibility into account in balancing the values involved. The typical example of the latter type of situation is the case of self-defence against a criminal attack.

The defence of superior orders is probably a subject in itself, but the situation which gives rise to it resemble cases of coercion, and it is sometimes treated as an example of necessity (e.g. Hume, i. 53-5; Alison, i. 672-5).

I - NECESSITY

The plea of necessity in one form or another is fairly generally recognised in Continental law (e.g. StGB Art. 54, SchwStGB Art, 34, Donnedieu de Vabres, p. 218. cf. International Convention on the High Seas, 1958, Art. 2/, reprinted in Report on the first United Nations Conference on the Law of the Sea, Cmd-584, 1958), but there is hardly any authority on or discussion of the question in Scotland, and not very much in England. In these circumstances I shall first consider the problem in general, then deal with the law of England as expressed in the two famous cases of R. v. Dudley and Stephens ((1884) 14 Q.B.D. 2/4) and R. v. Bourne ([1939] 1 K.B. 687), and finally I shall consider the position in Scots law.

The general problem

The scope of the plea.

The plea of necessity is one which is not regarded with enthusiasm by the law. The possibilities of abuse are considerable, and accordingly the plea will only be allowed to operate where it is clear that the otherwise criminal action taken was the only means of preserving the value in question. If there are two courses open each of which would preserve the value in question, and one of them is criminal, then the agent must adopt the non-criminal one, even if the criminal one is easier, or more likely to succeed. The criminal course of action may only be adopted where there is no other way out. Again, the danger must be imminent and considerable. A is not entitled to steal B's gun today because he thinks he may need a gun to defend himself against C to-morrow. The

necessity must probably be such that A can be said to have acted in the agony of the moment, and this is so even although A's action is justified or excused, not by his agonised state of mind, but by the fact that in a situation of necessity he adopted the legally approved course of action. Before the law comes to consider the relative values involved it must be satisfied that the situation truly was one of necessity - that danger was imminent and that no other way of avoiding it was open to the accused. Only after that has been decided does it turn to ask if the accused did the right thing in the situation. If there was no imminent danger and no necessity to commit the crime, no question of conflict of values arises.

The negative value of a prima facie crime.

Where there are two possible ways of preserving x units of value, and one of these is criminal, it is clear that the whole situation constituted by the preservation of x by the commission of a crime is less in value than the whole situation constituted by the preservation of x by a non-criminal act. This is because the commission of a crime is itself regarded as of negative value, so that the whole situation constituted by the preservation of x by the commission of a crime will in fact have a lesser value than x - its total value will be the value of x less the negative value of the commission of the crime. Suppose now that an agent is faced with a choice between preserving something valued at x and something valued at $x+y$, and that in order to preserve the latter he would have to commit a crime. Then, if the negative value of the crime is $-y$, the two courses of action will be equal, and if the negative value of the crime is greater than y , it will be his duty not to preserve the greater value

x+y, since in so doing he will create a total situation valued at less than x which is the alternative value which can be preserved without the commission of a crime. It is only where the total situation created by the crime is of greater value than the alternative situation that the 'crime' is justified or excused, and so ceases to be a crime. Prima facie it is criminal, and this factor must be included in any calculation of values.

If obedience to the law were regarded as the supreme value, and as an absolute value, there would be no room for the plea of necessity at all, since it would not be possible for a situation involving a breach of the law to be more valuable than one which did not involve such a breach. It would never be permissible to break the law, because no other value would be as great as the value involved in not breaking the law. It would never, for example, be permissible to borrow someone's car in an emergency to take a sick man to hospital, since even the value of his life would not compensate for the breach of the law. The deontological version of this situation is more familiar - if every imperative of the law is categorical, there can never be any conditions in which it is right to disobey any of them.

This, however, would be an impossible situation. It cannot be the law that it is a crime to steal a lifebelt to save a drowning man. The dilemma is the same as that in the well-known example which is always used in attacking the Kantian doctrine of the categorical nature of the moral law. Suppose A who is standing at a street corner sees someone running past him, obviously in fear of his life; he is followed very soon afterwards by someone running along the street brandishing a hatchet. The man with the hatchet asks A, 'Which

way did he go?' Unless the necessity of saving the first man's life is regarded as paramount, A will be obliged to tell the truth to the pursuer, since otherwise he would be breaking the categorical obligation to tell the truth.

There seems no reason for regarding legal rules as categorical, or as being all of equal value - there is no reason why some legal rules should not be regarded as more important than others, or why in some cases other considerations should not allow a legal rule to be broken. The law is not the embodiment of absolute wisdom but merely a means of social control, and it would be socially disadvantageous, for example, to prevent the preservation of a building by action involving the theft of a ladder and a fire extinguisher.

The possible situations.

Situations of necessity can be divided into three main groups by reference to the concept of value-conflicts. These are (i) Where one value is clearly greater than another, (ii) where the values involved are equal, (iii) where the values involved are absolute.

(i) In such a situation it should be clear that the agent's duty is to preserve the greater value, and where this involves the commission of a crime, the crime should be justified by the necessity of preserving the greater value. It should not be a crime, for example, to steal a fire-extinguisher in order to save a burning building (cf. Gl. Williams, para. 175). Indeed there may be occasions on which there is a legal obligation to commit a crime in order to preserve a value. If it is accepted that abortion is a lesser crime than homicide, then a doctor who refuses to save a pregnant woman's life by performing an abortion may be guilty of culpable homicide (cf.

R. v. Bourne [1939] 1 K.B. 687, Macnaghten, J. at p. 693).

(ii) Donnedieu de Vabres sums up his views on necessity as follows:- 'Le délit nécessaire ne peut... être considéré comme un acte antisocial; il a été socialement utile, si le bien sauvegardé était supérieur à celui qui a été sacrifié, et socialement indifférent, s'il était de valeur égale' (Donnedieu de Vabres, p. 218). This, it is submitted, is an appropriate approach, provided that the calculation includes the negative value of lawbreaking in arriving at the equivalence of values.

(iii) The most difficult questions arise in the case of absolute values, which, by definition, cannot be related to any other values. Probably the only absolute value is the preservation of life. This means that any lesser crime than homicide will be justified by the preservation of life, but it makes it very difficult if not impossible to allow any circumstances to justify homicide. It is possible to adopt a rule of 'quantitative necessity' (cf. Schönke-Schröder, p. 271), but to do so would not be consistent with the idea that each human life is of absolute value, and would offend against the feeling that no human being has a right to decide which of his fellows should survive in any situation. Nor is there any way of determining what preponderance of saved lives is necessary to overcome the great negative value of the crime of murder. At the same time there are situations, such as that of the shipwreck, in which it would be grossly wasteful to insist that all should drown and refuse to allow any to be saved at the expense of the rest.

The problem is a little easier in two special situations; (a) where the person making the choice has a legal duty towards one or more of the persons

whose lives are in danger, and (b) where the particular persons sacrificed would necessarily have died anyway.

(a) Suppose A is in a boat with B his child, and C, a stranger. If it becomes necessary for one of the three to be sacrificed in order to save the other two, it may be permissible for A to sacrifice C in order to perform his legal duty to protect B, although it would not be permissible for him to sacrifice C in order to protect himself, or to sacrifice B to protect himself or C. That is to say, it may be possible to resolve the conflict of values by means of the value involved in A's performance of his duty to protect B.

(b) Suppose three men, A, B and C, are climbing a mountain, roped together in that order, with A as leader. A is only able to pull one of the other two up behind him, and therefore he cuts the rope between B and C, and so kills C. A's action is regarded as justifiable (Schönke-Schröder, p. 271; Gl. Williams, para. 176); because A's only choice is between losing both B and C, and 'sacrificing' C in order to save B, and because the 'choice' of C as the sacrifice is made not by A but by the relative positions of the three men. Perhaps the real distinction between this case and that where two shipwrecked men decide to put a third out of a lifeboat which can hold only two people, is that in the mountain case it is clear that C will die whatever A does, so that A cannot be said to have killed him, but only to have saved B.

The effect of the plea.

It is possible to regard necessity as a justification, an excuse, or a mitigating factor. The words 'justification' and 'excuse' are often used loosely and interchangeably, but I propose to use them to

distinguish between factors which deprive an act of its criminal nature, and factors which merely render it unpunishable. A killing which is carried out under a valid judicial order is justified, it is not crime; a killing committed by a lunatic or by someone under the age of criminal responsibility is a crime, but it is not punishable, it is like an 'unenforceable crime' (cf. supra, 89). The important difference is this - it is lawful to defend one self or one's property against an excusable act, but not against a justifiable one. It is justifiable self-defence to kill a lunatic in order to save one's life from his attack, but it is murder to kill the public hangman in order to prevent him from carrying out a death sentence (cf. the distinction in German law between *Rechtfertigungsgründe* on the one hand, and *Schuldausschliessungsgründe*, sometimes called *Entschuldigungsgründe*, on the other - Schönke-Schröder, pp. 276-7).

Necessity should probably operate as a justification wherever the law lays down, or recognises, a clear scale of values. The owner of a fire-extinguisher can hardly be justified in preventing someone else from using it to put out a fire which has caught a woman's dress (cf. Gl. Williams, para. 177). Similarly, if there is a rule that in a shipwreck sailors must give precedence to women and children, a sailor would not be entitled to resist anyone who removed him from a boat in order to make room for a child.

It is submitted that where the law lays down no rule of choice, anyone who kills another to save himself is excusable. If the law gives no rules at all for a situation it can hardly blame people for making their own rules, and at the same time cannot expect anyone who is picked out for sacrifice not to resist the attack

on him. In the classic situation of two men making for a raft only strong enough to hold one of them, if the law can provide no principle of choice, each will be excusable for attacking the other and trying to keep him away from the raft, and each will be entitled to protect himself against the other's attempts to drown him (cf. Schönke-Schröder, p. 278).

It may be said that such a difficulty cannot arise in English law, since it provides a rule for such a situation - the rule that neither may attack the other, but each must await his fate passively, or sacrifice himself (Dudley and Stephens, (1884) 14 Q.B.D. 274). But this raises the question whether the law ought to lay down or to enforce such a negative rule (Since suicide is not a crime in Scotland, we can ignore the further difficulty involved where suicide is criminal). The sacrifice demanded by the rule is one which can hardly be enforced by threat of punishment - you cannot make a man into a martyr by threatening him that if he saves himself now at the cost of someone else's life, he may be punished at a future date. As Macaulay points out, 'An eminently virtuous man indeed will prefer death to crime; but it is not to our virtue that the penal law addresses itself; nor would the world stand in need of penal laws if men were virtuous' (Macaulay, p. 455). On Benthamite principles therefore, punishment should not be inflicted in such cases since it would be wholly inefficacious (cf. Bentham, XIII, 3). The law should therefore not enforce the negative rule, and so, since it does not lay down any positive rule, and probably cannot do so, it should recognise its impotence, and regard anyone who takes the law into his own hands as excusable (cf. Schönke-Schröder, loc. cit.).

Finally, it should be noted that, since justification is an objective matter, concerned with the actus reus, and exculpability a subjective matter, concerned with mens rea, a person who acts out of a reasonable error of fact regarding necessity can be only excusable. This can be seen most clearly by reference to a situation of self-defence. If A attacks B under the mistaken belief that it is necessary to do so in order to avert a threatened fatal attack by B, A is excusable, but B is entitled to defend himself against A, since in fact B was not about to attack A, and A's actions are therefore not justifiable, nor is B under any duty to submit to them.

The operation of necessity as a plea in mitigation is quite different from its operation as an excuse or justification. It is submitted that necessity may operate in mitigation in the same way as does provocation - by showing that the accused lacked malice and acted under a stress which entitles him to be treated sympathetically.

Two English cases.

The case of the Mignonette.

The classic example of the plea of necessity in a charge of murder is the case of R. v. Dudley and Stephens, known also as the case of the Mignonette ((1884) 14 Q.B.D. 274). D, S, and an eighteen year old cabin boy got into a lifeboat after the sinking of the Mignonette. After they had been in the boat eighteen days, for seven of which they had been without food, and for five without water, D proposed to S that one of the three should be killed and eaten by the survivors and that the victim should be chosen by lot. Later, however, it was decided to kill the boy

as he had the least chance of survival. This was done on the twentieth day, and the two men ate the boy until they were picked up on the twentyfourth day. On their return to England they were charged with murder. The jury brought in a special verdict in which they found the abovefacts proved, and that '...there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other two men'. On these facts the Court, in a judgment delivered by Lord Coleridge, C.J., had no doubt that the men were guilty of murder.

Dudley proceeded on the view that 'the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour... certainly is not law at the present day' (at p. 286). The suggestion that one could save one's life at the expense of another was said to be 'at once dangerous, immoral, and opposed to all legal principle and analogy' (at p. 281). The effect of Dudley is that in situations where only some of a group of people can survive, no one is allowed to sacrifice anyone else, and all must let matters take their course.

The decision, which in Scotland is at highest only of persuasive authority, is further weakened by two considerations which render it of doubtful value as a precedent. The first is that in fact the accused were not hanged but only imprisoned for six months, and that the Court knew that they would not be hanged (cf. Gl. Williams, para. 176). The second is that the Court may have been influenced by the peculiarly revolting facts of the case which involved not merely murder but cannibalism, although the latter was not

charged as a crime nor made an explicit ground of judgment.

The decision is objectionable mainly because it proceeded on moral and religious, and not on legal, considerations. The Court appear to have assumed that the law must enforce the same high standards as are laid down by the Christian religion. The Court accepted that, 'We are often compelled to set up standards we cannot reach ourselves' (at p. 288). But even if it is ethically or religiously right to insist on self-sacrifice and on that 'moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink' (at p. 287), it does not follow that the law must enforce the same standards as those of morality. The decision also fails to take into account the unlikelihood of anyone being persuaded to accept such standards by means of the threat of legal punishment. To try to prevent crimes like that in Dudley by hanging is probably futile, since the possibility of future hanging will not outweigh the certainty of present death; to try to prevent them by a sentence of six months imprisonment is merely ludicrous.

One of the main reasons for the decision in Dudley was the difficulty of answering the question 'Who is to be the Judge of this sort of necessity? By what measure is the comparative value of lives to be measured?' (at p. 287). It is feared that to allow one man to make such a choice among others is to let people take the law into their own hands, and to invite anarchy. But Dudley fails to face up to the difficulty that there are situations in which people will not in fact remain passive, and await their fate with folded hands. By refusing to lay down any rules of action for them, it invites a situation in which it will be 'every man

for himself', and in which no one will be punishable for what he does, or at any rate will be punishable only to a slight degree, because, as was in fact recognised by the way in which Dudley and Stephens were dealt with, his actions will appear excusable. But if there are rules, then whoever is in charge of the situation will be fortified by the rules and be helped by them to enforce order, and those who disobey the rules will be open to charges of acting wholly unjustifiably. Of course, this will not prevent them so acting if they are determined to do so, but it will give those of them who wish to abide by the law, a law by which to abide which is not wholly negative in character, but will allow some people to be saved.

In one American case an attempt was made to lay down such a rule. This was the case of U.S. v. Holmes ((1841) 26 Fed. Cas. 360, No. 15,383; Hall, p. 391ff.), which arose out of the wreck of the William Brown. Some passengers and all the crew got into two life-boats. One of these boats, commanded by the mate, was overloaded so that it became necessary to put some people overboard to prevent it sinking. Holmes helped to put sixteen male passengers overboard under the mate's orders. He was convicted of manslaughter, the Grand Jury having refused to indict him for murder. The defence of necessity which he pleaded was not rejected out of hand; the Court accepted the principle but held that the choice of victims had been wrongly made. It was held that passengers should have been preferred to sailors, and only as many seamen saved as were required to sail the boat. As among the passengers it was held that the victims should have been chosen by lot, that being the fairest method and 'in some sort, an appeal to God'.

The preference given the passengers is an example of the application of a recognised rule, referred to in Dudley as an example of self-sacrifice, and described by Glanville Williams as the 'etiquette of the sea' (Gl. Williams, para. 176). Its foundation is probably the sailor's contractual duty to look after his passengers. But at the same time it is a rule of law that this duty involves the further duty to sacrifice himself for the sake of the passengers. After all, the sailor does not explicitly contract to sacrifice his life if necessary for the safety of the passengers, and even if he did, that in itself would not matter, since no one can consent to be killed so as to free his killer from punishment. A captain who forcibly removed an unwilling sailor from a boat to make room for a passenger would not be guilty of homicide if the sailor was drowned as a result, but this would be so, not because of the sailor's implied consent to be drowned, but because of a rule of law governing the choice of victim in situations of shipwreck. That there is an 'etiquette of the sea' shows that it is possible to construct rules for choice of victim despite the moral and religious difficulties involved; and shows also, that where a situation occurs often enough, rules will be created. One reason the law manages to do without rules for situations like that in Dudley is that such cases rarely occur. Were they frequent the law might well find that its negative attitude was unworkable and produced undesirable results, and would set about trying to lay down and enforce rules.

The case of U.S. v. Holmes (supra) was summarily dismissed in Dudley as unsatisfactory, mainly because of the suggestion of a lottery. It may seem wrong, or frivolous, to decide such a matter by lot -

it might, for example, be better to apply the convention of women and children first, or to give the young preference over the aged, and so on. But in the absence of any other principle of choice a lottery does prevent an unseemly scramble for survival which can lead only to the survival of the physically strongest, and it is an admission that the situation has got beyond the power of human judgment; it is as much a committal of the matter into the hands of a higher power as is the fatalistic inactivity required by Dudley, and has the advantage of making possible the survival of some of the persons involved. It has the further advantage that it would often be difficult to reach agreement on any alternative mode of selection, while in the absence of agreement, drawing lots, or spinning coins, or picking cards, or any other such method, seems an obvious, if a last, resort. The most important thing about Holmes however, is that it recognises that there should be some rules, and that it is the function of the law to decide what they should be. Until that much is recognised, and it is not recognised in Dudley, we cannot go on to decide what the rules ought to be.

The case of R. v. Bourne.

The case of R. v. Bourne ([1939] 1 K.B. 687) may be regarded as authority for the view that lesser crimes are justified by the necessity of preserving life. Bourne itself deals with the rather special case of therapeutic abortion, but it would seem that a fortiori lesser crimes, such as theft, would be similarly justified. It must be pointed out, however, that Bourne was only a trial at first instance before a single Judge and a jury, and that the circumstances of the case were particularly favourable to an acquittal.

The abortion was carried out by an eminent surgeon on a girl who had been the victim of a series of rapes; and before carrying out the abortion the accused had given the police notice of his intention to do so.

In his charge to the jury Macnaghten, J. applied to abortion the provision of the English Infant Life (Preservation) act, 1929 (19 & 20, Geo.V, c.54), section 1(1), that the destruction of a child during birth was not criminal if done 'in good faith for the purpose of preserving the life of the mother'. Just what 'preserving the life of the mother' means is not clear, so that the precise scope of the rule that therapeutic abortion is not criminal is undefined (cf. Glanville Williams, *The Sanctity of Life and the Criminal Law*, op. 153 ff.). Macnaghten, J. said that it covered more than the prevention of imminent death, and that the doctor need not wait till the mother was on the point of death before terminating the pregnancy ([1939] 1 K.B. 687, 693). He also pointed out that it was difficult to distinguish the preservation of life from that of health, since life depends on health (*ib.* at p. 692). The defence do not appear to have claimed more than that the continuation of the pregnancy would have made the girl a physical wreck.

(Macnaghten, J. also pointed out, at p. 693, that a doctor who refused to save his patient's life because of religious or other objections to abortion might be guilty of manslaughter. This may be so, but Bourne can probably be applied in situations where failure to abort would not be manslaughter. Indeed, the facts in Bourne could hardly have involved such a charge. Dr. Bourne appears to have performed the operation as a volunteer, and not because he was the girl's doctor. A surgeon who undertakes to attend

a pregnancy may be obliged to destroy the foetus to save the mother, but no surgeon is bound to offer to perform an abortion some time before the due date of birth.)

Even if Bourne is restricted to the preservation of the mother from almost certain death, it offers an example of the law laying down a rule regarding the choice of values in circumstances of necessity - the life of the mother is preferred to that of the unborn child. Bourne is not authority for the view, e.g. that the life of a fully born child should be sacrificed if that is necessary to save the life of the mother. (The approach by way of balance of values is seen very clearly in Rabbinic law where it is provided that 'If a woman suffer hard labour in travail the child must be cut up in her womb or brought out piecemeal, for her life takes precedence over its life; if its greater part has already come forth it must not be touched; for the claim of one life cannot supersede that of another life' - Mishna, Oholoth, 7,6. English law now postpones the stage of equality until birth is complete, but the principle is the same.) This is the core of the decision, although it is somewhat obscured by the surrounding circumstances, such as the fact that abortion is a surgical operation and operations have a peculiar position in the criminal law, and the fact that the choice in question did not involve the life of the accused. The absence of any suggestion of selfishness on the part of the accused, who, indeed, put his professional future in jeopardy, and the fact that he was acting as a doctor probably made it easier for Macnaghten, J. to give the directions he gave, and for the jury to follow them; but the case depends on the rule that the mother is to be preferred to the foetus, and it would be

unfortunate if this were to be subordinated to the other features in the case. If Bourne is correct then an abortion carried out by an unqualified person for a fee would be justified, if it was necessary to save the mother's life; if Bourne is wrong, an operation carried out by a distinguished surgeon without a fee would be criminal, even although performed to preserve the mother's life.

The law of Scotland.

Hume deals with the defence of necessity only in connection with the old plea of Burthensack. He interprets the law of Burthensack as meaning that the theft of as much meat as a man can carry on his back is not capital - i.e. that the defence of want or necessity may mitigate the punishment of theft. Hume rejects even this restricted operation of the plea of necessity because of the difficulty of calculating 'the due measure of distress', of distinguishing genuine cases from those of 'pretended necessity' and because such a rule would make every man the judge of his own needs (Hume, i. 55).

Hume's reasoning can be applied a fortiori to the situation in R. v. Dudley and Stephens ((1884) 14 Q.B.D. 286), and Professor Smith thinks it likely that the reasoning of Dudley would be adopted in Scotland (T. B. Smith, p. 714). There is, however, room in Scotland for the acceptance of necessity as a plea in mitigation. Hume (i. 55-6) and Alison (i. 674) both propose that genuine cases of want should be dealt with by supplication to the Royal Prerogative in capital cases, and Alison says that in non-capital cases the Judge may take the necessity into account in imposing sentence (ib. 675). It is probably therefore open to a modern

jury to reduce a murder charge to one of culpable homicide on this ground in the same way as they can in cases of diminished responsibility. Such a course would be consistent with the actual result of Dudley, if not with its reasoning. It is, however, still open to the Scots Courts to accept necessity as a justification or excuse in appropriate cases of murder or other crimes, since there is no authority on the point. Should the matter arise it may be preferable to decide it by reference to modern European practice, rather than to the case of Dudley.

The only Scottish authority in support of necessity as an exculpatory plea is concerned with the crime of abortion, and is far from conclusive. Anderson states baldly that abortion 'is criminal if done feloniously and not as a necessary medical operation' but cites no cases (Anderson, p. 156); Macdonald says that in abortion 'there must be criminal intent, for it may be necessary to cause abortion' (Macdonald, p. 114) and cites the cases of Minnie Graham ((1897) 2 Adam 412) and of R. v. Bourne ([1939] 1 K.B. 687). Professor T. B. Smith cites Graham as showing that criminal intent is a necessary ingredient of abortion, and says that this indicates that 'the law of necessity is in Scotland regarded in such cases' (T.B. Smith, p. 714) - he adds that the Scots Courts might follow Bourne in rejecting a narrow interpretation of necessity.

The judgment in Graham does not even mention necessity, and it seems clear from the short report of the trial in the 'Scotsman' newspaper ('Scotsman' Newspaper, 14 Dec. 1897) that the defence of necessity was not in fact raised in the case - the accused was not a Doctor, but seems to have been a typical part-time professional abortionist. She was indicted on three charges of procuring an abortion by the use

of drugs and an instrument. It was argued that the indictment was irrelevant in that it did not specifically libel an intention to cause abortion. This argument was rejected because it was held that the words 'wickedly and feloniously' were to be implied in terms of the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict., c.35, s.8), and that the indictment was therefore relevant. The point taken was a technical point of procedure, and not a general point of principle. The only reference to necessity in the report of the case is a passing one by defence counsel to the effect that the abortion might have been lawful and necessary in the circumstances (2 Adam at p. 413). All that the case decided was that under the indictment as it stood, 'there is no crime at all in using drugs or instruments even if they caused abortion, unless they were used criminally' (Lord Justice-Clerk Macdonald at p. 415). This of course is tautologous, and devoid of any indication of what it is that makes the use of instruments which cause abortion criminal - it may be merely using them with intent to cause abortion. It is arguable that the dictum shows that the concept of abortion is defeasible, and that if so, the necessity of saving life would be a defeasing circumstance, since one would not normally describe the use of abortifacients for that purpose as a criminal use; but the question was not properly raised in the case at all.

Nor does it follow from the fact that abortion, like most other crimes, requires a criminal intention, that the plea of necessity can prevent conviction for abortion. A person in Dr. Bourne's position has the necessary intent - he intended to cause an abortion. Whether than intent was criminal or not depends on whether the termination of the girl's pregnancy

in the circumstances, was a crime, and not vice versa. Indeed, Dr. Bourne did what he did in the knowledge that it might be criminal, and with the intention of having himself arrested and tried, so that the law of abortion might be clarified, or be shown to be in need of alteration. Not only did he intend to do what he did, but he realised it might be criminal, and accepted that in that event he would be guilty of a crime, a crime he intended to commit. (See Lillian Wyles, *A Woman at Scotland Yard*, pp. 221ff. for an account of the circumstances of the case.) What was distinctive in Dr. Bourne's mental state was the absence, not of intention, but of wickedness and of selfishness, and their absence goes only to mitigation, and not to exculpation.

Although there are no cases which support the view that Bourne is law in Scotland, it is accepted as being such by Professor Glaister in his textbook of medical jurisprudence (*Glaister, Medical Jurisprudence and Toxicology*, 10th edn. p. 358), and also, with some hesitation, by Professor Smith and Dr. Fiddes in theirs (*Smith and Fiddes, Forensic Medicine*, 10th edn., p. 323). The position is probably that where the Crown Office discover a case of a genuine therapeutic abortion performed by reputable surgeons, they do not prosecute. Had Dr. Bourne carried out his operation in Scotland he would probably have failed in his purpose of clarifying the law and giving guidance to his profession, because the authorities would have declined to prosecute.

II - COERCION

Coercion and necessity.

There is considerably more authority on the defence of coercion than on that of necessity, and the former is much more favourably regarded by the law. This is perhaps because the typical situation in coercion - where the accused is forced to commit a crime at the point of a gun - is similar to the situation in which the accused is altogether deprived of volition, as where a knife is put into his hand and forcibly guided into the victim's body. The presence of such an analogy makes it easier for the law to accept coercion than it is to accept necessity where there is no such analogy. Another reason for the acceptance of the defence of coercion is that coercion is often thought of as involving the overpowering of the accused's will by the force of the threats made against him. There is here again an analogy with the case in which a man's will is completely overpowered, a situation in which - if it can ever occur - his actions would clearly not be voluntary. But in such situations, as in that of the man who is physically propelled by a stronger force, there is no need to invoke the defence of coercion, since there is no criminal conduct at all on the part of the accused. Coercion, like necessity, is concerned with situations in which the accused chooses to commit a crime because he prefers to do so rather than submit to the threatened alternative. Whether or not the defence of coercion succeeds, assuming the threat to have been sufficiently serious to create a situation of necessity, will depend on whether or not the law approves of the accused's choice

of action. It is this objective choice which is important. To prefer treason to imminent death is justifiable, to prefer it to the destruction of one's property is not (Alex. M'Growther, 1746, 18 St.Tr. 391, Lee, C.J. at pp. 393-4; cf. R. v. Purdy, (1946) 10 J.Cr.L. 182) - and it would not make any difference if the particular accused preferred the preservation of his property to that of his life, so that a threat to the former would be more likely to affect his mind than a threat to the latter.

The same considerations which make punishment futile in certain situations of necessity apply equally to coercion. 'A man who refuses to commit a bad action, when he sees preparations made for killing or torturing him unless he complies, is a man who does not require the fear of punishment to restrain him. A man, on the other hand, who is withheld from committing crimes solely or chiefly by the fear of punishment, will never be withheld by that fear when a pistol is held to his forehead or a lighted torch applied to his fingers for the purpose of forcing him to commit a crime' (Macaulay, p. 455).

The only fundamental distinction between coercion and necessity is that coercion can operate only as an excuse. The reason for this, it is submitted, is as follows. The man who commits a crime under coercion does so as the agent, albeit the innocent agent, of the criminal who is coercing him. Anyone, therefore, who defends himself against him is defending himself against a crime - the crime committed by the coercer through the agency of the coerced person. It is unlikely that this right of defence against a crime can be taken away from the victim merely because the criminal operates by way of coercing another person

into committing the crime rather than by committing it himself. If this is so, then the defence is something special to the coerced person, and does not affect third party rights, so to speak, and accordingly coercion can operate only as an excuse, and not as a justification.

This consideration may also raise particular difficulties where A is threatened with death if he will not kill or rape another, since it is lawful to kill an assailant to save another from these crimes. As it is put in the Talmud, since a man is allowed to save a woman from rape by killing her assailant, he should allow himself to be killed rather than commit the crime of rape (Babylonian Talmud, Tractate Yoma, 82a). This may be too wide, however, unless it postulates a duty to save another from rape. Suppose A is in a situation in which he is able to prevent B from raping C, but can only do so by killing B. If in such a situation it is his duty to kill B, it follows that where A and B are the same person, A has a duty to allow himself to be killed rather than rape C. But such a situation would only arise in Scots law if A had a prior duty to preserve C - because she was his ward, for example - as otherwise he would be entitled, but not bound, to intervene on her behalf. It seems therefore that murder or rape committed under coercion cannot be regarded as universally inexcusable on principle - provided A and C are not related by a duty of protection on A's part, A may be excused for preferring his own life to that of C, and a fortiori for preferring his own life to C's chastity.

Allowing for these specialities, the law regarding coercion should run parallel with that regarding necessity, so that if a particular choice of values

is regarded as proper or excusable when made under necessity, the same choice should be regarded as excusable when made under coercion.

Public coercion.

Hume deals with coercion under two heads, which he calls public and private coercion (Hume, i. 51-2). (Hume also deals with what he calls the defence of subjection - that the accused acted under the influence of someone to whom he stood in the relation of wife to husband, child to father, or servant to master. Hume accepts the possibility of such a plea being successful in the case of a child instigated to a minor crime by a parent, but rejects it in any other relationship except where in addition to the relationship there is an actual threat of violence. The plea thus becomes an instance of coercion - see Hume, i. 47-51.)

Public coercion arises in situations where the accused's actions are almost involuntary - as where he is forced by a mob to join them. In such a case the accused will not be responsible for being part of the mob, or even for taking part in their activities, while he was in their power. If he remains with them after he could have made his escape, his further actions will, of course, be treated as voluntary and criminal. In the case of Robert Main (11 Oct., 1725, Hume, i. 52) the Court found the defence 'That he was forced to take a gun by the disorderly people who were running that way, and who threatened to knock him down if he would not take it, relevant to exculpate him as to his being in arms, by having the said gun in that place where he was so forced, but not relevant as to his having the gun in any other place, unless the force was so continued, that he could not with safety lay his gun aside, or withdraw from the company who forced him'. This reasoning is the same as that of Lee, C.J.

in M'Growther (supra, p. 394), a charge of joining the rebel army in 1745, where he said that force and fear alleged as a defence 'must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force and that he quitted the service as soon as he could'. (Cf. R. v. Crutchley (1831) 5 C. & P. 133.)

In such a case, as in the case of a man pressed into the service of pirates (cf. Hume, i. 52), or even complying with the orders of a rebel army when living in an area under their control, there is an element not merely of threats but of actual physical compulsion. Indeed, the admission of compulsion as a defence to treason may be due to the fact that members of rebel armies were frequently pressed into service, and it was thought unfair to punish them in such circumstances.

Private coercion.

Hume takes the view that such situations - where a man is coerced into doing a particular act by threats of one or more individuals, and not merely caught up in a mob or pressed into service - are unlikely to occur in a society where law enforcement is effective. He gives, however, an example of such coercion being accepted in defence to a charge of robbery, although the facts of the case seem to lie somewhere between public and private coercion. The case is that of James Graham (1717, Hume, i. 52-3) who was forced to join Rob Roy's gang and take part in a robbery, under threat of violence. He was dragged out of his house by the gang, and threatened with a pistol and other weapons, threats which were repeated when he tried to escape. The jury found 'That he was present in arms along with Roy and others at the time when the robbery

was committed, but that he was forced into the service in manner mentioned, and that he was not possessed of arms to make resistance at the time', and he was acquitted.

Although Hume seems to accept the authority of this case he goes on to state his own views as follows:-

'But generally, and with relation to the ordinary condition of a well-regulated society, where every man is under the shield of the law, and has the means of resorting to that protection, this is at least somewhat a difficult plea, and can hardly be serviceable in the case of a trial for any atrocious crime, unless it have the support of these qualifications: an immediate danger of death or great bodily harm; an inability to resist the violence; a backward and an inferior part in the perpetration; and a disclosure of the fact, as well as restitution of the spoil, on the first safe and convenient occasion' (i. 53).

It would appear from this that in Scotland as in other countries fear of imminent death or serious injury may operate as a defence even to a serious crime (cf. StGB art. 52, Gardner and Lansdown, South African Criminal Law and Procedure, Vol. I, p. 84). But Hume does not deal in terms with the problem of balance of values, and it is not clear (a) if homicide is excused by threat even of instant death (The Indian Penal Code allows threat of instant death to excuse all crimes except murder and capital offences against the State - s.94), or (b) what threats are sufficient to excuse lesser crimes. Hume's reference to restitution of property suggest that he is thinking of crimes against property rather than of crimes of violence, and his requirement that the coerced person take a 'backward and inferior part' in the crime suggests that in his view coercion would not operate as a defence where, for example, the accused was coerced

into himself shooting someone, or opening a safe. It is difficult to draw any firm conclusions as to Hume's views on the subject, especially as he seems to be thinking in terms of someone forced to join a criminal gang rather than of someone forced to commit a crime by himself.

There is very little Scots authority on the subject after Hume, although the defence does seem to have been accepted. Alison says that 'The excuse of compulsion will only avail if the pannel was in such a situation that he could not resist without manifest peril to his life or property' (Alison, i. 672); but he does not elaborate this, and his examples are the same as those given in Hume. It is not clear on what he bases the view that a threat to property may suffice, and he does not say when peril to property is sufficient and when there must be peril to life. Anderson says that 'Compulsion, vis major, or necessity, is a valid plea, if threats have been used of such a nature as to overcome the resolution of an ordinarily constituted person of the same age and sex as the accused. The threats must have had reference to present, not to future injury' (Anderson, p. 16). This seems eminently reasonable so far as it goes, but again does not help in deciding whether any particular choice made under coercion is a proper one, and indeed seems more applicable to a plea in mitigation than to a plea in exculpation. Nor is it clear where the line is to be drawn between present and future injury (cf. infra). Macdonald merely says that the defence 'scarcely ever applies except where a large body of persons force individuals to act with them by absolute compulsion, or by threats of death or serious injury' (Macdonald, p. 11), which incidentally confuses cases where there is physical

force depriving the accused of the ability to act, and cases where he acts voluntarily under coercion.

None of these statements helps in deciding what particular crimes will be excused by what nature of threat, and on that matter there is no specific Scottish authority other than the case of James Graham (supra) and even there it is not altogether clear whether the accused's life was in danger, or indeed whether the decision proceeded on the view that escape was impossible because of the superior physical force of the gang, or on the view that there was coercion by threats, the verdict speaks both of threats and of 'restraint by force' (Hume, i. 53). (The Scots law of treason, is, however, the same as that of England - Treason Act, 1708, 7 Anne, c.21 - and the English cases which held that fear of death was a defence to treason would be followed in Scotland - M'Growther and Purdy, supra.)

Some foreign cases.

There is Irish authority that fear of violence is a defence to a charge of reset. The case is that of A.G. v. Whelan ([1934] Ir. Rep. 518) in which the Court said:-

'It seems to us that threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance should be accepted as a justification for acts which would otherwise be criminal. The application of this general rule must however be subject to certain limitations. The commission of murder is a crime so heinous that murder should not be committed even for the price of life and in such a case the strongest duress would not be any justification. We have not to determine what class of crime other than murder should be placed in the same category... Where the excuse of duress is applicable it must further be clearly shown that the overpowering of the will was operative at the time the crime

was actually committed, and, if there were reasonable opportunity for the will to reassert itself, no justification can be found in antecedent threats' (at p. 526).

This statement is not, it is submitted, inconsistent with Scots principle, and might well be followed, although for the reasons given above, coercion should be regarded as an excuse rather than a justification.

The reasoning in Whelan is, however, a little narrow in the following respects:-

(a) It excludes murder altogether from the scope of the plea. This is in accordance with the principle of R. v. Dudley and Stephens ((1884) 14 Q.B.D. 286); and with the case of R. v. Tyler ((1838) 8 C. & P. 616). But if U.S. v. Holmes ((1841) 26 Fed. Cas. 360, No. 15, 383) is preferred to Dudley, it may be that at any rate where the threat is to kill several people unless the accused kills one, he would be excusable for killing that one. Even if this is not accepted as a general principle, it may be possible to hold that a father is entitled to kill a stranger in order to preserve one or at any rate more than one of his immediate family. It is clear that a person in such a position would be able to advance a very strong plea in mitigation, but it is submitted that the possibility of his exculpation cannot be ruled out a priori by excluding murder from the scope of the plea of coercion.

The question of coercion as a defence to murder has been discussed in a number of American cases, and the general view is that coercion is not a defence in murder cases, although, as Hall points out, the Courts have usually found that in any event the facts did not disclose a sufficiently imminent danger to constitute a situation of coercion (Hall, pp, 409-11). In Arp v. State ((1892) 97 Ala. 5, 38 Am. St. Rep. 137), for example,

it was held that the accused could have escaped from those who were coercing him, before the time at which he had to commit the murder. It can probably always be said in cases of coercion that the necessity was not absolute - the coercer might have had a heart attack had the accused held out a moment longer, or the police might have arrived and so on. Even if one accepts that what matters is a reasonable belief that the necessity is absolute, coercion offers the Courts considerable scope for finding that a reasonable man would not have taken the same view as the accused of the imminence or inevitability of danger. Coercion is thus more difficult to establish than simple necessity, and it may be because of this that the law is, at any rate in theory, more favourably inclined to coercion than it is to necessity.

(b) Whelan (supra) lays too much stress on the overpowering of the accused's will. The exclusion of antecedent threats and the requirement that 'it must be clearly shown that the overpowering of the will was operative at the time the crime was actually committed' suggest that the Court intended to restrict the defence to situations where the accused was forced into making a sudden decision at the point of a gun (as he was in fact in Whelan), in which his will was not really active because he had no chance to deliberate and think things over. But these considerations would go to mitigation and not to exculpation, and so would be important only where the accused made a wrong choice of action under such stress. It is important to establish that there was in fact coercion, but that does not depend on the state of the accused's will, but on whether he believed that unless he committed the crime the threat was bound to be carried out. If there was such a situation of necessity then the accused is

entitled to acquittal if his preference of the crime to the threatened harm was a right one, whether he made his choice deliberately and on reflection, or under the immediate stress of a gun in his back.

These comments on Whelan are illustrated by the case of R. v. Steane ([1947] 1 K.B. 997). Steane and his family were in Germany during the war and Steane was asked to broadcast for the Germans. He was told that if he did not do so his wife and children would be taken to a concentration camp. In face of this threat he made a series of broadcasts, and was ultimately charged with a breach of the Defence Regulations. He was acquitted, on the ground that he lacked criminal intent, but the case is really one of coercion, since there is no doubt that he made the broadcasts intentionally, although his motive was the safety of his family and not a desire to assist the enemy. (Cf. Gl. Williams, para. 13. There was also some question of physical violence to Steane himself, but the Court were concerned mainly with the threat to his family.) Steane's will was not 'clearly shown to be overpowered' each time he made a broadcast, and there was plenty of opportunity for his will to reassert itself between broadcasts. The proper basis for his acquittal is that what he did was necessary to protect his family, danger to a man's family being equivalent to danger to himself (cf. StGB Art. 52; Gardner and Lanndown, South African Criminal Law and Procedure, Vol. I, p. 84). Indeed, a threat to his family may be a better basis for the defence than a threat to himself since a man has legal duty to protect his family, and only a right to defend himself.

Conclusion

It is submitted that the law of Scotland can be stated in something like the following terms:-
 Coercion is a defence to a criminal charge where the accused acted in a situation created by a threat which he had reason to believe and did believe would be carried out, and which he could not reasonably have expected to be able to prevent; provided that the law regards the prevention of that threatened harm as more valuable in the circumstances than forbearance from the crime. Where the law regards forbearance from the crime charged as more important than the prevention of the threatened harm, coercion may operate in mitigation of penalty. If the accused acted under the influence of threats of such a nature that although he was still able to act voluntarily, he was so affected by the threat as to be unable to act with deliberation.

III - SUPERIOR ORDERS.The scope and basis of the defence.

This defence is dealt with by Hume as a form of compulsion or subjection, the subjection of soldiers to officers, or of law-enforcement officers to magistrates (Hume, i. 53-5). What is involved is not, strictly speaking, coercion, but the right or duty of a soldier to carry out his orders without thereby incurring liability under the criminal law. The soldier who kills someone in pursuance of an order by a superior officer does not have to show that he was in fear that if he failed to carry it out he would himself be shot or undergo some commensurate punishment; he has only to show that he acted under a lawful

order, or rather that he believed he was so acting. He does not, even have to point to a specific order to kill the deceased; it is enough if he can show that he was acting according to normal military practice when he killed the deceased (cf. Hawton and Parker, (1861) 4 Irv. 58).

Hume considers the defence in relation to magistrates and judges executing bad laws, such as those against witches; in relation to soldiers carrying out orders; and in relation to officers of Court executing orders or killing persons who resist them in the execution of their duty (Hume, i. 53-5, 195-217). The only category of importance at the present day is that of the soldier.

The basis of the defence is probably public policy, and that would explain why an order may be lawful according to the municipal law of a particular country, and yet be unlawful according to international law. Policemen, messengers-at-arms, and soldiers act as instruments of the law and of the State, and it would be impossible for the State to punish them for so acting. A public executioner cannot be charged with the murder of the condemned man, or a Sheriff-officer with theft or embezzlement of goods which he poinds and sells under a Court order. In acting as they do these officials are carrying out the law, and the law can hardly punish them for doing so. Nor can a soldier be convicted of murder when he kills an enemy soldier according to the usages of war, since he does so on the command of the State. Even if he acts contrary to the usages of war his own State can hardly prosecute him if it authorised his action.

This protection extends beyond specific acts done in pursuance of specific orders; it extends to anything done in the course of the accused's duty. A soldier

or policeman must be allowed a certain discretion in carrying out his duties - his every move cannot be specifically ordered by a superior authority. So long therefore as he acts in the ordinary course of his employment and within the general rules laid down for his conduct, he is acting as an instrument of the State, and is entitled to protection even if, on occasion, he is over-zealous. The protection may extend to acts which are not strictly legal, in the sense that they have not been explicitly or implicitly authorised by any lawful order.

It may also extend to actings in pursuance of an illegal order, for it is necessary for the proper functioning of bodies like the police and the army that they be disciplined and obedient - theirs not to reason why. They will therefore be excused for obeying any order which is in fact illegal, provided at any rate that it is not blatantly so. It is bad public policy to encourage soldiers to disobey orders because they think them improper. And looked at from the point of view of the individual soldier or policeman it is unfair to train a man in automatic obedience, and then to penalise him for acting in the way the State itself has trained him to act (cf. Hume, i. 54-5).

Hume suggests that someone who carries out an unlawful order is excused because he is 'entitled to repose in confidence of the skill and attention of his superior', and because 'He intended to do a lawful act, and was justifiable in thinking it such: The error in that respect is thus, as to him, an error in point of fact only; and it ought therefore to excuse him, as that sort of error does in other cases' (Hume, i. 54). This seems, however, to be a very strained application of the law of mistake - to believe wrongly that an order is lawful is surely an error of law. Nonetheless,

it may be of importance to show that the soldier believed, and was justified in believing, that the order he was carrying out was lawful. A soldier might not be justified (or even excusable) in carrying out an order known to him to be unlawful, for example, an order by a junior officer which he knew to be contrary to the order of a superior, unless he acted under actual coercion. But the limits of the defence are by no means clear.

The cases.

It is submitted that the above statement of the law is borne out by the modern cases, and I turn now to consider them.

The first is the case of Hawton and Parker ((1861) 4 Irv. 58). A boatswain of the Royal Navy was sent out on a dark night in a boat with an armed crew of marines in order to intercept a trawler. The boatswain ordered the marine to fire on the trawler. He fired blank shots first and then fired live shots intended to go wide of the trawler; in fact one of them killed a member of the Trawler's crew. The boatswain and the marine were charged with murder, but the Crown only asked for a conviction of culpable homicide. The marine pleaded that he had acted under the boatswain's orders, and the boatswain pleaded that he had acted in accordance with normal naval practice. It was argued that the marine was absolutely bound to obey the boatswain unless he was ordered to do something obviously grossly criminal, and that the boatswain's order was not obviously criminal, since it was in accord with naval practice. The Lord Justice-General, Lord M'Neill, told the jury:-

'Subordinate officers or privates were not persons who were entitled to consider whether the rules to which they had been accustomed were imported into this duty [of suppressing trawlers], unless that were explained to them by their superior officers. One of the prisoners in this case had a certain command, the other was in the position of a subordinate; and it was the duty of the subordinate to obey his superior officer, unless the order given was so flagrantly and violently wrong that no citizen could be expected to obey it...if, when the prisoners fired the shots with the view of making the fishermen yield to legal authority, they were acting in accordance with the usage of the naval service, they were not guilty of any violation of the law' (at pp. 71-2).

His Lordship added that if the jury thought the accused had deviated from the rules of the service, or that 'in acting according to the rules of the service, they had failed to use due caution' (at p. 73) they should convict. The question of negligence arose because the shots had been intended to go wide of the trawler, and it was by accident, or carelessness, that they had instead hit a member of the trawler's crew. This aspect of the case was to some extent subsumed in the general question of naval practice. Presumably if the accused had acted recklessly it might have been said that they were not acting in accordance with practice, but it seems to have been assumed that if naval practice authorised firing it would be very difficult to convict the accused on the ground that only careful and accurate firing designed not to injure anyone was authorised. It would have been very difficult to hold otherwise. If a man is justified in doing an inherently dangerous act, he can hardly be convicted because the act caused harm, unless it can be shown that he did the act in a manner more likely to cause harm than the normal approved manner of acting.

The case of Macpherson (Edinburgh High Court, 18 Sep. 1940, unrepd. - see Sheppard, 1941 J.C. 67, 69) suggests that a soldier who exceeds his orders and acts recklessly may be protected if he acted honestly and with the intention of carrying out what he believed to be his duty. Macpherson was on leave and drunk when he saw a car during an air raid alert which he thought was travelling too quickly and had its lights insufficiently dimmed. He called on it to stop, and when it failed to do so he fired at it, killing the occupant who was the Assistant Chief Constable of Edinburgh. The case was treated as one of simple culpable homicide on the issue of recklessness and not of military duty, since Macpherson was not in fact on duty at the time of the shooting. But the Lord Justice-Clerk, Lord Aitchison, observed in his charge to the jury that,

'Even in a case where the soldier was on leave and had no specific duty to perform, if you are able to say that the accused acted under a mistaken sense of duty and that he had some reasonable cause for what he did, you would be entitled to acquit him'.

These observations appear to have been based on the general law of mistake - a man who reasonably believes that he is acting under orders or in accordance with proper military practice is entitled to be treated as if he were in fact so acting. As Lord Aitchison said,

'It won't do for a soldier on leave to discharge a loaded rifle in the public street and take human life and then seek to evade the responsibility for his act by saying that he thought he was doing his duty. You must ask yourself whether there were any reasonable grounds, such as might influence a man in his sober senses, for the accused acting as he did'.

The mistake here is of course an error of fact, and distinguishable from the case of a soldier acting

under an order he wrongly believes to be lawful. The legality of a practice of shooting at cars which did not stop when challenged does not appear to have been considered in Macpherson.

The question of homicide committed in pursuance of an illegal order was considered in the case of Sheppard (1941 J.C. 67). The accused was a private under the immediate command of a lance-corporal with whom he was taking a British prisoner from one camp to another. The lance-corporal left the accused alone with the prisoner for a short time in a railway station, having warned him to stand no nonsense, and to shoot if necessary to prevent the prisoner escaping, as the prisoner had previously tried to escape. The prisoner tried to escape and the accused killed him. He was charged with culpable homicide, and succeeded in the defence that he was acting in the course of his duty. Lord Robertson told the jury that they could take the view that,

'If the circumstances were such as to require the accused, for the due execution of his duty, to shoot in order to keep this man in custody, then the homicide was justifiable...It would be altogether wrong to judge his actings, so placed, too meticulously - to weight them in fine scales. If that were to be done, it seems to me that the actings of soldiers on duty might well be paralysed by fear of consequences with great prejudice to national interests' (at p. 71).

The Crown sought to prove that the accused had been ordered not to shoot British prisoners, in that general orders of that nature had been posted in his camp. They also produced an Army Council Instruction of later date than the shooting, to show that it was not army practice to shoot British prisoners. If they had succeeded in proving the accused's knowledge of such an order

or practice, he might have been convicted, since it would probably have been unreasonable for him to prefer the order of an absent lance-corporal to a general order from his headquarters, especially in a question of shooting someone. But had he been ordered to shoot by a senior officer, he might still have been excused for doing so, even if he had known that the order was contrary to a general order. The matter may resolve itself into one of degree, depending on the circumstances, and in particular on the rank of the officer who gives the illegal order. The question becomes one whether the accused could reasonably consider himself bound to obey the order last given by an officer on the spot, and whether he could be reasonably expected to risk the consequences of disobedience. Such a situation approaches one of true coercion, since the soldier would be placed in a dilemma in which it would be unreasonable to saddle him with responsibility for his superior's illegal orders, and in which he might be said to have been 'coerced' by his superior orders. (The case of Ensign Maxwell, in 1807, - Buch., 2d. Part 3 - may be noted in this connection. The accused was an officer at a prison where prisoners of war were detained. There were orders issuing from the Adjutant General allowing prisoners to be killed if they tried to escape, and setting out certain other rules which were to be enforced. The commander of the prison instituted a system whereby force might be used by an officer on a report by a sentinel that the prisoners were creating a disturbance or had ignored an order put their lights out. The accused ordered a private to shoot into the prisoners' room, apparently following this practice. The private refused at first because he did not think the circumstances justified such an order, but eventually

he obeyed, and one of the prisoners was killed. The private was not charged, but the accused officer was charged with murder, and pleaded justification, a plea in which he failed, partly at least because of evidence that the prisoners had not been disobeying any rules. In the course of his charge, Lord Hope said that the shooting would be justifiable if the accused acted under specific orders, or if 'in the general discharge of his duty, he was placed in circumstances which gave him discretion and called upon him to do what he did' (at p. 58). On the question of acting under orders Lord Hope said, 'be these orders right or wrong, he was bound to obey...There is some restriction, however, even upon this; because, if an officer was to command a soldier to go out to the street, and to kill you or me, he would not be bound to obey. It must be a legal order given with reference to the circumstances in which he was placed; and thus every officer has a discretion to disobey orders against the known laws of the land' (at p. 58) which, like the more modern statements leaves the matter to be dealt with according to the circumstances of each case.)

Chapter 12: Self-Defence.

The rules governing the plea of self-defence belong to the law of homicide and of assault, and I do not propose to consider them in detail. My concern with these rules and with their development is directed to discovering why the law accepts the plea of self-defence, and in particular to considering the relationship between self-defence and that type of necessity which is created by the operation of physical factors. The modern law of self-defence is fairly clear, but its relationship to the law as set out by Hume is not, and since in the absence of very much case-law on the subject Hume is still frequently cited in arguments on self-defence, I have thought it worthwhile to analyse his concept of self-defence in some detail.

The term 'self-defence'.

Two things require to be said at the outset about the term 'self-defence'. Firstly, it is a misleading term. Its literal meaning would confine it to situations in which a man acted in order to defend his own person; but it is used to cover acts in defence of persons other than oneself, and also acts in defence of things other than personal safety, such as chastity or property. Secondly, it is used both to describe a fact and to make a legal judgment. 'He acted in self-defence' may mean only 'He acted for the purpose of defending himself'; or it may mean 'He acted for the purpose of defending himself and was justified in doing so, having regard to all the circumstances'. Whether any situation is one of self-defence in the first meaning is a pure question of fact; whether any

situation is one of self-defence in the second meaning involves questions of law, and depends on the rules regarding self-defence in the legal system in the context of which the statement is made. A Scot and an American might agree that in a particular situation a man was acting in self-defence in the first sense, and disagree about whether he was justified in so doing. A man has no absolute right to act in self-defence; his only right is to act in justifiable self-defence; and the justification of his act in law depends on rules of law.

Types of situation in which a man may act in self-defence.

It is convenient to consider self-defence in a number of different types of situation, and it will avoid prolixity if these situations are set out initially and given names for the purpose of later reference. They are as follows:

Type A. Self-defence against a justifiable attack. The condemned man who tries to kill his executioner is acting in self-defence; so is the robber who defends himself against his victim while the latter is acting in justifiable self-defence against the robber's initial attack. This type of case can be dealt with briefly, as self-defence in such situations is clearly unjustifiable. Whatever the moral rights and wrongs in any case, a man cannot be legally entitled to interfere to prevent an executioner carrying out the law. And if the law allows a person to defend himself against an assailant it cannot allow the assailant to kill him just because he exercised his right of self-defence and so put the assailant's life in danger. It must be as criminal to kill someone who is resisting the attempt to kill him, as it is to kill someone who offers no resistance. The fact that the resistance

may endanger the life of the attacker is irrelevant unless the resistance ceased to be justifiable.

Type B. Self-defence against an unjustified and unprovoked attack. This is the situation of the man who defends himself against an attack for which he is in no way responsible, as where he is set upon by robbers. This is the situation which Hume and Alison describe as self-defence against a felon (Hume, i. 217-22, Alison, i. 132-6).

Type C. Self-defence against an unjustified but provoked attack, i.e. self-defence where both parties are to some extent to blame for the situation of danger. This is the most common situation in practice, and may be further divided into the following types of situation:-

Type C(1). Where the victim initiated the situation by a wrongful act of a minor nature, by 'some offence of word or deed, real or conceived, which has kindled anger on the spot, and led at last, to a mortal strife' (Hume, i. 222).

Type C(2). Where the accused initiated the situation by a wrongful act, but the victim retaliated in an unjustifiable way and put the accused's life in danger. The facts in such situations will approximate to one of the two following examples: (i) The accused slaps the victim's face and the latter retaliates unjustifiably by attacking the accused with a lethal weapon and the accused kills him in order to save his own life. (ii) A robber attacks a shopkeeper and the latter retaliates in self-defence. The shopkeeper, however, exceeds the bounds of justifiable resistance and in so doing puts the robber's life in danger, and the robber kills him in self-defence. A legal system may treat (i) as justifiable and (ii) as unjustifiable, or treat both as justifiable or unjustifiable, but it

cannot, it is submitted, hold that (ii) is justifiable and (i) not.

Hume's treatment of self-defence.

Type B cases.

The rules. Hume is favourably disposed to this type of self-defence, and deals quite fully with it (Hume, i. 217-22). He does not look on the man who defends himself against a felon as doing something the law grudgingly permits, but as exercising his rights as a citizen, in that he is not only entitled but even encouraged to kill his assailant. Hume takes as an example the man who 'being on the highway, and alone, is suddenly thrust at with a sword from behind, or has a pistol fired in his face, by one who springs out on him from the side of the way' (Hume, i. 218). Such a man, being innocent of all blame, has no duty to try to escape from the assault, but 'is rather called on, instantly, and without shrinking, to stand on his defence' (ib.). He is entitled to suppose the worst of his attacker, and even 'though the assailant give back on the resistance, yet still the innocent party is not for this obliged immediately to desist... he may pursue nevertheless, and use his weapon, until he be completely out of danger' (ib.).

The accused in a type B situation need only show that he acted for the purpose of defending himself, without showing also that what he did was necessary for that purpose. His plea will not be defeated just because he continued his defence after it was no longer necessary to preserve himself from imminent danger; nor because he could have saved himself from danger by escape. He must not, of course, continue his 'defence' once the assailant is secured, and he himself completely

out of all danger, since he can then no longer be said to be defending himself at all, but is acting out of 'deliberate cruelty or revenge' (ib. cf. Joseph and Maxwell Allison, (1838) 2 Sw. 167, Graham, 1958 S.L.T. 160). But so long as he is genuinely defending himself, he is not bound to use only the minimum force necessary to preserve his life from imminent danger, but is entitled to go some length to 'mak siccar' that he is free from any possible danger.

These rules are different from the rules laid down by Hume for type C situations, where he restricts the right of self-defence to the use of the minimum force necessary to save one's life, and where 'the survivor must have given back, and done all that in him lay to take himself out of the affray' (Hume, i. 217; cf. Macdonald, p. 106).

What may be defended. According to Hume a person may kill to save his own life or that of others, to prevent rape, and, in some circumstances, to preserve his property. (Hume does not specifically mention the prevention of sodomy, and it can be distinguished from rape both because the definition of the latter requires resistance from the woman before she can complain to the criminal law, or, presumably, evade the civil consequences of adultery, and because of the historical veneration of female virginity. Killing in defence of male chastity seems to have been regarded as justifiable in Roman law - cf. D. 48.8.1(4) - 'Item, divus Hadrianus rescripsit eum, qui stuprum sibi vel suis per vim inferentem occidit, dimitendum'. It was explicitly declared to be justifiable in Rabbinic law - Mishna, Sanhedrin, 8.7. Neither Roman nor Jewish law was quoted in the modern case of M'Cluskey, 1959 S.L.T. (Notes) 26, where it was held that such killing was not justifiable.)

As Hume points out (Hume, i. 220), both Roman and Jewish law permit the killing of a thief, or at any rate of a housebreaker; but they both regard this as an application of the right to kill in defence of life. A nocturnal thief may be killed because one cannot see whether or not he is armed or what his intentions are, and because it is reasonable to fear that he will do violence; a daylight thief may be killed only if he does in fact use violence. (cf. D.48.8.9 - 'Furem nocturnum si quis occiderit, ita demum impune feret, si parcere ei sine periculo suo non potuit', and Cicero, Pro Milone, III, 9, where he says that a nocturnal thief can be killed in any circumstances, but a daylight one only if he defends himself with weapons - cf. Hume, i. 221. Cf. also Rashi's Commentary on Exod. 22,2. which prohibits the killing of a thief 'if the sun shone upon him' - Rashi treats the phrase as metaphorical, and as meaning that it is illegal to kill a thief if it is clear that the latter did not intend to kill the owner even if he resisted him, whatever the time of day.) Killing a nocturnal housebreaker is explicitly recognised as justifiable homicide by the Scots Act of 1661, c. 217 (cited by Hume as c.22 - The Act was repealed by the Statute Law Revision (Scotland) Act, 1906, 6 Edw. VII, c.38), and Hume accepts this as being the law. But he explains it, in line with the Roman and Jewish attitudes, on the ground that the householder is entitled to assume that the intruder intends to commit murder, rape, hamesucken, or to set fire to the house, all dangers which go beyond a mere threat to property. Again, Hume considers it justifiable to kill a daylight thief where there is reasonable apprehension of similar danger. The difference between the nocturnal and daylight thief is that the mere fact of daylight stealing does not make it reasonable for the

owner to apprehend such dangers (Hume, i.221). It must be said, however, that Hume is not altogether clear on this matter. He seems to be moving towards the view that only danger to life can justify killing, but he does not explicitly state this as his opinion. At one point he says that the householder invaded by night cannot be absolutely enjoined by law not to kill the invader, although 'tenderness for the life of another may indeed suggest to one to endeavour, by cries and otherwise, to deter him from his purpose, before proceeding to make use of higher means' (*ib.* 220), and he thinks that a man may have a right to kill an escaping thief in order to rescue his property (*ib.* 222).

In the case of William Williamson (7 Sep. 1801, Hume, i.220-L), the accused lay in wait for a thief who had robbed his bleachfield on earlier occasions, and killed him as he was entering an outhouse. He was acquitted, and Hume remarks that the case goes further than is warranted by his view of the law. Alison considers it 'hardly reconcileable with the principles of law' (Alison, i.105). The rule that there is no right to kill merely in defence of property can be regarded as having been finally settled by the case of Jas. Craw ((1827) Syme, 188 and 210) who was convicted of killing a poacher who died after having been caught in a spring-gun set by Craw. The position regarding housebreakers, however, remains unclear (see *infra*, 500).

Hume's reasons

Although Hume's tendency to restrict the right of self-defence to the defence of life - or chastity - shows that there is some similarity between his views on self-defence and the law of necessity, Hume does not base the right of self-defence against a felon on necessity. He talks, it is true, of 'the necessary

defence of one's life, against an attempt feloniously to take it away' (Hume, i. 217), but, as we have seen, he allows the person who is attacked to exceed what is necessary in order to save himself from imminent peril. The right of self-defence is thought of as an independent right, grounded in the law of nature (Hume, i. 218). This right exists where the assailant 'is no true man, to be contended with on equal terms, but a foul criminal, found in the commission of a high felony, and the fit object, therefore, of extreme and summary justice' (ib. 218).

This combines two ideas. The first is that the felon, by his actings, has broken the law, and so has forfeited his right to be protected by it. More crudely, he set out to attack somebody, and so laid himself open to counter-attack. The second idea is that the citizen who kills a felon in self-defence is acting as an officer of the law; he is not just defending himself, he is administering 'extreme and summary justice'. (ib.) (It should of course be remembered that when Hume wrote rape and theft were capital offences.) This accounts for Hume's apparent enthusiasm for the defence. The law has scant sympathy for the felon and sheds no tears over his death. Even if the felon was not committing a capital offence, there is still the feeling that society is well-rid of the miscreant, and that it would be churlish and hypocritical to be too severe on the accused. (Cf. Donnedieu de Vabres, p. 230, where he points out that a person who acts in self-defence, 'a rendu service à la société'.)

Hume also speaks of the indignation and resentment a woman is entitled to feel at an attempt to rape her, and suggests that the right of third parties to kill the intending ravisher rests on their right to partake of this resentment (Hume, i. 218). But if this is

the basis of the right, whether or not the killing was justifiable would depend on whether in fact the accused acted under the influence of resentment, and the plea of self-defence would in effect become a plea of provocation. Nor would it be possible to distinguish between a resentment which operated to prevent rape, and one which operated to kill the ravisher after the rape had been completed. If a man is entitled to defend himself or a third party he is entitled to do so whether in indignation or cold blood, and conversely, if he is not entitled to do so, he does not become entitled because he feels indignant. What is important is not the indignation, but whether the accused was entitled to feel indignant; for if he was not, the indignation can only mitigate his punishment, it cannot exculpate him.

Type C cases.

Hume's treatment of type C situations, and in particular of type C(1) situations, blurs the distinction between types B and C(1), although he makes the distinction explicitly both at the outset of his whole treatment of self-defence (Hume, i. 217), and at the outset of his treatment of type C cases (ib. 222). He describes type C situations as 'self-defence on a sudden quarrel' (ib.), but adds that 'wherever it appears that either in the origin or progress of the quarrel, or in the ultimate strife, there was any thing faulty or excessive on the part of the survivor; here for the sake of correction and example, the judge inflicts a suitable punishment, though it be true that he did not kill out of wickedness or malice, but only to save his own life, and really believing that he could not otherwise escape' (ib. 223). (Hume seems to regard type C self-defence more in the nature of an excuse than

a justification - for example, he does not allow that third parties have a right to kill to prevent the death of one of the parties to a quarrel - Hume, i. 218.)

This means that a plea of self-defence cannot succeed in type C(2) situations, and also makes it impossible to justify the application of different rules to type C(1) from those applied to type B. If the accused must have remained blameless throughout, the only difference between type B and type C(1) is that in the former the deceased's first assault was in itself sufficiently violent to endanger the accused's life, while in the latter there was no danger to life at the outset and so no immediate need to kill in self-defence. But if the accused's conduct remains exemplary throughout, once the situation reaches the stage of danger to his life, it will be indistinguishable from a type B situation. It may be said that in type C(1) the accused has a chance to escape at an early stage before the danger to his life develops, but in that event the distinction between the two types is not one of kind based on the felonious nature of the attack in type B, but simply one of fact, depending on the degree of actual necessity, so that both types of self-defence require to be justified by necessity. Moreover, the requirement of exemplary conduct on the part of an accused in a type C(1) situation means that if he does not retreat when he can, he is not entitled to succeed in his plea of self-defence at all, so that if he is entitled to succeed, the situation must have been indistinguishable from that in type B cases.

If these two types are indistinguishable, which rules are to apply - the rules of strict necessity said to apply to self-defence in a quarrel, or the less strict rules said to apply to self-defence against a

felon? It appears from the examples given by Hume of type C(1) situations that the strict rules are to be applied. It seems as if in talking of type B situations Hume was carried away by his sympathy for the innocent man who, when attacked by felons, stands up and defends himself, but that when he came to actual cases and examples, he fell back on the principle of necessity. He gives the following example when discussing the rule that a man may not kill in self-defence unless escape is impossible - one of the requirements of necessity - 'One, for instance, is assaulted at mid-day, on the street, where he may easily retire, and find shelter among the bystanders; but instead of doing so, he deliberately waits to receive the onset, and will not give back' (Hume, i. 226), and says that such a man is not acting in justifiable self-defence. It seems, therefore, that the man surprised on the highway by night is entitled to stand on his defence, not because of any natural right to kill a foul criminal, but simply because he has no reasonable chance of escaping.

Hume's insistence on the complete innocence of the accused means, of course, that he does not recognise any right of defence in type C(2) situations, and means in effect that he does not allow self-defence in a quarrel, despite the fact that that is how he describes his type C(1) cases. Hume takes his rejection of type C(2) so far that he holds that a man who tweaks the nose of another is not entitled to defend himself if that other retaliates by running at him with a drawn sword (Hume, i. 233). (In the case of Lieutenant Robertson - January, 1758, Maclaurin's Cases, No. 68 - R. twitched a fellow-officer on the nose after having suffered a prolonged course of verbal provocation from him. The latter picked up a poker, and then ran at R. with a sword, and R. killed him. R. was acquitted on a combined defence of accident, absence of mallice, and self-defence. Hume concedes

that on the whole there was not much injustice done, but takes the view that this was not a case of justifiable self-defence, because R. started the fight - Hume, i. 233.)
A Humean theory.

From the above critique of Hume's treatment of self-defence there emerges a simple and consistent theory. A man is entitled to kill an assailant in order to save life or chastity, when he reasonably apprehends that these are in danger, and where there is no other way of averting the danger. The plea becomes one of necessity, and the only problem, and it is not discussed by Hume, is how a legal system which refuses to allow the plea of necessity in circumstances of physical necessity can allow it in circumstances of self-defence. The answer lies in Hume's insistence on the innocence of the accused, and, conversely, on the guilt of the victim. As Hall says, 'In self-defence, the defender injures the creator and embodiment of the evil situation; in necessity, he harms a person who was in no way responsible for the imminent danger, one who, indeed, might himself have been imperilled by it' (Hall, p. 401). As we have seen, one of the principal difficulties in the case of physical necessity is that of determining which of a number of innocent lives is to be sacrificed. In self-defence this problem does not arise since one of the persons involved is to blame for the situation. The point is not that anyone who commits a crime forfeits his right to the protection of the law but that, once the stage of necessity has been reached, and only then, the law is able to resolve the impasse by reference to the legal guilt or innocence of the parties involved.

The law since Hume.

Type B cases.

Hume himself recognised the absence of authority for his distinction between types B and C(1), and said of his treatment of type B, 'These observations

I only offer as my own sentiments, which are not indeed contradicted by any thing on record, but do not rest on any judgment of our Supreme Court' (Hume, i. 218).

He notes also that lawyers in Scotland and abroad deal mostly with type C situations (ib.). He does, however, refer in a note to the case of John Symons (30 Aug. 1810, Hume, i. 228, Burnett, p. 44).

Symons was attacked in the street by the deceased who struck him with his fists and feet. Symons drew his sword and the deceased ran off, but Symons pursued and killed him. Hume explains Symons' acquittal on the ground that it was a type B case. The case is not, however, clear authority for this view. Symons pleaded self-defence, provocation, the right to pursue and apprehend the deceased, and that he acted under such great perturbation of mind as to be insensible of what he was doing; and his acquittal proceeded on both the first and last of these pleas (Burnett, p. 45).

Burnett (at pp. 39ff.) and Alison (Alison, i. 133ff.) both retain Hume's distinction between types B and C, but offer no examples of the former other than Symons, of which they both disapprove. Burnett says in terms at one point that the rules of necessity apply to all cases of self-defence (at p. 42), and Alison stresses the difficulty of succeeding in a plea of self-defence in any situation at all (Alison, i. 100).

In the case of James Forrest ((1837) 1 Sw. 404), the accused was a foreman in charge of some buildings which housed women servants. He killed one of a group of intruders who were trying to break into the women's quarters, and pleaded both self-defence and accident. This was a type B situation, but Lord Moncrieff directed the jury in general terms applicable to any form of self-defence, telling them that 'if you think he fired

intentionally, you will then consider whether he had reason to fear immediate danger to his own life, or to the safety of those in his house' (at p. 418).

In the case of Robert M'Annaly ((1836) 1 Sw. 210) the accused killed his father, and the jury were directed that in order to succeed in his plea of self-defence he must show that what he did was absolutely necessary, and that escape was impossible, although there was no suggestion that the accused was to blame for the initial situation which arose out of an attack by the father on the accused's mother.

Macdonald disregards type B cases entirely, and sets out the type C rules as applicable to all cases of self-defence (Macdonald, 106), and this almost certainly is the modern law.

Type C cases.

It is impossible to trace the development of the law on this matter in view of the almost complete absence of reported cases prior to 1938. (In 1826 However it was regarded as settled law in the case of David Landale ((1826) Shaw, 163) that the reluctant partner in a duel might succeed in a plea of self-defence, despite Hume's outright refusal to countenance the plea in cases of duelling - Hume, i. 230-2.)

In the case of Kizileviczius (1938 J.C. 60) the accused punched his father, and when the latter made to pick up a poker, he hit him several times, instead of trying to take the poker from him. Some time later, the father approached the accused with a flat-iron in his hand, and the accused took the iron from him, and beat him to death with it. At best this was a type C(2)(i) case (in fact the accused was convicted of culpable homicide), but Lord Jamieson directed the jury that if they thought the accused had acted in necessary self-defence they could acquit him (at p. 62).

There was no suggestion that the accused was not entitled to plead self-defence at all because of his part in the events leading up to the death.

In Robertson and Donoghue (Edinburgh High Court, 28-30 Aug. 1945, on appeal, 17 Oct. 1945, unrepd.) a plea of self-defence was advanced by two men who had broken into a cafe and killed the proprietor. They failed in their plea, but on appeal Lord Normand, the Lord Justice-General, said '...although an accused person may commit the first assault and may be, in general, the assailant, he is not thereby necessarily excluded from a plea of self-defence. If the victim in protecting himself or his property, uses violence altogether disproportionate to the need, and employs savage excess, then the assailant is in his turn entitled to defend himself against the assault by his victim...the victim of an assault who in resisting the assailant begins to overpower him does not become merely by the success of his resistance an assailant in his turn'. Lord Moncrieff said that 'Such an intruder has only a duty withdraw and can rarely have occasion for self-defence'. But whatever the qualifications - and quaere if 'savage' excess is a higher standard than the 'cruel' excess standard applied in other cases of self-defence, in which there is also a duty to withdraw (Doherty 1954 J.C.1), - the case is authority for the view that a plea of self-defence may succeed in type C(2)(ii) situation. Macdonald's repetition of Hume's requirement that the accused should not have started the trouble (Macdonald, p. 106) cannot stand with either Kizileviczius or Robertson.

The modern law, then, is not concerned with the origin of the situation. If the accused was in danger

of his life by reason of an unjustified assault - however much provoked - at the time of the fatal blow and could save himself only by killing the 'assailant', he is entitled to succeed in his plea of self-defence. All that is left of the distinction between type B and type C cases, or of that between type C(1) and type C(2) is that a jury will no doubt regard the accused most favourably if the case is one of type B, and least favourably if it is of type C(2). This development means that the sole basis of the right of self-defence is necessity, and it becomes very difficult to justify any distinction between the treatment of physical necessity and self-defence. It is only by viewing the last moments of the situation in isolation that the deceased in type C(2)(ii) situations can be said to have created the necessity by his own wrong: on a commonsense overall view it is the accused who was responsible for the situation. But the Scots Courts have not considered the relation between self-defence and necessity.

What seems to have happened is that so much stress has been laid on the requirement of necessity, that the requirement of innocence has been forgotten. Perhaps also, the stress on necessity has made the rules regarding self-defence so stringent that it seems reasonable to allow the defence to succeed wherever an accused comes within them, whatever the surrounding circumstances. In practice the modern law seems to work well. Type C(2)(ii) situations are very rare. The refusal to distinguish between types C(1) and C(2) avoids having to assess responsibility in situations where the facts are usually confused, and where usually both parties are to some extent to blame, whoever sparked off the final situation. A complete rejection of type C(2)

cases is so harsh as to be unworkable: one cannot prevent a man succeeding in a plea of self-defence if the jury feel sufficiently sympathetic towards him, as they may well do in many type C(2)(i) cases.

What may be defended.

The tendency to concentrate on necessity, and to refer to the passages in Hume which deal with self-defence in a quarrel, encourages the view that homicide is justifiable only in defence of life. The present position is not altogether clear, but it is probably the law that homicide is justifiable only to save life or to prevent rape. It is true that in Crawford (1950 J.C. 67) Lord Keith included resistance to a housebreaker as one of the classic instances of self-defence (at p. 71), but it is extremely unlikely that homicide in defence of property would be considered justifiable in modern times, and Macdonald is correct, it is submitted, in saying that 'it is personal danger, and not patrimonial loss, which justifies homicide' (Macdonald, p. 107).

This view, it is submitted, is supported by the most recent case on the subject, that of M'Cluskey (Court of Criminal Appeal, 24 Feb. 1959, as yet unrepd. except in 1959 S.L.T. (Notes) 26). The accused was charged with murder and pleaded self-defence. He said that he had assaulted the deceased while resisting an attempt by the latter to commit sodomy with him. The trial Judge refused to direct the jury that if they accepted the accused's story they could acquit him on the ground of self-defence, and the accused, who was convicted of culpable homicide, appealed against this refusal. The Appeal Court did not deal squarely with the legal question before them - was the trial Judge right in refusing to direct the jury that resistance

to attempted sodomy could found a successful plea of self-defence? Instead they were at pains to point out that there had in fact only been a threat of sodomy (the deceased had made an indecent suggestion to the accused and then gripped him by the waist and pushed him towards a bed), and they also assumed that sodomy could always be prevented by means short of killing. But the ratio of their decision, it is submitted, was not that the facts did not amount to attempted sodomy, or that it was not in the circumstances necessary for the accused to kill to prevent the sodomy (this latter would probably have been an irrelevant ratio, so to speak, since the factual necessity would have been a jury question and the ground of appeal was that the matter had not been left to the jury), but that the facts did not amount to a situation in which the accused's life was in danger. Lord Russell set out danger to life as a necessary condition for a successful plea of self-defence, and the Lord Justice-General quoted Hume's remarks on the necessity of danger to life, made with reference to self-defence in a quarrel, as applying to the instant case, which was clearly a case of resistance to a felony.

In the course of his opinion the Lord Justice-General said:

'Murder is still one of the most serious crimes in this country, for no man has a right at his own hand deliberately to take the life of another. Indeed it is because of this principle of the sanctity of human life that the plea of self-defence arises. Just because life is so precious to all of us, so our law recognises that an accused man may be found not guilty even of the serious crime of murder if his own life has been endangered by an assailant...But I can see no justification at all for extending this defence to a case where there is no apprehension of danger to the accused's life, and indeed, very little evidence of any real physical injury done to the accused himself, but merely a

threat, pushed no doubt quite far, but nonetheless only a threat, of an attack upon the appellant's virtue...

Where an attack by an accused person on another man has taken place and where the object of the attack has been to ward off an assault upon him it is essential that the attack should be made to save the accused's life before the plea of self-defence can succeed'.

It is true that the existence of a right to kill in defence of property is not inconsistent with the last sentence quoted, and it is true that the Court did not refer in their judgments to the authorities quoted to them in support of the view that homicide can be justified if committed in defence of property, or, more generally, in the prevention of a felony (Hume, i. 219-22), Alison, i. 136), but it seems implicit in the Lord Justice-General's language that self-defence can be justified only by danger to life. In any event, it seems impossible that a twentieth century legal system should allow a man to kill to defend his property but not to defend himself against sodomy.

Lord Clyde specifically allowed for the continued operation of the plea of self-defence by a woman resisting rape, saying that rape, unlike sodomy, required a complete absence of consent on the part of the woman. The precise logic of this is not clear, but it appears that the exception for rape was thought of as being a corollary from the definition of rape with its requirement of resistance to the utmost by the victim.

If then, we put rape on one side as an unique exception, it is submitted that the result of M'Cluskey is that homicide can only be justified by the necessity to save life from an unlawful attack. If this is so then Scots law is in line with, if not indeed in advance of, the law laid down in the European Convention

of Human Rights to the effect that:-

'Art. 2(1) Everyone's right to life is protected by law. No-one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this punishment is provided by law.

(2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary -

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection' (Text taken from (1951) 45 American Journal of International Law, Supplement of Documents, pp. 24-5.) (The United Kingdom is a party to this convention which was signed at Rome in 1950, but unlike e.g. West Germany - see Schonke-Schröder, p. 273 - has not passed legislation bringing it into effect.)

The phrase 'defence of any person from unlawful violence' can be read to include the case of a man resisting sodomy or a woman resisting rape, but it clearly excludes the defence of property, and again, it is submitted that the Courts of a signatory to the convention can hardly continue to maintain a right to kill in defence of property, especially if they restrict the right to kill in defence of a person from unlawful violence to resistance to rape or homicidal assault.

Chapter 13: Provocation.

The rules regarding provocation, like those of self-defence, form part of the law of homicide and of assault. They are treated here only in outline, and only in relation to homicide. They are regarded as falling within the scope of this thesis because they illustrate the operation of certain basic principles and attitudes, and because they are of interest as displaying certain widespread confusions.

Provocation is perhaps the typical plea in mitigation, and homicide under provocation the typical case of voluntary culpable homicide. Provocation is a plea in mitigation of intentional killing; and it operates because someone who kills under provocation does not kill deliberately or out of wickedness; his intention to kill 'arises from sudden passion involving loss of self-control by reason of provocation' (A.G. for Ceylon v. Perera, [1953] A.C. 200, Lord Goddard, C.J. at p. 206). Like other pleas in mitigation, provocation is concerned with motive, with the reason for the act, rather than with intention.

In order to deal with the problems raised by the Scots law of provocation it is convenient to distinguish three types of situation, though there may be little effective difference between the first two. These are:

(1) Cases in which the accused was in danger of his life, and acted in self-defence, but did so in such a way that his killing of the deceased was not justifiable.

(2) Cases in which the accused was defending himself against an attack which was serious, but less than murderous.

(3) Cases in which there was no serious attack on the accused, but he acted while deprived of self-control as a result of the provocative behaviour of the deceased or of someone else. This group comprises three types of situation:- (i) a minor assault by the deceased on the accused; (ii) provocation by insulting words or gestures or other insulting behaviour on the part of the deceased; (iii) provocation by such behaviour on the part of someone other than the deceased.

(1) Provocation and self-defence.

The law in Hume and Alison.

Hume states that where a man acts in defence of his life in circumstances where his action is not justifiable - because he acted excessively or because he started the quarrel (Hume, i. 223, 232) - he is guilty of culpable homicide. Hume deals with such cases under the head of self-defence and not in his section on provocation, although he talks of provocation in connection with some of the cases he mentions (e.g. Ensign Hardie, Jun. 9, 1701, Hume, i. 223). In dealing with cases in which the accused started the quarrel, he does not go on to ask if the deceased's retaliation led to loss of control by the accused (Hume, i. 232). He is not altogether clear whether the line of argument is 'He could have escaped or he started the trouble and his action is therefore not altogether justifiable, so we convict him of culpable homicide', or 'He was attacked and acted under provocation, being excited and agitated, and so is guilty only of culpable homicide'. His use of phrases like 'absolute and entire justification' in talking of cases of excessive retaliation (Hume, i. 227)

suggest the former approach, as if there were a full justification leading to acquittal where the accused's retaliation was not excessive, and a less full one leading to conviction for culpable homicide where it was excessive. But Hume also talks in terms of 'provocation' and 'resentment' in dealing with cases of unjustifiable self-defence (Hume, i. 223ff.).

Alison at one point classes together persons who are 'provoked, or placed in circumstances of real or supposed danger,' as having a duty to exercise self-control, and as guilty of culpable homicide, 'where that control has not been exerted, or the belief of danger was not real' (Alison, i. 92). But he later enunciates a separate proposition that 'Culpable homicide is committed by an undue precipitance, or the unjustifiable use of lethal weapons, in defence of life or property' (Alison, i. 100). He cites many cases, and does not use the word 'provocation' until he comes to talk of English law (Alison, i. 100-108). (But he does talk of 'perturbation' when discussing the case of John Symons, 26 Aug. 1810, at p. 104.) For Alison the culpable homicide conviction comes about because a prima facie case of self-defence is partially defeated by the accused's excessive reaction (Alison, i. 103), and not because the accused acted while deprived of self-control. A certain degree of excess reduces the effect of the plea of self-defence from acquittal to conviction for 'culpable homicide; a greater degree of excess destroys its effect altogether and results in a conviction for murder. Alison is concerned with 'whether the homicide will be justifiable or culpable' (Alison, i. 107), and not with whether it is murder or culpable homicide. This approach, which views the plea of 'provocation' as a plea of

'unjustifiable self-defence in mitigation', led to a confusion which remained in the law until 1950 (see Crawford, 1950, J.C. 67, criticising Hillan, 1937 J.C. 53).

It might be quite feasible to make unjustifiable self-defence a valid plea in mitigation whether or not the accused lost control as a result of the attack made on him. A man can stand his ground and fight instead of taking advantage of an opportunity to escape whether or not he is so provoked by the attack as to have lost self-control. If escape were impossible, he would be acquitted, and would not have to show that he lost control; and it may be said that if escape was impossible he should be convicted of culpable homicide, even if he did not lose self-control.

The modern law.

The tendency of the modern law is to allow the plea of provocation only where the accused has lost control - but the idea that provocation is a form of unjustifiable self-defence is not altogether dead. The passage in which Macdonald deals with provocation in homicide is very confused, but the only clear statements he makes are that excessive retaliation in the face of real danger amounts only to culpable homicide if done in heat and without thought, and that 'provocation such as would deprive a reasonable man of the power of self-control' will reduce the charge from murder to culpable homicide where a plea of self-defence would fail because the accused started the trouble, or because his retaliation was excessive, or because he did not escape when this was possible (Macdonald, pp. 93-4). Macdonald seems to be saying that the plea of provocation will only apply where the accused acts in defence, either against a murderous attack, or against an attack which is serious but not

murderous.

The modern law thus requires than even where the accused is acting unjustifiably in self-defence, he must show that he acted in the heat of the moment, under provocation, although in fact it is usually assumed that anyone in this position did act under the stress of the provocation constituted by the assault made on him.

In Kizileviczius (1938 J.C. 60), in which the accused killed his father after disarming him of a weapon with which he was threatening him, Lord Jamieson distinguished three pleas open to the accused - self-defence leading to acquittal; self-defence leading to a conviction of culpable homicide; provocation leading to a conviction of culpable homicide. Lord Jamieson said that the third was very like the second, and that the second - which is the plea of unjustifiable self-defence - required both danger to the accused's life and that he should have acted in heat without thought, but he did treat the second and third as distinct.

The confusion between self-defence and provocation which is expressed in the idea of a plea of unjustifiable self-defence in mitigation was criticised in Crawford (1950 J.C. 67), where it was said that self-defence could operate only in exculpation, and that the plea in mitigation was one of provocation. The modern law is probably therefore that whether or not the accused's life was in danger, the charge will be reduced to one of culpable homicide only if he acted under loss of self-control induced by provocation; although in fact in such a situation the law more or less assumes that the accused acted under provocation. Accordingly it becomes unnecessary to have a special category for cases in which the accused's life was endangered, and such cases can be treated as similar to cases where

the accused was subjected to a substantial attack or threat of force.

(2) Provocation by serious assault.

Its nature.

In his section on provocation Hume deals only with provocation by serious assault, and seems to consider this a different question from that of unjustifiable self-defence. Where the accused's life was not in danger, it is essential that he should have lost control. Culpable homicide under provocation arises where the accused 'is not actuated by wickedness of heart, or hatred of the deceased, but by the sudden impulse of resentment, excited by high and real injuries' (Hume, i. 239).

This type of provocation is described by Macdonald (at p. 94) in a passage adopted in Kizilevizcius (1938 J.C. 60, 63) as follows: 'being agitated and excited, and alarmed by violence, I lost control over myself, and took life, when my presence of mind had left me, and without thought of what I was doing'. This passage is regarded as an authoritative expression of the law, and is frequently quoted by Judges in directing juries. But it may be questioned if it accurately represents the law; in particular one can conceive of cases in which an accused might well succeed in a plea of provocation although he could not say that he acted without thought of what he was doing. Indeed, had he so acted it would probably have been unnecessary to plead provocation; he would have been entitled to an acquittal on the ground that the killing was involuntary. The description given by Macdonald slurs the distinction between voluntary and involuntary homicide, and takes no account of the fact that

provocation is a defence to intentional killing. The plea is not designed for someone who kills automatically, but for someone who is so provoked by the deceased that he sees red, and determines on the spot that he will 'swing for the bastard', like the husband who kills his wife's paramour on hearing of their adultery. Macdonald does not seem to have appreciated this - he suggests, for example, that in testing whether there has been the requisite degree of provocation one should ask if the accused can be said to have had a murderous purpose - but again, unless there was a murderous purpose, or murderous recklessness, there is no need to invoke the plea of provocation at all.

Its rules.

The rules regarding this sort of provocation show that it is very much influenced by ideas of self-defence. Indeed, it is thought of as a form of unjustifiable self-defence, self-defence against serious assault and not against danger to life itself. The position is this: the accused was grossly assaulted, he retaliated in order to defend himself from bodily harm; but he killed his assailant, and therefore, since the accused's life was not in danger, he must have exceeded the limits of justifiable self-defence; but if he acted under the provocation of the attack, he will only be convicted of culpable homicide.

That this is the position will be clearer if we consider some of the rules regarding provocation. These rules are: (a) the provocation must be by 'real' injury, (b) the retaliation must not have been grossly excessive, (c) it is important to consider who started the quarrel.

(a) The provocation must be by 'real' injury - 'real' being a suitably ambiguous word combining the

meanings of 'physical' and 'substantial' (R.C. Evid. of Faculty of Advocates, Q. 5662-3). It must be physical because without physical attack there can be no question of self-defence at all: it must be substantial because otherwise there would be no need for any defensive action. So Hume, Alison, and Macdonald, all exclude insulting words or disgusting behaviour, and even minor assaults, as relevant provocation. (Hume, i. 247-8. Alison, i. 12. Macdonald, p. 93); and Hume specifically rejects the then current English view that any assault might amount to provocation (Hume, i. 247-8).

(b) There must be some equivalence between the mode of retaliation or resentment, and the provocation given (Macdonald, p. 93; Mancini v. D.P.P., [1942] A.C.1, Lord Chancellor Simon at p. 9). Exact equivalence cannot be demanded, because if the accused killed the deceased while retaliating exactly to the deceased's assault on him, the deceased's assault must have been murderous, and so the accused would be entitled to acquittal on a plea of self-defence (cf. Kenny, para. 119). The requirement depends on the idea of unjustifiable self-defence to assault; if the accused's retaliation was grossly excessive he is guilty of murder, if it was excessive but not grossly so, then if he was provoked, he is entitled to a verdict of culpable homicide. And from this it follows that the assault on the accused must have been substantial, since otherwise his retaliation must have been excessive.

This approach cannot be justified if the only important element in provocation is loss of control, for then the relation of retaliation to provocation would be important only as a guide to credibility - a jury would be unlikely to believe that a slap on the face so provoked the accused that he could not stop

himself cleaving the victim's head with a hatchet. But if loss of control is what matters, and they do believe the unlikely story, they should then be able to sustain the plea. If, however, the analogy with self-defence is important, they would have to reject the plea because of the obvious gross inequivalence of the retaliation (cf. Kenny, loc. cit. Macdonald seems to have realised this when he said that a 'murderous' purpose' is unlikely to be presumed where the retaliation is roughly equivalent - Macdonald, p. 93).

(c) There is authority that it is important to consider whether the accused or the deceased started the trouble, although it will not be fatal to the accused's plea that he was the originator of the situation (Hume, i. 248; M'Guinness, 1937 J.C. 37, Lord Justice-Clerk Aitchison at p. 40). This idea is clearly linked to the idea that the plea of provocation, like that of self-defence, may be defeated if the accused brought the trouble on himself (Hume, i. 240; M'Guinness, supra).

(d) The rule that A may plead provocation where he has killed B under the provocation of the latter's attack on C (Jas. M'Ghie, Jan. 17, 1791, Hume, i. 246; cf. R. v. Harrington, (1886) 10 Cox C.C. 370), can be explained by the analogy with the similar rule that A may kill B in order to save C's life.

(3) Provocation and loss of self-control.

In this section I consider the rule that wherever an accused is provoked so as to lose his capacity for self-control, he is guilty only of culpable homicide. If such a rule is recognised, the fact that in any particular case the provocation took the form of a serious assault will be irrelevant (since the more general category includes the less general one),

and the rules set out above will give way to the more general rules applying to provocation leading to loss of control, whatever the nature of the provocation. The special rules applied because of the self-defence analogy can be disregarded whether or not the facts are analogous to self-defence.

Should such a rule be recognised?

The law of provocation has to balance two conflicting considerations. It must allow for the fact that it is not in accord with ordinary moral attitudes to brand the person who kills under extreme provocation as a murderer, a consideration perhaps weakened by the restriction of capital punishment, but still strong, since it will continue to be felt that the law should recognise the inappropriateness of classing such a person with deliberate murderers. Failure to make allowance for this and for the sympathy naturally felt with a man who gives way to violence under the pressure of provocation will bring the law into disrepute, and may also, as Hume points out, lead to juries acquitting altogether in cases of provocation (Hume, i. 240). There is much to be said, from the point of view of the individual accused, for the argument that a man who acts when he is unable to control himself, cannot be regarded as guilty of killing at all. This was the view taken by Lord Justice-Clerk Aitchison in Gilmour (1938 J.C. 1) when he said that if the accused 'acted in the first transport of his passion without appreciating to the full extent what he was doing' the jury would not 'hold him criminally responsible for the death that occurred', but would convict him only of assault (p. 3). Presumably, if he did not appreciate what he was doing at all, he would be entitled to complete acquittal. (Gilmour was strongly criticised in Hill -

1941 J.C. 59 - and in Delaney - 1945 J.C. 138 - by Lord Patrick and Lord Moncrieff respectively; but in M'Cluskey - Glasgow High Court, 20 and 21 Jan. 1959, Lord Strachan directed the jury that they could bring in a verdict of guilty of assault on a charge of murder to which the defence was that the killing had been occasioned by an attempt of the deceased to commit sodomy on the accused. The other cases were cases of husbands killing their wives' paramours.)

On the other hand, the law cannot deal as leniently with the person who acts without full appreciation of his deeds by reason of provocation, as it can with someone who is in such a condition by reason of error or mental disease. It is generally recognised that there is a duty to retain one's self-control, and to endeavour not to give way to passion. Any undue extension of the plea of provocation will weaken the strength of this duty, and it is important for the law to discourage people from giving way to passion, by imposing some punishment on those who do give way to it. It was for this reason that Hume felt that it would be wrong to allow all assaults to rank as provocation, and felt that the law as set out by himself was 'more suitable to the fervent temper of the Scottish people' (Hume, i. 249). Hume thus recognises that 'what is "provocation" sufficiently "gross" to transform murder into manslaughter....cannot be satisfactorily dealt with by the Courts by means of purely legal analysis, i.e. without taking into account the attitudes and needs of contemporary society and of the different groups within it' (H. Mannheim, Group Problems in Crime and Punishment, p. 268).

If then, contemporary attitudes in Scotland recognise that provocation should not be restricted

to cases of serious assault, the law should accept this and modify or develop its concept of provocation accordingly. English law has now developed to the extent that provocation may be constituted by 'anything done or said' (Homicide Act, 1957, 5 & 6 Eliz. II, c.11, s.3), and it seems unlikely that Scottish attitudes today are different from English ones. The circumstances in which the ordinary man would feel that loss of self-control was partially excusable are clearly not restricted to cases of serious assault. Many situations can be imagined which would illustrate this, but it will be sufficient to notice the one mentioned to the Royal Commission on Capital Punishment by the Faculty of Advocates: the situation of the victim of a blackmailer who is exasperated into killing his oppressor. The provocation of blackmail, as the Faculty pointed out, may be much more extreme than that of blows (R.C. Evid. of Faculty of Advocates, Q. 5664).

In considering the conflict between the plea of provocation and the deterrent purpose of the law it is also important to remember a fact so obvious that it is sometimes forgotten - the accused who succeeds in a plea of provocation is not acquitted, he is convicted of culpable homicide, a crime for which he can receive a very severe sentence. To insist on the principle of deterrence being given full weight twice over - in deciding what amounts to provocation as well as in restricting the effect of a successful plea of provocation - may well be to tip the balance too far against the accused.

Acceptance of the general rule that any provocation causing loss of self-control should operate in mitigation would be in accord with the general tendency of Scots law to give weight to any feature which shows that

the accused did not act of wickedness or malice. The view that a killing may be intentional and not murder because of 'the extent of malice under which [the accused] was actuated' (Kane, (1892) 3 Wh. 386, Lord Justice-Clerk Macdonald at p. 388), and the idea that there are different categories of homicide, run through the 19th century homicide cases, and influenced Scots attitudes to diminished responsibility and intoxication (cf. supra, chs. 9 and 10). It seems reasonable to adopt the same broad approach to the question of provocation, but it must be admitted that in fact provocation, like diminished responsibility and intoxication themselves, has come to be hedged round with legal technicalities.

Does Scots law recognise the rule?

The special case of adultery. Hume, Alison, and Macdonald all recognise one exception to the rule that only provocation of the nature of serious assault is relevant. They all recognise that a husband who kills his wife or her paramour under the provocation of finding them in adultery is guilty of only culpable homicide (Hume, i. 248; Alison, i. 113; Macdonald, 97). Hume calls this a 'peculiar case', and it is still regarded as special. (It is indeed highly peculiar in the scheme of law laid down by these authors. For it lacks any element of physical assault, and does not permit of any measurement of the equivalence between provocation and retaliation - cf. Kenny, para. 119. There is no suggestion, for example, that discovery of adultery in some circumstances may palliate assault but not homicide, but simply an independent rule that a husband discovering his wife in adultery is guilty only of culpable homicide if he kills her or her paramour forthwith and under the influence of loss of

control induced by the discovery. Presumably the same rule applies in the case of a wife killing her husband or his mistress in such circumstances, but there are no reported cases of this.)

The scope of this 'peculiar case' has been somewhat extended in recent years, but no inference can be drawn from the extension which would be applicable to the law of provocation in general. It is the law today that a husband provoked by hearing a confession of adultery is in the same position as one who finds his wife committing or about to commit adultery (Hill, 1941, J.C. 59; Delaney, 1945 J.C. 138; both single Judge decisions), but that does not mean that Scots law recognises any other form of verbal provocation. (It was suggested to the Royal Commission on Capital Punishment that the Scots Courts might follow the contrary decision of the House of Lords in Holmes v. D.P.P. [1946] A.C. 588, but that this was unlikely - cf. R.C. Evid. of Lord Cooper, Supp. Memo. 13. It can now be regarded as impossible since Holmes is no longer law in England - Homicide Act, supra, s.3.) This extension was effected by treating 'discovery of adultery' as equivalent to 'finding in adultery', and by pointing out that adultery might be discovered through confession. As Professor Smith remarks, this verbal provocation is therefore at best restricted to provocation by giving information, and does not include provocation by words of insult (T.B. Smith, 'Capital Punishment', 1953 S.L.T. (News), 197, 199). It is submitted that it is probably restricted to information regarding marital infidelity, and that the Courts would be loth to extend it, e.g. to information that the deceased had just assaulted, or even killed, the accused's wife, or any other relation or friend.

In Callander (1958 S.L.T. 24), a case of assault, Lord Guthrie extended the exception to include the case of a husband finding his wife in bed with her Lesbian paramour, because he regarded Lesbianism as constituting as serious an infringement of the duty of a wife as does adultery. The exception is based on the idea of marital duty, and so cannot extend beyond the relationship of husband and wife. This shows up the artificiality of the exception, and the need for an extension of the general law in order to make it possible to take into account other equally provoking situations, even of this limited kind. As Macaulay pointed out, a man may be as inflamed at the sight of his fiancée in bed with someone else as at the sight of his wife in such a situation. Macaulay went on to say 'That a worthless, unfaithful, and tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother be guilty of murder for killing, in a paroxysm of rage, the seducer of his sister, appears to us as inconsistent and unreasonable' (Macaulay, p. 502).

(i) Provocation by minor assault. It is probably the law today that any assault, although of a minor nature, may constitute provocation. Macdonald follows Hume in saying that minor blows will not palliate homicide (Macdonald, p. 93), but the Royal Commission on Capital Punishment were of opinion that Hume's strict views would not be followed today (R.C. para. 131), and Professor Smith agrees with them (T.B. Smith, op.cit. loc.cit.). This in itself greatly diminishes the element of self-defence in provocation, and makes it easier to extend provocation to cover words or gestures. If killing may be palliated by a minor assault on the accused, this will be because of the accused's consequent

loss of control, rather than because he was defending himself from attack. It will be no longer plausible to exclude the plea of provocation on the ground that the accused's retaliation was grossly excessive, since such an exclusion will bring us back to the Humean position. If a man is so provoked by a punch that he loses control and beats his assailant to death with a poker it is hardly logical to refuse to reduce the crime to culpable homicide because he lost control to such a great extent as to be incapable of stopping short of killing the deceased. Such a rule would mean that the more the accused lost control, the more likely would he be to be convicted of murder, which would be the reductio ad absurdum of any attempt to base the law of provocation on ideas of self-defence.

The emphasis on loss of control in provocation, like that on necessity in self-defence, makes the question of who started the quarrel much less important. Juries will doubtless still be less inclined to sustain a plea of provocation on the part of someone who initiated the quarrel, even if, at the time of the killing, he was deprived of self-control as the result of provocation, but they will not be barred from sustaining the plea on this ground. (In the case of Forbes, Edinburgh High Court, 22-4 Sept. 1958, Lord Wheatley left a plea of provocation to the jury in a case in which the accused had killed a watchman in the course of a theft.)

(ii) Provocation other than by blows. The question here is whether loss of control caused by provocative words, gestures, or other actings, not amounting to assault or the threat of assault, can be the basis of a successful plea of provocation. Any argument from the adultery cases is circular - if the

law does not generally recognise provocation other than by assault, they are exceptions; if they are not exceptions this can only be because the law does recognise provocation by words etc. in cases other than the adultery ones. In any event, as has been noted, they concern words as a source of information, and not as insults.

Although the advisability of extending provocation beyond cases of physical assault has been widely recognised (cf. R.C. app. 11(f), and, so far as insulting acts are concerned, the Fourth Report of Her Majesty's Commissioners on the Criminal Law of 1839, Parl. Papers, 1839, xix, 235, Digest, Art. 41, and Report of Commission on Draft Code of 1879, C.-2345, 24-5, Draft Code, s.176) Scots law has traditionally set its face against allowing 'insulting words or disgusting conduct' to operate as provocation (Hume, i. 248; Alison, i. 18; Macdonald, p. 93). Macdonald repeats Hume's example of throwing the contents of a chamber pot in a man's face as being insufficient to amount to provocation, and the rejection of mere words or gestures follows a fortiori from this. The Scots attitude seems based on the view that 'Sticks and stanes may break your banes, but words will never hurt you'.

Despite this, the Lord Advocate somewhat surprisingly opposed the application to Scotland of section 3 of the Homicide Act which allows a jury to take into account 'things said or done' when considering a plea of provocation (5 & 6 Eliz. II, c.11, s.3). His opposition was based on the view that the section expressed what was already the law of Scotland, and he told the House of Commons that 'There is nothing that I have been able to find which would indicate that a judge in Scotland would be precluded from leaving

provocation by words to a jury' (Hansard, House of Commons, 28 Jan. 1957, Vol. 563, Col. 788). He added that 'It is quite conceivable that a person might lose all reason by seeing something' in which case the question of provocation would be left to a jury. The discussion of this question before the Royal Commission and in Parliament seems to have been bedevilled by an undue concentration on the cases involving confessions of adultery. Even on the limited question of confessions of adultery the Commission recommended legislation to clarify the position in Scotland (R.C. Rec. 6. cf. R.C. para. 131-2, 153), but the Lord Advocate may have been right in regarding such legislation as unnecessary, although it would have done no harm, especially as Lord Cooper expressed doubts as to the applicability or otherwise of Holmes ([1946] A.C. 588) in Scotland.

So far as the general law is concerned, the Lord Advocate's statement leaves Hume, Alison, and Macdonald out of account. His Lordship offered the House no authority for his view of the law, and there is no conclusive authority for it. What little authority there is rests on three cases, none of which is satisfactory as authority for the wide proposition that provocation may be constituted by words or actings other than assaults.

The first case is that of M'Guinness (1937 J.C. 37) which in fact involved an element of assault. The deceased had entered a house occupied by the four accused, had used language calculated to lead to violence, and had threatened them with a baton. He was disarmed and put out of the house. He then created a disturbance and challenged one of the accused to fight, whereupon all four came out and attacked him.

He was killed by a combination of stab, poker, and hatchet wounds. Lord Aitchison, the Lord Justice-Clerk told the jury that the best direction he could give them was a 'perfectly general' one, and he directed them that if they found that the accused 'were provoked in a real and substantial sense, so that it was only natural and human that they should retaliate' (at p. 40), they should bring in a verdict of culpable homicide. This dictum is wide enough to cover any form of provocation, but it was given as a general direction, and should be read, it is submitted, in its context, which was, or could be regarded as, one of threatened violence. It must also, it is submitted, be read in its historical context, the context of Glasgow High Court in the 1930's, when Judges and juries were extremely loth to convict of anyone of murder. (So far did this unwillingness go that in the first murder trial of the notorious Patrick Carragher the jury were directed that the absence of provocation by the victim might lead them to take the view that the accused had not acted deliberately in killing him; and so entitle them to reduce the charge to one of culpable homicide - see Trials of Patrick Carragher, ed. Blake, p. 117.) Such a wide statement, in any event, can probably not be regarded as expressing Lord Aitchison's considered view on the whole question of provocation, especially as apparently no authorities were cited to him. His Lordship clearly felt that the facts in M'Guinness could amount to provocation, but it cannot be assumed that he thought that any other facts which fitted his 'perfectly general' direction would also amount to provocation.

The second case is an unreported case referred to by Professor Smith in his article on 'Capital Punishment'

in 1953 Scots Law Times (1953 S.L.T. 197, 199). It was a case in 1940 in which the accused was a Dunkirk survivor whom the victim had called a 'bloody Dunkirk harrier', and 'a sympathetic if self-willed jury refused to convict' (ib.), which suggests that they were directed to disregard the verbal provocation but refused to do so. In any event the facts are exceptional, and even if the jury were directed that they might take the provocation into account, it is unlikely that the Courts would follow such an exceptional unreported case, or treat it as authority for the general principle that words of abuse can constitute provocation. (I have been unable to trace this case.)

The third case is that of Crawford (1950 J.C. 67). Crawford killed his father after what he believed to be a threat by the latter. The accused had frequently quarrelled with his father but had only once been assaulted by him, and that had been many years previously, when he was only sixteen. His plea of self-defence was withdrawn from the jury, but the presiding Judge (Lord Mackay) left to them a plea of provocation caused by many years of domestic unhappiness. His Lordship had his doubts about whether this could amount to provocation, but took the view that as provocation was not a special defence he should leave it to the jury; he seems also to have thought that it might be possible to regard the facts as amounting to a 'constant terrification' lasting up to the time of the fatal assault (see Extract of Proceedings, Glasgow High Court, 3 May, 1950). The appeal in Crawford was directed against the trial Judge's refusal to leave the special defence of self-defence to the jury, and so was not directly concerned with the sufficiency of the provocation; in any event there was evidence

of diminished responsibility to support the jury's verdict of culpable homicide. But Lord Cooper in the course of his opinion said, 'I assume in the appellant's favour that the culpability of his action falls to be reduced because of his physical and mental state, coupled, with the provocation which the jury may have been entitled to infer from his unhappy home life' (at p. 71). This does suggest a much broader view of provocation than that taken by the Institutional writers, but it is obiter, and is not even expressed as a definite dictum. It is submitted that it is unlikely that it represented Lord Cooper's considered views on the matter, especially as his Lordship did not consider the relation of such a defence to the rule that where provocation is pled in palliation of an assault, the assault must be shown to have followed immediately on the provocation (Macdonald, p. 94), so that a long course even of persecution, and a fortiori of unhappiness, would not be enough unless coupled with a final provocative act.

Since section 3 does not apply to Scotland the position remains doubtful. The mere fact of its non-application may, if anything, tell against its acceptance in Scotland - the Court cannot refer to Hansard to see why it was not applied, and the obvious approach would be to read the Act as meaning that Parliament did not intend to interfere with Scots law on this matter by amending it in the same way as it amended the law of England. (The Lord Advocate's reason for not applying the section to Scotland even 'for the removal of doubt', so to speak, was that to do so would mean 'that it might be said that a judge, in circumstances in which he felt that there was an opportunity for a verdict of culpable homicide rather than a verdict of murder, but

there did not exist either provocation by words or provocation by actions, would be bound to withdraw the possibility of culpable homicide from the jury' - Hansard, supra Col. 786-7 - which I do not understand. If there is provocation neither by words nor actions there is no provocation, and no alteration of the law of provocation is going to affect the matter. Nor is the law of provocation going to affect any other ground on which a murder charge might be reducible to one of culpable homicide.) Professor Smith's view in 1953 was that words of insult, as against verbal information, had always been regarded as insufficient to constitute provocation (T.B. Smith, op.cit. loc.cit.). In 1957, he said of section 3 that 'In the English law of murder now, as in Scotland, rigid categories of provocation have been discarded' (T.B. Smith, 'Malice in Murderland', 1957 S.L.T. (News), 129, 130), but this remark follows on a discussion of Holmes (supra) and may be restricted to adultery cases. Professor Smith's view in his textbook (in 1955) was that 'Verbal provocation of the nature of mere vulgar abuse will generally not be accepted as sufficient' (T. B. Smith, 732), and this may well represent the law. I would suggest that it may be the law that words of insult will be accepted as provocation in exceptional circumstances (such as that of the 'Dunkirk harrier'), but 'mere vulgar abuse' never, if by that term is meant just abusive language having no particular relation to the circumstances of the accused. I find it difficult to envisage the Court of Criminal Appeal treating a direction by a trial Judge that the jury should disregard provocative words as a misdirection in law, but on the other hand, it will always be open to a trial Judge to give, and to a jury to follow, a direction that in the

circumstances of the case verbal provocation can amount to provocation in law. Whatever the books say, the jury always have the last word if they wish to reduce a murder charge to one of culpable homicide. Furthermore, if it is still the law that murder requires malice, a Judge need only direct the jury that if they find the accused was not actuated by malice they may reduce the charge, and to indicate to the jury, or leave it to them to deduce, that the presence of provocation may denote the absence of malice. On the narrower question of the law of provocation I would submit, however, that the 'written law' still is that words of insult, however pointedly directed at the accused's particular susceptibilities, do not constitute provocation, and that the same applies to insulting actions.

(iii) Third party provocation. If loss of control is taken as the only important element in provocation, and the question who started the trouble regarded as unimportant, there is no reason to confine provocation to provocation by the deceased. Provocation by A which causes B to lose control and kill C could then operate to reduce B's crime to culpable homicide, just as provocation by C could have done. Thus, as Professor Smith points out ('Malice in Murderland', 1957 S.L.T. (News) 129, 130) Iago's statements to Othello could rank as provocation, since they gave him information regarding Desdemona's adultery which led him to kill her while suffering from loss of control as a result of discovering her adultery. Provocation does not justify homicide (as Donnedieu de Vabres points out, if A kills a husband in order to prevent the latter killing the wife he has discovered in adultery, A's action is justifiable - Donnedieu de Vabres, p. 232), it only operates as a mitigating factor.

That being so, it should be concerned solely with the accused's state of mind, should look at the situation solely from the accused's point of view: and from Othello's point of view Iago's lies were just as provocative as a true confession from Desdemona would have been.

One can figure other situations in which an accused may be taunted into killing someone in circumstances in which the taunter cannot be charged with murder because the accused must be regarded as a free agent, but in which at the same time it would be unfair not to allow the taunts to rank as provocation. Suppose A meets B, who many years earlier killed A's mother, and C, who has a grudge of his own against B. Suppose C reveals B's guilt to A and expresses the view that A should now kill B - so far, if A kills B he is guilty of murder. But suppose C expresses contempt for A's reluctance to kill B, casts scorn on A's devotion to his mother, taunts A with cowardice, and so on, until A gives way under the pressure and kills B. Surely, in such circumstances, if the law recognises provocation by words at all, it should sustain a plea of provocation by A. (This may sound fantastic, but such a situation might arise if, e.g. B was a former concentration-camp guard who had tortured A's mother to death and escaped punishment.)

The degree of provocation.

Whatever the law is regarding the nature of the provocation it will recognise, it must also decide what degree of provocation it will recognise as sufficient to reduce murder to culpable homicide. In particular it must decide whether provocation is to be measured by reference to the particular accused, or by reference to the reasonable man. Need the accused only show

that he in fact was provoked to loss of control by the actings of the deceased, or must he show in addition that a reasonable man would have been so provoked? Is the test subjective or objective?

It is rather paradoxical to talk of the reasonable man in this connection, and to ask 'Would the reasonable man have been provoked to the extent of losing control of himself?' This is because (i) if it can be said that the reasonable man would have lost control, then the accused behaved as a reasonable man, and, generally, to behave as a reasonable man is to fulfil all one's legal duties; and (ii) it is strange to talk of the provoked reasonable man, of the extent to which a reasonable man is likely to lose his reason, and of what constitutes reasonable action on the part of a man who is ex hypothesi suffering from an inability to control his actions by the use of his reason. The question really is 'Would the average man have lost control?', or rather 'Was it to be expected that a normal average man would lose control as a result of the provocation offered?'

The test of the reasonable man.

The arguments for and against the reasonable man test can best be appreciated in the light of examples, and I would therefore offer the following examples of cases in which the reasonable man test excludes a plea of provocation - I am assuming, of course, that the provocation in question is of a nature recognised by the law, and that the only question is one of degree.

In Bedder v. D.P.P. ([1954] 1 W.L.R. 1119) the accused was an impotent man who had unsuccessfully tried to have intercourse with a prostitute. She jeered at him for his failure, hit him, and kicked him; he lost control and stabbed her to death. The House

of Lords held that as the prostitute's conduct would not have provoked the reasonable man into killing her, the accused's conviction of murder must stand, since the fact of his impotence could not be taken into account.

The second example was given by Mr. A. Greenwood, M.P. in one of the debates on the Homicide Act (Hansard, House of Commons, 15 Nov., 1956, Vol. 560, Col. 1165). Two Yugoslavs were working on a farm in England; one had fought with the partisans and all his family had been killed by the Germans; the other had been a Quisling. One day the partisan broke down and wept over the fate of his family, and the Quisling jeered at him for this. The partisan picked up an axe and killed the Quisling. The partisan was convicted of murder and hanged, no doubt at least partly because of the nature of the provocation offered. But even if verbal provocation is admitted, as it now is in England, he would still be guilty of murder if the degree of provocation were tested by reference to a similar situation involving two Englishmen. It is clear that justice requires that the peculiar relationship of the two men to each other, one a partisan and one a Quisling, should be taken into account in considering the defence of provocation.

The arguments in favour of the reasonable man test. The reason given for the adoption of the test is that 'if it were not so there might be circumstances in which a bad-tempered man would be acquitted and a good-tempered man would be hanged, which, of course, is neither law nor sense' (R.C. Evid. of Lord Cooper, Q. 5367). It is submitted, with the greatest respect, that this argument is itself neither law nor sense. There is no question of acquitting anyone, but merely

of convicting him of culpable homicide and not of murder. And, as is pointed out by Mr. J.W.C. Turner in Russel on Crime (11th edn. p. 608), there can never be any question of hanging the good-tempered man. If the good and bad tempered man are thought of as being the two extremes on either side of the reasonable man, the good man will never need to invoke the plea of provocation, because he will never be provoked into killing anyone. If the good-tempered man is the reasonable man, he will be provoked only by what would provoke the reasonable man, and so will never be hanged. The good tempered man cannot be hanged on the objective test, and no man, good or bad tempered, can be hanged on the subjective test, if he was in fact provoked so as to lose control. The good-tempered man cannot be affected by the extension of a rule of law which at its narrowest is sufficient to protect him.

The real objection, of course, is to allowing the bad-tempered man to use his bad temper as an excuse. But to refuse to allow this 'may be in effect to inflict punishment not so much in respect of the particular act of deliberate malice, as of a want of habitual control over a mind naturally impetuous and ready to break forth on slight occasions' (Fourth Report of Her Majesty's Commissioners on Criminal Law of 1839, Parl. Papers, 1839, xix; Digest, Art. 43, n.(i)). It would be as illogical as punishing a drunk man for his drunkenness by convicting him of murder, which, of course, is what the law sometimes does.

Even if we accept that the law has a duty to curb the bad-tempered, and that a man cannot plead his 'want of habitual control over a mind...ready to break forth on slight occasions', it by no means follows that the law must adopt the test of the reasonable man in its entirety. There is a great difference between merely

giving way to temper, and losing control in circumstances in which it would be unfair wholly to blame one for doing so. The scope of the plea of provocation can be restricted, and the principle of deterrence sufficiently satisfied, it is submitted, by asking if the accused made any effort to control himself. (This requirement, incidentally, might result in the conviction for murder of indignant husbands who as the law now stands are convicted only of culpable homicide.)

He would have to satisfy the jury that he did not just 'fly off the handle' and indulge his temper because that was the easiest way of reacting to the situation: he would have to show that he was provoked beyond his endurance. It seems unfair to ask that he should go further and show that he was provoked beyond the endurance of the reasonable man, i.e. in practice, show that he was provoked beyond what the Judge or jury, sitting in the calm atmosphere of the Court, think would have been the extent of their endurance.

The arguments against the objective test. (i) As Mr. J.W.C. Turner points out, the decision in Bedder (supra) is 'one more illustration of the way in which a point of evidence has been allowed to slide into a point of law and the inevitable mischief which thereby results' (Russell on Crimes, 11th edn. p. 594). It is, in fact, the most obvious example of the operation of the principle of disfacilitation (supra 290).

Instead of being used as a way of testing the truth of the accused's statement that he lost self-control, the reasonable man has been turned into an objective standard of self-control. Even if the jury believe that the accused in fact lost control to an extreme degree, and that he killed because of this, they must convict him of murder unless they think that the

reasonable man would have lost control to that degree, a result which, it is submitted, is clearly unjust, especially when what is in question is not the objective rightness of what was done, but the degree of punishment which should be inflicted on the particular accused. If the accused's alleged loss of self-control was something which the jury feel was quite unusual and unexpected in the circumstances this may properly lead them to refuse to believe that he did lose control, but if they do believe it, its unexpectedness seems unimportant - even the law must recognise that the unexpected can happen.

(ii) The objective test is also open to the criticism that it refuses to recognise that certain groups of people are more susceptible to certain types of provocation than are others. Even within the principle of disfacilitation, so to speak, its standard is too impersonal - it deals always with 'the reasonable man', the man on top of a tram in Sauchiehall Street, instead, for example, of dealing with the reasonable Yugoslav in a case in which the accused is a Yugoslav, or the reasonable impotent man, in a case in which the accused is impotent. Any reasonable person - in the non-legal meaning of the word - would consider the accused in the two examples given as being more deserving of sympathy than a normal man like Kizilevizcius who disarmed and killed his father (Kizileviczius, 1938 J.C. 60) or the four accused in M'Guinness (1937 J.C. 37) who wantonly slaughtered the deceased because he had challenged one of them to a fight. It is, with respect, wrong to say, as did the House of Lords in Bedder ([1954] 1 W.L.R. 1119, Lord Simonds, L.C. at p. 1123) that 'It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as

a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic'. Let us assume that the standard is the even-tempered man - why must it be the even-tempered potent healthy average Scotsman? Of course such a person is not going to kill someone who says, 'You're the scum of the earth, you dirty Jew', but that is no reason for refusing a priori to accept that such a remark might in some circumstances provoke a survivor of Belsen into killing the person who said it; conversely the fact that a Glaswegian might be provoked into doing violence by being called a 'f...g Billy boy' (cf. M'Guinness supra), does not mean that a negro who reacts violently to such a remark is entitled to claim the same degree of loss of self-control through provocation, just because he happens to stand trial for murder in Glasgow. If the examples seem somewhat far-fetched and ludicrous, that is because the objective test, taken these lengths, is far-fetched and ludicrous.

(iii) The purpose of the plea of provocation is to enable the law to take cognisance of the plight of the individual accused and to override to some extent the principle of deterrence. This purpose will be defeated by the laying down of general rules ab ante as to the circumstances in which a plea of provocation can be accepted. It is the purpose of the law 'to curb and repress a jealous, choleric, or quarrelsome humour, so far as this can be done without injustice in the particular case' (Hume, i. 249), and justice in each particular case requires an investigation of the circumstances of that case, and an assessment of the position of the particular accused; it cannot be done by ignoring the particular case and concentrating on a hypothetical case in which the particular accused

is replaced by a legal fiction. Just as the trivial nature of the provocation offered, the unexpectedness of the accused's loss of control may help the jury to disbelieve his story, so the fact that he was impotent, or a Negro, or the fact that the deceased was a prostitute, or a member of the Ku Klux Klan, may help them to understand why the accused reacted as he did, and lead them to believe his story.

The Scots law.

The law of Scotland has never considered this problem. The Crown Agent told the Royal Commission that the test was the reaction of the particular accused (R.C. Evid. of Crown Agent, Q. 1934); this was specifically contradicted by Lord Cooper who said that the law was the same as in England (R.C. Evid. of Lord Cooper, Q. 5366); Macdonald also adopts the objective test (Macdonald, p. 93). Professor Smith suggests that Scots law may avoid the grosser absurdities of the objective test by taking into account the special features of the situation - i.e. by applying the test not of the reasonable potent, but of the reasonable impotent man, in a situation like that in Bedder (supra), but it is only a tentative suggestion. He says, 'In Scotland, it may [his italics] be competent to consider factors which make the particular accused more sensitive to certain forms of insult than would the ordinary Scotsman - as, for example, taunts regarding religion, race, colour or physical deformity' (T.B. Smith, 'Malice in Murderland', 1957 S.L.T. 129, 130). But he rejects the wholly subjective approach (T.B. Smith, p. 731). This solution, it is submitted, is unsatisfactory, although it is preferable to a purely objective approach. For how are we to decide which of the

features in any situation is to be regarded as sufficiently special to be taken into account? For example, is the reaction of a Belfast Catholic to religious provocation to be measured by the standards of the reasonable Belfast Catholic, the reasonable Edinburgh Catholic, the reasonable Irishman, the reasonable Ulsterman, etc.? It may be possible to exclude the accused's unusual pugnacity from consideration, but apart from that it is very difficult to find a resting-place between the wholly subjective test and the Bedder test.

The situation, as in the question of the nature of the provocation recognised by the law, appears to be that if the law is to be found by asking what the Courts will probably decide in fact, then, on my prediction, the law is as laid down in Bedder. But if one applies the principles of Scots law, and in particular the principle that the absence of malice or wickedness reduces murder to culpable homicide, then logically Scots law must adopt the wholly subjective test. But then, one of the few things one can say with assurance about Scots criminal law is that it is not logical.

Chapter 14: Criminal Negligence.I - CULPABLE HOMICIDE.Introduction.

The most important and the commonest crime of negligence is involuntary culpable homicide, and the problems of criminal negligence are best studied by reference to that crime. Involuntary culpable homicide is, of course, completely different in kind from voluntary culpable homicide which is just murder committed under such mitigating circumstances as operate to reduce the appropriate penalty from death or life imprisonment to some lesser punishment. Involuntary culpable homicide - and when the term 'culpable homicide' is used in this chapter it is used to mean involuntary culpable homicide - is the causing of death unintentionally but either with a degree of negligence which is regarded as sufficient to make the homicide culpable in the circumstances, or in circumstances in which the law regards the causing of death as criminal even in the absence of any negligence.

It will be useful, I think, to set out the various kinds of unintentional homicide without employing the rather confused terminology of Scots law. They were set out by Maimonides in the twelfth century as follows:

'There are three types of slayers without intent.

One slays inadvertently and in complete unawareness...

Another slays inadvertently in a manner that is almost an accident, such as when the death is the result of some unusual circumstance, uncommon amid the greater part of human events...

Still another slays inadvertently but in a manner that approximates wilfulness because there

is present a circumstance tantamount to negligence, or because he should have been careful but was not' (Maimonides, Book of Torts, 5.6.1-3, trans. H. Klein, in Yale Judaica Series, the Code of Maimonides, Vol. XI, p. 212).

An example of the first type would be a man falling off a roof quite accidentally and knocking over and killing a passer-by on whom he fell. Here it can hardly be said that the death is caused by an act of the falling man at all. The second type covers cases where death results from an act of the accused, but in circumstances where the fatal result is not reasonably foreseeable, and so where no question of objective carelessness arises. An example would be the case where a slight slap caused death because the victim slipped and broke his neck, or because he suffered from an unusual physical condition unknown to his assailant, which rendered such a slap fatal.

The third type includes all the various degrees of negligence, and can be divided according to the number of degrees of negligence recognised by the legal system in question. Scots law appears to recognise two main degrees of negligence - gross negligence, and negligence which is not so gross. The second degree is measured by the same standard as is used in civil claims for reparation, by reference to the care exercised by the reasonable man. The first degree cannot be measured by reference to any standard at all. It is usually described as gross, or palpable, or wicked, or even just as criminal. Into which degree a particular case falls is a question of fact, a question for the jury, and the only help they are given by the Judge is by way of the epithets just mentioned, which are hardly more than vituperative and have no definite meaning. Presumably the jury

simply look at the facts, and then look again, and come to a decision. The simplest way for them to decide would probably be for them to imagine they were witnessing the situation under examination, for example, the situation in which the accused drove his car into a group of people. If their imagined reaction is 'What a careless way to drive', then they will find that the accused's negligence was of the less gross variety. If their reaction is 'What a bloody stupid way to drive' they will find that the accused was grossly negligent. This second type of negligence is often referred to as recklessness, but it must be distinguished from an even grosser degree of carelessness, the degree which is so gross as to amount to that 'wicked and deliberate' recklessness which is considered as equivalent to intention, and whose presence may make even unintentional homicide murder (cf. supra, 295).

The present law of Scotland is that where the homicide is caused in the course of lawful conduct the negligence must be of the gross type before the killing can be treated as criminal, but where the death is caused in the course of unlawful conduct it will be culpable homicide even in the absence of any negligence, provided it falls within Maimonides' second type of unintentional slaying. It is accordingly necessary to consider the law of culpable homicide in two separate compartments - homicide in the course of lawful conduct, and homicide in the course of unlawful conduct.

Homicide in the course of lawful conduct.

The old law.

Hume states that 'It is culpable homicide, where slaughter follows on the doing even of a lawful act; if it is done without that caution and circumspection which may serve to prevent harm to others' (Hume, i.233),

which just means that any negligent homicide is criminal. Hume gives the following as examples of culpable homicide - 'if a man leave his fowling-piece loaded, and afterwards kill in trying the lock, having forgot the condition in which he left the piece: Or if in driving any carriage through the streets of a town, the driver quit his horses, and they run off with the carriage, and a passenger is killed: Or if workmen on the roof of a building by the side of a highway throw down slates or rubbish, without timely warning to the passenger.' In all these examples, Hume says, 'there is a want of that serious and considerate regard to the safety of one's neighbour, which justly makes one answerable for the consequences, and punishable to such an extent as may serve to correct so faulty a habit of mind, in one's self or others' (Hume, i. 192-3). There is no suggestion that the want of regard must be gross or palpably wicked.

The progress of this type of culpable homicide can be traced through the 19th century cases, of which there is a great variety. Carelessness by chemists in dispensing drugs (e.g. Robt. Henderson and Wm. Lawson, (1842) 1 Broun 360; Edmund Wheatley, (1853) 1 Irv. 225) by builders in erecting buildings (e.g. John Wilson, (1852) 1 Irv. 85; Alex. Dickson, (1847) Ark. 352), by persons conducting blasting operations (e.g. Jas. Finney (1848) Ark. 432; John Drysdale and Ors., ib. 440), by pit managers, miners, and other persons in charge of machinery (e.g. Geo. Stenhouse and Archibald M'Kay, (1852) 1 Irv. 94; Thos. Hamilton, (1874) 3 Coup. 19; Robt. Young, (1839) 2 Sw. 376), and, of course, by drivers of vehicles, and in particular of railway engines, can all be found in the nineteenth century reports. The standard of care required was simply 'due care and circumspection'. In the case of James Donald Clark

((1877) 3 Coup. 472), who was charged with causing death by leaving explosives in a dangerous place, the Lord Justice-Clerk said simply that if it was the accused's duty to keep the explosives in a store and not where he in fact had left them, then 'if that was his duty, and if he neglected it, he was guilty' (at p. 507).

The locus classicus of the nineteenth century law of culpable homicide is the charge to the jury in the case of Wm. Paton and Rich. M'Nab ((1845) 2 Broun 525). The accused were a railway superintendent and driver respectively, and were charged with culpable homicide after an accident caused by their use of a defective railway engine to carry a passenger who had missed the ordinary train from Glasgow to Edinburgh by a special train. The Lord Justice-Clerk, Lord Hope, said that

'The degree of blame, which will constitute this crime, varies with the circumstances of each case. It is not necessary, in order to substantiate a charge of culpable homicide, either that there should be any intention to do to another the injury which has occurred, or that the party should even know that another is actually exposed to risk, as in the case of a carter who neglects his duty and runs down a child, though he may not know that any child is actually near him.

The general rule is, that every person, placed in a situation in which his acts may affect the safety of others must take all precautions to guard against the risk to them arising from what he is doing...and if that has been omitted, which common sense and ordinary reflection as to the situation of others required, which their duty to the law required for the safety of others, the guilt is clear' (at pp. 533-4).

The standard there set out is the same as the present-day standard in civil law, and indeed Lord Hope's statement of the duty of care sounds very like Lord Atkin's famous statement of the law in Donoghuev.

Stevenson (1932 S.C.(H.L.) 31, 44).

The only difficulty in the nineteenth century cases was that although culpable homicide consisted merely of the negligent causing of death, it was common to libel as an alternative charge either culpable and reckless neglect or merely culpable neglect, and often both were libelled. This was done even when the act involved was not strictly lawful. In one case a nursemaid who killed a child by giving it laudanum for the purpose of keeping it quiet was charged with culpable homicide, and also with 'culpable and negligent or culpable and reckless administration of laudanum to a child to the injury of the health or danger of the life of such child', and her plea to culpable and negligent administration was accepted by the Crown (Jean Crawford, (1847) Ark. 394. In Eliz. Hamilton, in similar circumstances, only a charge of culpable homicide was brought - (1857) 2 Irv. 738). The position of the alternative charges was discussed in Thos. Henderson and Ors. ((1850) J. Shaw, 394), where the charges were of culpable homicide, and culpable and reckless neglect of duty by a ship's officer causing the wreck of the ship and loss of life. The Lord Justice-Clerk told the jury that there was no difference between the charges, and described the introduction of the two charges as 'inexpedient and tending to distract and confuse the mind of the jury' (at p. 437). The jury however remained determinedly confused, and convicted one accused of culpable and reckless neglect and another of culpable but not reckless neglect, and the Court took those distinctions into account in passing sentence.

The 'confusion' shown in Henderson has persisted in the law of culpable homicide, and foreshadows the

present-day distinctions between culpable homicide and the statutory crime of causing death by reckless driving (Road Traffic Act, 1956, 4 & 5 Eliz. II, c.67 s.8. cf. Paton, 1936 J.C. 19, Andrews v. D.P.P., [1937] A.C. 576). The two crimes of which the accused were convicted in Henderson were both considered less serious than culpable homicide, so that 'reckless' conduct is regarded as something less than the type of conduct necessary for a conviction of culpable homicide, although the latter was said to be committed, 'whenever a person unintentionally committed an act whereby the life of another was lost, or where he failed to perform his duty when charged with the preservation of life, without having a sufficient excuse for such neglect, and life was lost in consequence' (Henderson, supra, at p. 437), i.e. when culpable neglect results in death.

In two subsequent cases it was argued that it was incompetent to libel the crime of causing death by culpable neglect as an alternative to culpable homicide since both crimes were the same. The Court rejected the arguments holding that although they might be right in principle there were conclusive authorities against them (Robt. Lonie, (1862) 4 Irv. 204; Jos. Calder, (1877) 3 Coup. 494). In one case the Crown stated specifically that 'the charge might have been culpable homicide only, but in practice it has been found convenient, to state the charge in the alternative and less serious form' (Jos. Calder, supra at p. 495). In other words the Crown found it convenient to offer the jury an opportunity of convicting the accused of something less than culpable homicide, in order to obviate the chance of their acquitting him altogether because of their dislike of convicting of culpable homicide where death was caused by the accused

while acting lawfully. The alternative form of charge does not seem to have been used after 1887, but its place is now taken by statutory charges in the road traffic cases, which are the only important modern examples of 'lawful-act' culpable homicide.

The law does not appear to have changed throughout the nineteenth century, but, apart from traffic cases, this type of culpable homicide gradually disappeared from the reports, perhaps because of a number of unsuccessful prosecutions (e.g. Thos. Hamilton and Anr., (1874) 3 Coup. 19, Geo. Armitage, (1885) 5 Coup. 675, James Donald Clark, (1877) 3 Coup. 472 and 506, John Fail and Ors., (1877) 3 Coup. 497). In 1903, however, Lord M'Laren said in a case in which the charge was one of culpable homicide by negligently dispensing poison that '...it would be a very dangerous doctrine to lay down that a man who by mistake caused the death of another was free from all blame, and from liability to punishment merely because he was able to say that he meant no harm, and only neglected all the precautions that experience has shewn to be necessary in the handling of poisons' (Wood, (1903) 4 Adam 150 at p. 160). But it is quite clear that Lord M'Laren encouraged the jury to acquit the accused, and so to avoid acting on his definition of the crime of culpable homicide.

The modern law.

'Lawful act' culpable homicide seems almost to have disappeared from the law except for traffic cases. The reasons for this are in the main extra-legal. It is true that the use of explosives, and the management of factories and mines, are now governed by statute so that it is possible to deal with them without reference to the common law - indeed even

fatal accidents caused by carelessness are normally followed only by statutory prosecutions (e.g. Wilson v. M'Fadyean, 1954 J.C. 107): but road traffic is also regulated by statute, and common law prosecutions for culpable homicide caused by reckless driving are still common. No one would be taken seriously who suggested that whenever a fatal factory or mine accident was caused by gross negligence, the manager or foreman or other person responsible should be charged with culpable homicide. But on principle and on nineteenth century authority such a charge would be quite proper; and such charges could be brought where an employer failed to employ competent staff or to instruct his staff properly (e.g. Thos. Rowbotham and Ors. (1855) 2 Irv. 89, Wm. Baillie, (1870) 1 Coup. 442), or even where he allowed the use of dangerous machinery which injured a stranger (cf. Wm. Paton and Richd. M'Nab, (1845) 2 Broun 525, Lord Justice-Clerk at p. 534).

One reason for the absence of such prosecutions in this century is the complex nature of modern factories and mines which makes it very difficult to single out the negligent party. The negligence may be far removed in time and place from the death - the immediacy of the traffic accident is lacking, and the feeling of indignation aroused by that immediacy is dissipated by the complexity of the situation in a factory. Another reason is probably the reluctance of the authorities to brand a respectable factory owner or senior employee as a common law criminal, especially where the circumstances are not such as to arouse any immediate indignation which might counter-balance this reluctance. It is accordingly the present practice, if not the present law, that an employer who causes the death of a workman by gross carelessness, for example by leaving a dangerous

machine unfenced, or by allowing the use of a system of working so bad that its use is 'obvious folly' (cf. Morton v. Wm. Dixon, Ltd., 1909 S.C. 807), is not guilty of culpable homicide, or indeed of any common law crime. No doubt if such a charge were brought, the standard of negligence necessary for conviction would be that gross, palpable, and wicked, negligence required in traffic cases, and it would be very difficult to establish this degree of negligence in the absence of anything akin to the situation of the reckless driver careering down the road at speed and running into his victim.

The modern law on this subject must therefore be sought in the traffic cases. In the nineteenth century, as we have seen, the standard of care imposed by the criminal law was the same as that imposed by the civil law - reasonable care. Signs of modern developments can, however, be seen in the case of Wm. Drever and Wm. Tyre ((1885) 5 Coup. 680) which arose out of a shipping collision. The accused were charged with culpable homicide, or culpable and reckless negligence - sic - by members of a ship's crew in failing to keep a proper lookout. Lord Young directed the jury that

'....the law upon this subject undoubtedly is, that any person who is in a situation charged with a duty which involves the safety of human life, must observe care and caution in the discharge of his duty, or at least an absence of gross negligence and recklessness. I put it to you in that way, gentlemen, because it is not any slight fault or neglect which will make a man a criminal; it must be a notable and serious fault or neglect by a man upon whose care and caution the safety of human life depends' (at p. 686).

Lord Young requires more than ordinary negligence, he requires 'gross negligence'. The reason for this development was clearly a feeling of sympathy with the sailors, a feeling that 'it is hard to impute crime, and it will require exceptional circumstances to impute crime, to a man who is present at his post, on the spot where his duty requires him to be, attending to his duty to the best of his ability, and to nothing else' (ib. at p.687). The benefit of this attitude has now, however, been extended to motor car drivers driving in a manner contrary to the criminal provisions of the Road Traffic Acts.

Drever and Tyre did not establish any definite change in the law. In 1907, for example, an engine driver who failed to adhere to the proper method of driving in a snowstorm and as a result ran into a station and killed twenty-two people, was charged simply with failing to take the necessary precautions and killing the victims. The words 'reckless' and 'negligent' do not appear in the indictment, and the report of the Judge's charge is unhelpful (Gourlay, (1907) 5 Adam, 295).

The next case of interest is Waugh v. Campbell (1920 J.C. 1). The accused was charged with driving 'recklessly and negligently', contrary to section 1 of the Motor Car Act of 1903 (3 Edw. VII, c. 36); he had taken a blind corner on the wrong side of the road, without sounding his horn, and had collided with a car coming in the opposite direction. The Sheriff-substitute acquitted him on the ground that there was nothing to show either recklessness or negligence, since at the time the road had seemed clear. The High Court reversed this decision, and held that there had been negligence within the

meaning of the Act, but they took the opportunity to observe that the statutory negligence differed from common law negligence, and that the Sheriff had erred in applying the common law requirement of moral blame. This case sets the tone for the modern law in that it states clearly that there are two types of road traffic negligence (or rather at least two types - the Court do not appear to have been concerned with the fact that the accused was charged with both recklessness and negligence, while the statute prohibited reckless or negligent driving) - one, a minor degree of negligence, is a statutory offence; the other, a gross degree of negligence, is a common law offence. Lord Salvesen pointed out that 'the statutory offence may be constituted merely by negligence, although the judge who tries the case thinks the negligence was not gross negligence and involved no moral blame' (at p. 6), although it is not clear what sort of blame his Lordship thought attached to common law negligence. He also specifically distinguished the civil and criminal standards, saying 'We are quite familiar with cases in which drivers are found liable by a jury for negligence involving loss of life or injury to person, and yet the public prosecutor would never dream of bringing a complaint' (at p. 5). (His Lordship also showed a remarkable lack of prescience when he said that the best way to remedy the apparent contradiction between the common and statutory law would be to alter the statute to conform with the common law, since 'It may have been that, when the statute was framed, a motor car was looked upon as an instrument of greater danger to the public than we are now accustomed to consider it, and I think it would be better if legislation

with regard to motor cars were brought more up to date' - at p. 5.)

Although there was no argument or citation of authorities on the common law in Waugh, the dicta are in accord with the twentieth century attitude to traffic cases. There may, however, have been some doubt on the matter in the 1920's, and in 1931 a short extract from a charge by Lord Alness in a culpable homicide case was reported. His Lordship said 'At one time in our law it was quite sufficient to establish a charge of culpable homicide that any fault on the part of the accused resulting in the death of a fellow human being had been established. I do not think that that is the law today... The carelessness which the Crown must prove, according to our conception of the law today, in a case of this kind, must be gross and palpable carelessness' (Cranston, 1931 J.C. 28).

This standard was approved by the Court of Criminal Appeal in the case of Paton (1936 J.C. 19), where it was said that there must be 'gross, or wicked, or criminal negligence, something amounting, or at any rate analogous to, a criminal indifference to the consequences' (Lord Justice-Clerk Aitchison at p. 22). The Court were rather reluctant to set such a high standard, and Lord Aitchison went so far as to suggest that this 'unfortunate modification' of the old law should perhaps be reconsidered. Yet the only authority quoted to the Court was Cranston, and there seems to have been nothing to prevent them reconsidering the matter there and then. One can only surmise that the strict standard had become very generally accepted, perhaps because of the refusal of juries to convict drivers except in extreme cases.

The standard in Paton is not only extreme, it is also rather vague. It is clear that recklessness

sufficient to entail conviction for reckless driving under section 11 of the Road Traffic Act 1930 (20 and 21 Geo. V., c.43), or to entail conviction for causing death by reckless driving under section 8 of the 1956 Act (4 & 5 Eliz. II. c.67), is not sufficient to entail conviction for culpable homicide, but that is all that is clear. (Cf. Andrews v. D.P.P. [1937] A.C. 576. It might be arguable that sections 11 and 8 lay down two standards, that of recklessness, and that of driving without due care and attention, and that although carelessness of the second standard would not be enough for culpable homicide, carelessness of the first would. But it is not clear why the same section should impose the same penalty for two different degrees of offence, and in any event the Courts seem to take the view that recklessness under the section is something less than the gross carelessness required for a common law conviction. Charges under section 11 often recite both halves of the section, and no distinction is made between them on conviction - cf. Archibald v. Keiller, 1931 J.C. 34.) To say that there must be criminal negligence before there can be a conviction for culpable homicide is tautologous, unless the word 'criminal' is used emotively; to say there must be gross, or wicked, or palpable, negligence, is just to say that there must be negligence, and to add an expletive. The assessment of negligence is very much a jury question, and therefore there can be no definite categories of negligence. All that Paton means is that the jury ought not to convict of culpable homicide unless they feel the accused has been very careless indeed. Juries, are of course, only too willing not to convict drivers of culpable homicide, and the modern development of the law probably owes a great deal to the fact that whereas

nineteenth century Judges and juries did not drive railway engines but were, on the contrary, passengers, and modern Judges and juries do drive cars, and are easily moved by arguments of the 'There but for the grace...' kind. Before they will convict they must be convinced that the accused behaved in a way that they would not behave, and that is why they must be convinced he behaved 'wickedly' and 'criminally'.

The development is also due to the tendency of juries, a tendency already present in the nineteenth century, to adopt the halfway house of convicting on a lesser alternative charge, wherever they are offered such an alternative. This tendency is all the more marked where the lesser alternative is only a statutory offence, and so lacks the 'moral turpitude' of culpable homicide - a tendency recognised by the recent creation of the statutory offence of causing death by reckless driving (4 & 5 Eliz. II, c.67, s.8) which enables juries to convict of this offence, which carries a penalty of five years' imprisonment, where formerly they could only convict of culpable homicide, or of reckless driving which carries only two years' imprisonment.

Homicide in the course of unlawful conduct.

Involuntary homicide is divided in Scotland into casual homicide and culpable homicide; casual homicide is defined as homicide done when the person causing death was 'lawfully employed, and neither meaning harm to anyone, nor having failed in the due degree of care and circumspection for preventing mischief to his neighbour' (Hume, i. 194; Alison, i. 139); it is then assumed that any homicide which is not casual must be culpable (cf. Rutherford, 1947

J.C. 1). As a result there is said to be absolute liability, so to speak, wherever death is caused in the course of unlawful conduct, and it is no defence that the death was unforeseen and in the highest degree unforeseeable. Although Hume at times seems, like Alison, to adopt this approach (Hume, loc.cit.) there are indications that he regarded absolute liability as restricted to cases where there was not merely an unlawful purpose, but a purpose to do some bodily harm. He says that homicide 'by misadventure, without any intention to kill, and in an unforeseen and unlikely way; but withal in pursuance of a purpose to do some sort of bodily harm' is culpable even where 'the death is an extraordinary event, such as no one... can fairly be presumed to have contemplated or to have thought of as a probable or even a possible event' (Hume, i. 234). Alison and the modern law do not appear, however, to restrict the scope of absolute liability in this way, although the two modern cases (Rutherford, supra; and Bird, 1952, J.C. 23) both contain an element of assault. Macdonald states simply that 'Homicide by the doing of an unlawful act, where death could not reasonably be foreseen as the probable consequence of the act' is culpable (Macdonald, p. 96).

The result of these statements is that, far from it being true that there is nothing akin to the doctrine of constructive malice in Scotland (cf. R.C. para. 92), there is a clear doctrine of constructive negligence, a 'felony-culpable homicide' rule, so to speak, (cf. Hall, p. 494), whereby any death caused during the commission of a crime is automatically culpable homicide, irrespective of the mens rea of the killer, or of the probability of the fatal result. Glanville Williams has pointed out that we 'should...

recognise that every charge of involuntary manslaughter requires proof of the requisite degree of criminal negligence, and that this negligence always means negligence as to the death - not negligence as to a consequence short of death' (Glanville Williams, 'Constructive Manslaughter', [1957] Cr.L.R. 293, 301). To convict someone of culpable homicide because it was foreseeable that his actings might frighten his victim although it was not foreseeable that they would kill him (cf. Bird, supra), is to convict him of constructive culpable homicide. The above statements of Scots law go further even than this; they do not require the likelihood of any injury, but merely that at the time he caused the death the accused should have been unlawfully employed.

If this is the law, its implications are considerable, not to say fantastic, and I turn now to see if it is possible to avoid stating the law in such general terms as it is stated by Macdonald.

Unlawful employment.

No attempts have been made to define 'unlawful' in the phrases 'unlawful employment', 'unlawful act' etc. One would expect the word to mean 'criminal', but there are dicta which suggest that it means more than that. In Geo. Broadley ((1884) 5 Coup. 490), Lord Moncrieff said that the rule of absolute liability applied where 'a person is engaged in an unlawful act, or in the discharge of a lawful act in an unlawful way' (at p. 492). In Bird (supra) it was apparently regarded as sufficient that 'no justification in law or in fact or in common sense could be assigned to the conduct proved against the appellant' (at p. 27). I would submit, however, that 'unlawful' does mean 'criminal'. Broadley was a case in which one sailor

pushed another overboard in the course of a fight, and in Bird there was at least one minor assault. It is hardly conceivable that it should be casual homicide if a man's gun goes off in his hand while he is going through a hedge and kills someone if the man is lawfully on the land, and culpable homicide if he happens to be a trespasser (cf. Alison, i. 140).

It is not clear what 'the discharge of a lawful act in an unlawful way' means, unless it just means 'performing an unlawful act'. Perhaps driving a motor car without a licence, or while drunk, is performing a lawful act in an unlawful way - although it is more like an unlawful act - but in neither case does the law of constructive homicide apply.

It seems to be assumed that 'unlawful employment' and 'unlawful act' mean the same, but this is not so, and it is submitted that 'unlawful act' is preferable to 'unlawful employment' as a criterion for the application of the rule of constructive homicide. If the criterion were employment, then completely inadvertent happenings might be classed as culpable homicide. If a window cleaner falls off a ladder and kills someone in the street, he is not guilty of culpable homicide assuming his falling was not itself negligent - not merely because the fall is not criminal, but because it can hardly be described as his act at all - he slays in complete inadvertence (cf. supra, 536-7). If he were not a window cleaner, but a housebreaker, he would have caused death while unlawfully employed, but not by an unlawful act, and he could not, it is to be hoped, be convicted of culpable homicide. Again, 'if a person's gun burst in his hand, and kill his neighbour', that is casual homicide (Alison, i. 140) - surely it cannot become culpable homicide if the person did not have a licence

for the gun, or was carrying it for the purpose of poaching.

I would further submit that the act must be in itself unlawful, and not be unlawful merely because it forms part of an unlawful employment. It is not easy to distinguish between an act unlawful in itself and one rendered unlawful because of its context, if only because no act is unlawful in itself, but the point I wish to make will become clear if we consider the unreported case of Finnigan (Glasgow High Court, 5-6 March 1958). Finnigan wrenched a gas meter from its supply pipes in order to steal its contents, and as a result two people in an adjoining house were killed by an escape of gas. Finnigan was probably grossly careless, and no question of constructive guilt arose with regard to him. But suppose he had removed the meter with the utmost care, according to the approved official method of doing so, but quite unforeseeably had caused a fatal escape of gas. Would he have been guilty of culpable homicide? It is submitted that he would not, because what he did would be in itself lawful - if a Gas Board official had removed the meter carefully, but accidentally caused a fatal escape, the official would not have been guilty of any crime, and it is submitted that the same result should be reached where the removal occurs in pursuit of a criminal purpose.

Macaulay offers an even more extreme example of the difficulty of regarding such cases as culpable homicide. He says 'A heaps fuel on a fire, not in an imprudent manner, but in such a manner that the chance of harm is not worth considering. Unhappily the flame bursts out more violently than there was reason to expect. At the same moment a sudden puff of wind

blows Z's light dress towards the hearth. The dress catches fire, and Z is burned to death'. Would that be culpable homicide, Macaulay asks, if 'the fuel which caused the flame to burst forth was a will, which A was fraudulently destroying?' (Macaulay, p. 508). Or, I would add, if the fire was criminal for any other reason? And if fraudulent destruction of a will was a crime yesterday, but is not one today, would A's guilt of culpable homicide depend on whether the accident happened yesterday or today?

There is no Scots authority on this question except in cases of abortion (e.g. Rae, (1888) 2 Wh. 62), in which death is usually foreseeable, and in cases of assault; and I would submit that if constructive culpable homicide is to be retained in Scots law, it should be restricted to cases of abortion, or to cases involving assault, such as assault itself, or rape or robbery. (In one case - Jas. Stewart (1856) 2 Irv. 359 - where the accused had set light to some railway wagons while stealing whisky from them, Lord Justice-General M'Neill asked 'Is it more illegal to burn when the man is stealing than when he is not?', but he did not answer his question, saying only, 'This may be, but I should wish more authority on the point'. No authority was produced, and the Crown dropped the charge of fire-raising. It is submitted that it is not more illegal to burn or kill when stealing than when not.)

I accordingly turn now to cases of assault, in the context of which this branch of the law has developed.

Death caused by assault.

The victim's condition. Before dealing with the different types of cases it should be noted that there

is one important rule which applies to them all - that is the rule that the assailant 'takes his victim as he finds him'. This means that in estimating the likelihood of a fatal result we consider the actual physical condition of the victim, so that an assault which would not be remotely likely to be fatal in the case of an ordinary man, will be regarded as foreseeably fatal if the particular victim was suffering from a physical condition which rendered him peculiarly susceptible to fatal injury. For example, a slap is not likely to be fatal in the case of an ordinary person, but it may be foreseeably fatal in the case of an extremely highly strung person with a very weak heart. If someone slaps and kills such a person, the death is regarded as a probable result of the slap, and so the assault is regarded as foreseeably fatal. And this is so whether or not the assailant knows of the heart condition.

There is ample authority for this rule (e.g. Angus Cameron, (1811) Hume, i. 234; Wm. Brown, (1879) 4 Coup. 225; Robertson and Donoghue, Edinburgh High Court, 28-30 Aug. 1945 unrepd.; Rutherford, 1947 J.C. 1; Bird, 1952 J.C. 23), but it rests on a paralogism. In Robertson and Donoghue (Edinburgh High Court, 28-30 Aug. 1945, unrepd.) two men attacked, robbed, and killed, an elderly cafe proprietor who, unknown to them, and indeed to himself, suffered from a weak heart. Lord Cooper told the jury, 'Now, it cannot be sufficiently emphasised.. that if an intruder or aggressor, acting from some criminal intent and in pursuance of some criminal purpose, makes a violent attack upon any man or woman he must take his victim as he finds him. It is every whit as criminal to kill a feeble

and infirm old man, or a newborn infant as it is to kill an adult in the prime of life' (Judge's Charge, p. 17). In Rutherford (1947 J.C. 1) where a young man was charged with strangling his girl-friend, there was a suggestion that she suffered from a weak heart but for which she would not have died, but Lord Cooper said 'It is no answer for an assailant who caused death by violence to say that his victim had a weak heart or was excitable or emotional, or anything of that kind. He must take his victim as he finds her. It is just as criminal to kill an invalid as it is to kill a hale and hearty man in the prime of life' (at p. 3).

The last sentence of each of these quotations is indisputable, just as it is indisputable that 'that may be criminal violence in the case of a frail person.. which would not be such in the case of a person in good health' (Macdonald, p. 88; cf. Hume, i. 238; Thos. Breckinridge (1836) 1 Sw. 153). But it is a non-sequitur to say that therefore 'you must take your victim as you find him', with respect to any sort of physical condition. There is a great difference between a patent weakness such as infancy or old age, which the accused must have known of and ought to have taken into account, and a latent condition which he cannot be expected to have known of or even suspected. Responsibility for a latent condition cannot rest on negligence, and must be constructive. But the effect of this rule is that the law is enabled to pretend to be proceeding on the ground of negligence, and pretend that the victim's death was reasonably foreseeable, since it is reasonably foreseeable that a slight injury may kill someone with a weak heart - what the law conveniently forgets is that it is only foreseeable to someone who knows about the weak heart.

The 'real reason' for the rule is, again, the principle of disfacilitation. As Lord Cooper said in Robertson, 'It would never do for it to go forth from this Court that housebreakers or robbers, or others of that character should be entitled to lay violent hands on a very old or very sick or very young man, and, if their victim died as a result, to turn round and say that they would never have died if they had not been very weak or very old or very young' (supra, p. 8). This is excellent oratory, since it combines the emotive fear of robbers with the admitted responsibility towards the very old or very young. But in Rutherford (supra) the accused was not a robber or a housebreaker, and his victim was to all appearances a healthy young girl; in Bird (supra) the accused was neither a robber nor a housebreaker, and the victim died from trivial injuries, because of her weak heart: and the rule was applied in both these cases.

The types of assault cases.

Assault cases fall into three types - (i) Those in which death is a foreseeable result of the assault, although the foreseeability may not be so great as to render the assault reckless and so murderous; (ii) Those in which the assault forms part of or is carried out in pursuance of the commission of another crime, as in cases of robbery and rape; (iii) Those in which death is not at all a likely result of the assault, and the assault is not connected with any other crime.

(i) This type of case offers little difficulty, and the law can be stated by reference to Lord Moncrieff's dictum in Delaney (1945 J.C. 138), where he said:

'It may be that those who offer violence, especially violence which is subject to be followed by death, have not had in view the taking of life. They, however, are not accidental in their use of violence. They are responsible for the violence they use so far as the violence is concerned; and, if consequences follow which they did not anticipate or apprehend, they are also responsible for these consequences. One cannot say "I chose to exercise violence against a person against whom I thought I had a grievance, and it was merely accidental that a probable consequence of that violence followed"' (at p. 139).

(ii) The clearest example of this type of case is Wm. Brown ((1879) 4 Coup. 225). Brown tried to steal a woman's handbag, and in pulling at the bag he swung the woman round so that she fell on the pavement. She died a fortnight later from 'nervous shock acting upon a weak, diseased heart', and from her injuries which were slight. Brown had not intended to hurt her at all. In these circumstances the jury were directed that the crime was culpable homicide, and indeed were told that it would have been possible to charge Brown with murder. The ratio of Brown is the simple ratio of constructive malice, applied to culpable homicide - 'anyone attacking a person with a view to robbery' is guilty of culpable homicide (Lord Young at p. 226). Indeed, Lord Young's reference to the possibility of a charge of murder suggests that he regarded the case as one of voluntary culpable homicide - a case strictly murder but reduced to culpable homicide because of the clemency of the Crown. This view cannot, however, stand with the accepted rule that constructive malice does not exist in Scotland (cf. R.C. para. 72), and Brown must accordingly be treated as having been constructively negligent, rather than as having constructively intended to kill the woman.

(iii). This type of case is the most difficult, and it may be that even if some form of constructive culpable homicide is to be retained it should be restricted to cases of the Brown type. For the retention of this type means that wherever an assault, however technical and lacking in malice, causes death, however unforeseeable and exceptional the fatal result, the 'assailant' is guilty of culpable homicide.

Two modern cases fall to be considered under this head.

The first is the case of Rutherford (1947 J.C. 1), a most unusual and difficult case, but one of great importance because of the Charge of the presiding Judge, Lord Cooper. The facts were these: R. and his girl friend went into a park in the early hours of the morning; the girl pestered R. with requests to kill her; eventually he put his tie round her throat in order to humour her, and, in his own words 'only meant to give her a fright and see if it would put a finish to her nonsense of wanting to be strangled' (Accused's evidence, Transcript of Proceedings, Edinburgh High Court, 3rd and 4th Oct. 1946, p. 93). Now, in fact, R. had probably been reckless, and he gave evidence that he gave no thought to the risk when he put the tie round the girl's neck, and could not remember how tightly he had pulled it (ib. pp. 94-5), but the Lord Justice-Clerk's charge proceeded on the view that the degree of negligence was only important in deciding if the crime was murder or culpable homicide, and that R could not be acquitted. R's defence was substantially one of accident, and if such a defence was relevant at all it would have been left to the jury to decide on the facts whether or not they considered R. had been culpably negligent,

but Lord Cooper directed the jury that the case could not come into the category of casual homicide on any view of the evidence.

It is submitted, however, that unless we regard R. as having been in fact culpably negligent, there is nothing in the case to take it out of the class of casual homicide. Lord Cooper quoted Alison's definition of casual homicide with its requirement that the accused be 'lawfully employed, neither meaning harm to any one, or having failed in the due degree of care and circumspection for preventing mischief to his neighbour' and told the jury that 'On no view of the evidence would you be entitled to accept...that this is a case of misadventure or pure accident...or casual homicide as known to the law' (Rutherford, 1946 J.C. 1, 5; cf. Alison, i. 139-40) Lord Cooper did not say why he thought the case could not be one of casual homicide, and as has been pointed out, his approach suggests that it was not because of failure in the due degree of care. But unless R. was negligent there was nothing unlawful in what he did. It is not unlawful, however improper, to be out in a park with a girl at night, even if fornication is in the air. This leaves the actual assault, and Lord Cooper dealt with this by saying that the girl's having consented to be killed was irrelevant, since consent does not relieve the killer of guilt. But this is to put the matter too simply. Consent cannot affect guilt of homicide, but it can affect guilt of assault. To 'assault' a consenting victim is not a crime unless the assault is of a serious nature. One is not entitled to inflict serious injury, far less injuries which may be fatal, even on a consenting victim, but it is not a crime to put one's hands round one's girl friend's

neck, unless she objects. If what R. did was not foreseeably fatal or seriously injurious, the girl's consent would, it is submitted, have rendered it lawful. R. intended only to pull the tie round the girl's neck, and he did so at her request. Accordingly, unless he was in fact culpably negligent, what he did was lawful, and the girl's death the result of a lawful act, and therefore an example of casual homicide. (The element of fright is not, I think, important - the girl did not die of simple fright, and it is probably not a crime to frighten someone by a lawful act.)

For these reasons I would submit that Rutherford is best regarded as a DeJaney type of case, and as depending on the accused's actual negligence quoad the likelihood of fatal harm. If it is treated as a case of constructive homicide (and I concede that that was probably the way Lord Cooper sought to treat it) the scope of culpable homicide would be extended to what it is submitted are impossible lengths. Suppose in the course of a boxing match one boxer delivers a fair blow which strikes the other knocking him quite unexpectedly into the ring-post and even more unexpectedly causing him to crack his skull and die. Applying the reasoning of Rutherford one could say that consent was irrelevant, since the boxer did not consent to be killed, and that accordingly as the death occurred in the course of an unlawful act - an assault - it was culpable homicide. The only distinction between the boxer and R. would be the improper nature of the surrounding circumstances in R's case, and that, it is to be hoped, cannot be the ratio of the case. For if it were, then every time a woman had a fatal heart attack while making violent love, the man in question would be guilty of culpable

homicide - unless he were her husband, in which case the facts would fall within the class of casual homicide. Any doctrine of constructive guilt is illogical and leads to difficulties, but none, it is to be hoped, is as illogical or leads to such difficulties as these.

The second modern case to be considered is that of Bird (1952 J.C. 23). B. was a drunken sailor who believed that his victim, an old woman, owed him money. He pursued her and her daughter for about half a mile, making such a nuisance of himself and causing such apprehension, that the victim sent her daughter for the police. Eventually the victim tried to get into a passing car, B. pulled her out, and she fell down dead. Her injuries were trivial, but she had a bad heart, and it was likely that a slight shock might kill her if she was in a state of physical exhaustion and fear. B. was charged with culpable homicide, and convicted. In his charge to the jury Lord Jamieson stated that any death following on an assault was culpable homicide, and emphasised that an assault did not need to be anything involving great violence, but might be just a threatening gesture. The degree of violence, he said, was not a question for the jury, but was something to be taken into account in assessing sentence (at p. 25). B's conviction was upheld on appeal, although the matter seems to have been dealt with rather summarily. The only authority quoted was Brown (supra) which had nothing to do with the case since Bird was not bent on robbing his victim but on recovering what he believed she owed him. (That the Lord Justice-General regarded this belief as being without any justification does not matter unless the belief is to be characterised as unreasonable, and no attempt seems to have been made to do this.)

It was argued for Bird that the jury should have been specifically directed that in order to convict they must find that B killed the woman in the course of unlawful conduct. The Court of Appeal held that such a direction was unnecessary because 'no justification in law or in fact or in common sense, could be assigned to the conduct proved against the appellant' (at p. 27), a phrase which raises many difficulties about what constitutes justification, and whether it need be in law, or only in fact, or in common sense, none of which difficulties was considered by the Court. The other factor which weighed with the Court was that death followed on a course of conduct 'well calculated to induce great apprehension in the mind of any reasonable woman' (ib.). That is to say, they held that apprehension was foreseeable, or perhaps that B must be deemed to have intended to cause great apprehension, and upheld the conviction of homicide, presumably on the ground that where an accused intends some harm and causes death he is guilty of culpable homicide (cf. Hume, i. 234).

Bird can, I think, be best considered, and its consequences best appreciated, in the light of the following example. John is waiting at the street corner for his habitually unpunctual girl friend Mary. He has been waiting some time and has become angry and impatient. He sees Mary at last approaching and decides, partly as a joke, partly to 'teach her a lesson', to give her a fright. He slips into a doorway, and as Mary passes him, he jumps out at her, makes a threatening noise, and pulls her round by the arm. She slips and falls, catches her head against the kerb, and is killed: or, alternatively, she dies of shock because, unknown to John, she has

a weak heart, and was tired, having been rushing in order not to be too late for their meeting.

If we look at the bare bones of this case and that of Bird, it is impossible to distinguish them. Both had grievances against their victims - it would hardly make any difference to John's case if his grievance was unjustified in that Mary had been unavoidably delayed, or in that he had mistaken the time of meeting and she was in fact on time - both committed assaults from which minor harm was to be expected, both in fact killed their victims. It might be said that Bird's assaults were more violent and prolonged than John's, and the latter's were not calculated to cause any great damage, but according to Lord Jamieson - and his charge was not criticised in any way by the Court of Appeal - the degree of violence is irrelevant to guilt, whatever effect it may have on punishment.

If, however, we clothe the bare bones with the flesh of the surrounding circumstances, a difference can be discerned between the cases. For the general picture in Bird is of a drunken sailor rudely and violently molesting a poor old woman, while the general picture in John's case is of a decent young man playing a prank on his girl. In other words there is an element of 'badness' about Bird which is absent from John's case. If John had been really angry with Mary and determined to discipline her, albeit by minor violence, then he too might have been guilty of culpable homicide.

Conclusion.

I would submit, with diffidence and respect, that involuntary homicide is only culpable when committed in circumstances which excite moral disapproval

because they exhibit an element of wickedness. In the 'lawful-act' cases this disapproval is excited by the quality of the negligence itself, which is gross, wicked, and 'criminal'. In the Delaney type of case, the position is much the same, but any lack of criminality in the negligence is supplemented by the criminality of the assault, which is, ex hypothesi, a serious one.

When we turn to Brown we have to transfer the wickedness to the killing from the accused's ulterior motive of robbery. This transfer is analogous to the transfer made in Anglo-American law by the doctrine of constructive malice, an analogy which explains Lord Young's view that Brown could have been a case of murder. Where, however, there is no ulterior criminal purpose, and the assault in itself is not serious or wicked, the wickedness has to be derived from the surrounding circumstances, seen as a whole. If the whole picture arouses disapproval, then the case is one of culpable homicide; if it does not, the case is one of casual homicide.

This, it must be admitted, is not a legal criterion, and is extremely vague; but it appears to me to be the only way to avoid convicting John of culpable homicide. It also explains what the Court had in mind in talking of the lack of justification in law, fact, or commonsense, for Bird's action. In the absence of this justification, the action aroused moral disapproval in the minds of the Court - and no doubt of the jury - since the spectacle of a drunk man pestering a woman does arouse moral disapproval. In John the initial disapproval aroused by seeing a man attack a woman can be dispelled by the surrounding circumstances - but in Bird the surrounding circumstances did not 'justify' the accused's conduct.

There is no authority for the view I am putting forward, but it may be possible to gain some support for it from a comparison of two old cases - those of Isabella Livingstone ((1842) 1 Broun 247) and Isabella Brodie ((1846) Ark. 45). In each case the accused pushed an old woman who fell and died unexpectedly as a result. Livingstone was charged with culpable homicide and acquitted by direction of the Court; Brodie was charged with murder and convicted of culpable homicide. It was said in Livingstone that death might have been caused by a push 'which might, under the circumstances, have been given without any intention to injure', but any push unless itself unintentional, must be intended to cause some injury, however minimal, and so must constitute an assault. The reason for the acquittal, whatever its ratio, was probably contained in the surrounding circumstances; the push had been given after the deceased had accused Livingstone of having taken some of her brandy, and after she had thrown water at Livingstone. Brodie, on the other hand, pushed her landlady after a quarrel about money, and after the latter had told her to leave, so that the push was probably actuated by spite. In that event, there would be an element of wickedness present in Brodie which would enable one to distinguish it from Livingstone.

In Bird itself Lord Jamieson spoke of someone who 'having a grievance against a man', pushes him down. This is not an altogether satisfactory criterion - it would prevent a merely playful push from amounting to culpable homicide, but would not exclude cases like Livingstone or situations like that of John - but for what it is worth, it does support my view, since it suggests that the circumstances surrounding the push are important. It

suggests that it is not enough that there should have been a technical assault, but that there must have been an assault motivated by something involving a degree of actual malice.

(It may be argued that my view conflicts with the rule that any assault which causes death must amount to culpable homicide, and can never result in a conviction for assault only. But this rule, if rule it be, rests only on two Charges to juries in cases involving provocation - Hill, 1941 J.C. 59 and Delaney, 1945 J.C. 138 - and is contrary to the Charges in two other provocation cases - Gilmour, 1938 J.C. 1, and M'Cluskey, Glasgow High Court, 20 and 21 Jan. 1959. Even if Hill and Delaney are correct, that cannot affect the position with regard to negligent involuntary homicide so as to make it impossible to convict only of assault where the assault has quite unexpectedly led to death. At the same time it must be conceded that a system which prefers the analogy between a drunk driver or a man driving a car he has stolen and someone driving lawfully to that between the drunk driver or car thief and a housebreaker or robber, may well prefer the apparent similarity between involuntary and voluntary homicide to their actual difference.)

Some comments on constructive culpable homicide.

It is worth considering briefly why the law retains a doctrine of constructive culpable homicide. The main 'reason', at any rate in the assault cases, is probably just that the facts look like those of murder, and would be treated as murder, but for the accused's explanation that he only delivered a slight blow, and did not intend any serious injury. To strangle someone, to pull someone out of a moving car, to push someone against a sharp object, to strike someone a

blow which kills him, are all, so to speak, prima facie murder. The first reaction of the man in the street is to say 'He's murdered him', and to expect a trial for, and conviction of, murder to follow the apprehension of the assailant. As a result the accused must in fact, whatever the position in law, displace this prima facie conclusion, and show that the death of the deceased was a pure accident. But the law, like the man in the street, is chary of accepting 'excuses' from an accused person, chary of believing him when he says he did not mean to do what he did, especially when it is clear that he was guilty of some crime. In other words, the principle of disfacilitation operates to make it impossible for any criminal to escape the consequence of his crime by showing that these consequences were unforeseeable.

The only counter to this attitude is the disinclination to hang the accused, with its concomitant disinclination to convict him of murder. As a result he is convicted of culpable homicide, and it is felt that as he might well have been convicted of murder, he is lucky to have got off as lightly as he did, and that it does not lie in his mouth to complain about his conviction - 'after all, he killed him, didn't he'. It is because of their similarity to the circumstances of a typical murder that the assault cases are not so obviously illogical or perverse as those involving other crimes, such as housebreaking.

In legal language these popular paralogisms become the principle of general mens rea. The accused is ex hypothesi guilty of a crime, say assault, and so has shown that he possesses mens rea. We have

therefore the actus reus of homicide, coupled with 'that corrupt and evil intention, which is essential... to the guilt of any crime' (Hume, i. 21). It is interesting that this idea of mens rea as a moral, or rather an immoral, disposition, would probably exonerate John, in the example given above, since no wicked disposition is revealed in the case of a trivial, friendly, or playful blow, even if it does cause death. But a rule of law may develop in a way which pays no attention to the principle behind it, and the rule of constructive homicide may have developed as follows: persons who cause death while committing crimes are clearly of a wicked disposition or they would not commit crimes; assault is a crime; any blow or threatening gesture constitutes an assault; therefore death following on even a slight blow, or on a gesture, is culpable homicide. It is to be hoped that the law has not developed in this way, but it cannot be clearly asserted that it has not done so.

So far as crimes other than assault are concerned, there is also a confusion in thinking about causal relationships. Death occurring in the course of a theft is treated as having been caused by the theft, and so as the result of the wicked disposition displayed by the theft, on the naive sine qua non view that but for the theft there would have been no death. This is 'as illogical as to say that if a postman while engaged in the operation of delivering letters meets with an accident in the street, this is necessarily the consequence of his delivering letters' (Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport, [1942] A.C. 691, Visc. Simon, L.C., at p. 696). This approach gains some strength, however, from the fact

that it can be regarded as a generalisation of the accepted slogan that 'you must take your victim as you find him' into 'he who commits a crime does so at his own risk and must take the consequences.'

Another reason for picking on the theft as the cause of the death is, of course, that theft is a cause the law can, or at any rate ought to be able to, do something about. It is not interested in the fact that the death was caused by a physical weakness in the victim because it cannot prevent people being physically weak, but it is concerned with its having been caused by a crime because it is its job to prevent crimes. If, therefore, 'For any given person, the cause of a given thing is that one of its conditions which he is able to produce or prevent' (R.C. Collingwood, 'On the so-called Idea of Causation', in Proceedings of the Aristotelian Society, 1937-8, p. 85, at p. 92; cf. supra, 71), it seems plausible for the law to regard the theft as the cause of the death. But the plausibility is specious since the theft is not one of the conditions of the death in any relevant sense. If A is involved in a collision while returning from a meeting, his having gone to the meeting is not a cause of the accident, for legal purposes, whether the meeting was legal or illegal. The reason for a man's presence at the place of an accident is not a relevant cause of the accident whether that reason be that he was about to steal something or that he was going to London to see the Queen.

The most convincing reason for the existence of constructive culpable homicide is that by punishing thieves, bagsnatchers, rapers, and the like, for causing death accidentally, the law is discouraging them from committing these crimes by adding to the risks

involved for them, and is reassuring the community that if honest persons are killed by criminals the law will not let their deaths go unpunished, but will do something to show that the community will not stand for this sort of thing. To make an exception even for purely accidental deaths in such circumstances might be regarded as weakening the deterrent power of the law, and its force as an expression of popular indignation at such happenings. Hume deals with the matter with refreshing frankness when he says that the accused in an assault case is blameable 'in that he offers any violence to the person of his neighbour, and would be liable to some censure on that account, even if no further harm ensued...so, for the sake of example, and to satisfy the public, and the relations of the deceased, the aggressor shall, within certain bounds, be held answerable for the fatal consequence, which will here, without much inquiry be presumed to have been owing to great indiscretion on his part' (Hume, i. 234).

This presumption may often be justifiable, but that will be because the act in question was in fact dangerous, and not merely because it was criminal. If the facts do not show any indiscretion on the part of the criminal he should not be convicted of culpable homicide - a result which Hume implicitly accepts by requiring the presumption of indiscretion as a condition of conviction. Modern law seems to go further, and to require conviction even where an inquiry into the facts reveals an absence of indiscretion with regard to the fatal consequences. This, in Macaulay's words, is 'To pronounce [someone] guilty of one offence because a misfortune befell him while he was committing another offence' and is 'surely to

confound all the boundaries of crime' (Macaulay, p. 508). In any event it is probably not the case that unlawful acts are on the whole in fact more dangerous than lawful ones: it is statistically clearly false to say that theft, rape, or even moderate assaults, are more likely to lead to death, than are such 'lawful' acts as driving a motor car drunkenly, or even driving it at all.

It should be noted finally that even if 'unlawful-act' culpable homicide is restricted to cases where the accused has been negligent, this will not be wholly satisfactory unless the degree of negligence required for conviction is the same as that in the 'lawful act' cases. For if a lesser degree of negligence is sufficient where it occurs while the accused is acting unlawfully, his conviction will not depend on his negligence but on his unlawful actings, and he will again in effect be punished for one offence because he was at the time committing another offence - he will be punished for an offence requiring gross negligence because he was negligent to a minor degree while committing another offence. A consistent system would have either to regard all deaths caused by negligence as culpable homicide, or to regard only those caused by gross negligence as culpable homicide whether or not the person causing death was lawfully employed at the time.

(It is perhaps only fair to add, after this attack on the law, that culpable homicide is an offence which varies greatly in gravity according to the circumstances of each particular offence, and that anyone convicted of culpable homicide in cases where death was not foreseeable and his conduct not regarded as grossly criminal, would receive a very light sentence,

or perhaps none at all. In one case a fine of 1/- was imposed - Robt. Bruce, (1855) 2 Irv.65, and in another the accused was given an absolute discharge - Shand, Edinburgh High Court, 16 Jan. 1959, unrepd. This, however, only serves to show the unsatisfactory state of the law - if such persons are not regarded as really culpable why should the law pretend that they are guilty of culpable homicide, and proceed to record against them a conviction on indictment for what is, at least prima facie, a very serious crime?)

II - OTHER CRIMES OF NEGLIGENCE.

The law regarding the negligent commission of crimes other than culpable homicide has not been much developed in Scotland, and is of little practical importance today. There is a dearth of authority and particularly of modern authority, and it is impossible to formulate any clear general principles. It is not quite clear, for example, whether, and if so, when, a negligent act can be criminal even if it produces no actual harmful results, nor is it clear whether the principles of constructive homicide apply to other crimes of negligence. It is not possible to set out a comprehensive list of crimes which can be committed negligently - as it is in England (cf. Gl. Williams, para. 301) - nor is it possible to affirm that the negligent creation of certain harms is criminal, whatever the mode of creation. The approach by way of types of harms is probably the simplest, however, and I propose to adopt it and to consider the subject of criminal negligence under four heads - negligent injury to the person; the negligent creation of danger to the person; negligent injury to property; the negligent creation of danger to property.

Injury to person.

It is almost certainly still the law that it is criminal to cause injury to the person by negligence of the requisite degree. There are quite a number of cases which are authority for this proposition (e.g. Alex. Dickson; (1847) Ark. 352; David Balfour (1850) J. Shaw 377; Arch. Grassom, (1884) 5 Coup. 483), the latest of which is Phipps, in 1905 (4 Adam 616), where the accused was charged with assault, and alternatively with the infliction of injury by the reckless discharge of loaded guns. Lord Ardwall rejected the argument that the alternative charge disclosed no crime, and told the jury, 'There have been several cases where a verdict of reckless discharge...of firearms was found justified in our law where the result was quite outwith the expectation of the accused...on an occasion when crime was the last thing present in the accused's mind, at a wedding festivity, the accused had fired off a gun loaded blank by way of a salute, and injured a member of the public passing by who was struck by the cotton wool, and conviction followed' (at p. 631).

The cases are by no means restricted to firearms, and include cases of negligent driving of railway engines (e.g. Thos. Smith, (1853) 1 Irv. 271), and of the negligent use of explosives (e.g. Jas. Finney, (1848) Ark. 432). It was recognised as a general rule in the 19th century that culpable neglect of duty resulting in injury to the person, was a crime; and this is probably still the law, although the standard of culpability necessary for conviction is now much higher.

Macdonald recognises Phipps as authority for the existence of the crime of causing injury by culpable breach of duty in his section on 'culpable neglect of

duty' (Macdonald, p. 142), but in another part of his book he says, rather misleadingly, 'Assault... differs from culpable homicide insofar as injuries happening from carelessness, however culpable, are not assaults' (Macdonald, p. 115). This is quite correct, but the comparison with culpable homicide suggests that they are not crimes at all, which is incorrect. The true correlative of assault is not culpable homicide but murder; the correlative of culpable homicide is the infliction of injury by culpable neglect of duty, and this, it is submitted, is a crime in itself. 'Reckless disregard of the safety of the public which in fact does injure someone' (Quinn v. Cunningham, 1956 J.C. 22, Lord Justice-General at p. 26) is a crime. The quotation comes from a road traffic case, but it is submitted that the principle is not confined to such cases. In fact, however, prosecutions for this crime are almost unknown at the present time, probably because the most common examples are dealt with under the road traffic legislation. (Quinn v. Cunningham was a common law prosecution because at the time it was brought pedal cyclists were not subject to the careless driving provisions of the Road Traffic Acts.)

The standard of negligence necessary for conviction is that gross negligence required by Paton (1936 J.C. 19) for the conviction of motorists for culpable homicide. The crime is thought of as a lesser alternative to culpable homicide, and was often so charged in the 19th century, and the development of the modern standard of negligence in culpable homicide applies to it as well. (Cf. Thos. Smith, (1853) 1 Irv. 271, Lord Deas at p. 282, and Quinn v. Cunningham, supra, Lord Justice-General at p. 25.)

(There are no cases which deal with the question of constructive negligence in cases where injury is carelessly or accidentally caused by someone unlawfully employed. If a gas-meter thief causes a leak which injures the householder is the former guilty of culpably causing injury even if his carelessness was less than that of the Paton standard? The rule should be that in cases where he would be guilty of culpable homicide if he caused death, he will be guilty of culpably causing injury if in fact he only causes injury. The question of constructive negligence does not arise in the more common case of an assault which turns out unexpectedly to be more serious than was intended. Assault to severe injury and assault to the danger of life are thought of as merely aggravated forms of the crime of assault, so that for a conviction of the aggravated crime it is necessary only to show some intentional injury followed in fact by severe injury or danger to life. The question of the likelihood of the unintended result may affect the sentence imposed, but does not affect the conviction for the aggravated offence. The point, however, seems never to have been taken in a reported case.)

Danger to the person.

Macdonald divides the cases under this head into three types - traffic cases; cases involving firearms; and other cases (Macdonald, pp. 141-2), and it will be convenient to follow this classification.

Traffic cases. Alison stated that 'Furious or improper driving along the high road is in itself a police offence; and if it leads to injury to the persons or property of others, becomes the fit object of higher criminal punishment' (Alison, i. 625), but it seems now to be recognised that actual injury to the person is not necessary. (And also that injury to property

is in itself insufficient - see infra. § 82/8.) In David Smith ((1842) 1 Broun 240) Lord Justice-Clerk Hope observed - obiter, as the case involved the discharge of firearms - that 'Furious driving upon a public road, even when no passengers are to be seen upon it, is an offence, although it may not be worthwhile to try the case in the Court of Justiciary, unless some person has been injured'. In M'Allister v. Abercrombie ((1907) 5 Adam, 366) it was said that reckless driving was not a crime 'unless there is danger to the lieges', and Macdonald accepts that danger is sufficient without actual injury.

'Danger to the lieges' as a degree of negligence. Generally speaking 'danger to the lieges' is regarded as a result of carelessness, and the crime charged is that of culpable neglect of duty whereby certain persons are in fact put in danger. In modern law, at any rate in the traffic cases, where only gross negligence is criminal, whatever the result, 'danger to the lieges' seems to be regarded as a description of the degree of negligence required for conviction, and not as a result of the negligence. As such a description it is regarded as equivalent to gross and wicked negligence, usually called recklessness (cf. Paton, Quinn v. Cunningham, supra). It is not a crime to cause actual danger or even injury unless by driving to the danger of the lieges - i.e. in a grossly negligent manner. If the lieges are in fact endangered by driving which is not as negligent as this no common law crime has been committed. In Quinn v. Cunningham (supra) a pedal cyclist was charged with riding his cycle 'in a reckless manner and causing it to collide with and knock down F.C.....whereby both sustained slight injuries'. The charge was held to be

irrelevant because it did not specify that the recklessness was 'to the danger of the lieges'. The Lord Justice-General said 'There is all the difference in the world between a reckless act which in fact happens to result in injury and a reckless disregard of the safety of the public which in fact does injure someone' (at p. 26). The double use of 'reckless' makes this a little confusing, but in its context the meaning is clear - mere carelessness is not criminal even if it causes injury, but carelessness of the degree 'to the danger of the public' is criminal if it injures someone. This only concerns cases of actual injury, and there is no reported case in which an accused has been convicted of the common law crime of reckless driving in the absence of actual injury, but the reasoning in Quinn suggests that it is criminal to drive 'to the danger of the lieges' even if none of the lieges is endangered. It is strange to talk of driving which in fact endangers the lieges but is not 'to their danger', and also of driving which is 'to their danger' but does not endanger them, and it would have been better if the Court in Quinn had merely said that careless driving was not a crime at common law unless the carelessness was gross. But they wished to use the statutory short form of charge in order to show that the charge in Quinn was irrelevant, and the statutory form is 'recklessly to the danger of the lieges' (Summary Jurisdiction (Scotland) Act, 1954, 2 and 3 Eliz. II, c.48, Second Sch. Pt. II). So they held that the charge was bad because it did not include these words. At the same time, as someone had been injured, however slightly, and this was narrated in the charge, they felt constrained to treat these words as describing the degree of recklessness

and not its result. It seems, therefore, that one may drive to the danger of the lieges without endangering them, and endanger them without driving to their danger. Fortunately, the matter is unlikely to arise often, since even pedal cyclists are now subject to the careless driving provisions of the Road Traffic Acts (Road Traffic Act, 1956, 4 & 5 Eliz. II, c. 67, s.11).

Firearms. The case of David Smith ((1842) 1 Broun 240) in which the accused fired into an inhabited house 'to the imminent danger of the lives' of certain persons, is authority for the proposition that it is a crime to endanger the lieges by the reckless discharge of firearms, and it is so accepted by Macdonald. There is no authority to suggest that imminent actual danger is unnecessary - or indeed that it is necessary.

Other cases. Macdonald's view is that, 'In other cases, in order to make a relevant charge of danger to the lieges, it may be necessary to specify that injury resulted to some of them' (Macdonald, p.142). The authorities are conflicting. In Robert Young ((1839) 2 Sw. 376) the accused was in charge of a diving-bell which was faulty, as a result of which certain persons were killed. He was charged with culpable homicide, and also with culpable neglect of duty 'whereby lives are lost, or injury suffered, or the safety of the lieges put in danger'. It was argued that the last alternative was irrelevant, an argument which was opposed by the Crown who asked the Court to decide the matter on relevancy. The Court, however, declined to do so since they regarded the last alternative as unnecessary and the matter as speculative. In David Smith (supra) the Lord Justice-Clerk referred to Young and said - after talking about furious driving -

'If by the argument which was stated in the case of Young, it is meant that in order to constitute an indictable offence, there must be injury to the person, this is clearly erroneous. But if, on the other hand, the doctrine merely is that there must be a completed act on the part of the panel, then, in the present case, a sufficient result has been set forth in the alleged act of firing into an inhabited house' (at p. 142). This suggests that it is a crime to endanger the lieges by an intentional act, such as firing a gun or driving a car, but not by a negligent omission, such as failing to take care of a piece of machinery. But this is a difficult distinction - careless driving consists in the negligent omission to take care, and an omission to perform a duty may be equivalent to an act - and has not been developed beyond this remark of Lord Hope. In two subsequent cases of neglect of duty, Alex. Dickson ((1847) Ark. 352) and Jas. Finney ((1848) Ark. 432), alternative charges of injuring the lieges or putting them in danger of their lives went unchallenged. On the other hand a charge of putting lives in danger was rejected as irrelevant in Thos. Simpson ((1864) 4 Irv. 490), a case of failure to make a coal mine secure, and this case is relied on by Macdonald.

In principle there seems no reason for treating firearm cases as special. David Smith (supra) suggests that traffic cases, firearm cases, and other cases, were all regarded as depending on the same principles, but it is necessary to treat traffic cases as special today, because of their historical development, and because Judges do consider them as forming a tract of authority on their own. But the only specialty about firearms is their great and obvious danger - if any other activities which involve equal danger are indulged

in, there is no reason for refusing to regard them as criminal just because they do not involve firearms. If it is a crime to endanger the lieges by the grossly negligent use of firearms, it should be equally a crime to endanger them by the grossly negligent use of explosives or of bows and arrows, or by grossly negligently throwing stones from a roof into a crowded street, or indeed by endangering them in any other grossly negligent fashion.

Injury to property.

Here again it is necessary to consider the matter with regard to three types of injury - injury by fire; injury by careless driving; other forms of injury.

Fire-raising. Before 1887 there were two distinct types of fire-raising - wilful fire-raising, which consisted in the intentional burning of certain specified subjects and was a capital offence, and culpable and reckless fire-raising which was the name given to intentional burning of any subjects other than the specified ones, and also to the reckless burning of any subjects. The distinction between subjects ceased to be important when wilful fire-raising ceased to be capital (Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict. c. 35, s. 56), and it is now competent to charge a person with wilful fire-raising for intentionally setting fire to any subjects (Angus, (1904) 4 Adam 640). Since 1887 culpable and reckless fire-raising has not been defined, and cases of fire-raising have been rare.

The existence of the crime of culpable and reckless fire-raising - if it does still exist - means that it is a crime to set fire to property other than intentionally. But the degree of recklessness required seems to be the same as that which renders unintentional killing

murder - a reckless disregard of the consequences. Hume says that the recklessness must be 'of that high degree "ut luxuriae aut dolo sit proxima"' (Hume, i. 128). Reckless fire-raising was described in one case as fire-raising 'in such a state of reckless excitement as not to know or care' what one was doing (Geo. MacBean, (1847) Ark. 292, Lord Justice-Clerk at p. 293), and in Angus (supra) it was said that the element of wilfulness was always present in culpable and reckless fire-raising (supra, Lord Justice-Clerk at p. 644). In one case, Arch. Phaup ((1846) Ark 176), it was suggested that it might be culpable and reckless fire-raising to drop a match into a whin bush as a result of which a house was burnt, which suggests something much less than the MacBean standard, but the suggestion was made by the Lord Justice-Clerk after the Crown had dropped the only charge in the case - one of wilful fire-raising. It seems accordingly that it is not a crime to damage property by fire unless one does so either intentionally or with that extreme degree of recklessness which is regarded as equivalent to intention in cases of homicide.

Hume applies his ideas of general mens rea to wilful fire-raising, in the same way as he does to murder, so that it is wilful fire-raising to shoot at someone if the shot sparks off a fire which burns a house instead of killing the victim as intended (Hume, i. 24), or to set fire to non-capital subjects and burn capital ones, where such a result, although unintended, was so likely as to indicate utter indifference as to the result (at p. 130). But this only means that wilful fire-raising, like murder, may be committed unintentionally, if done with that 'wicked and reckless indifference' which is regarded as equivalent to intention (cf. supra, 290).

There is hardly any law on the question of constructive culpable and reckless fire-raising. In James Stewart ((1856) 2 Irv. 359) the accused carelessly set fire to a truck while stealing some whisky from it. He was charged with culpable and reckless fire-raising - he could not have been charged with wilful fire-raising because it was not capital to burn a truck - and the Lord Justice-General said, 'Is it more illegal to burn when the man is stealing than when he is not? This may be, but I should wish more authority on the point' (at p. 365). No authority was forthcoming and the Crown dropped the charge. In Robert Smillie, ((1883) 5 Coup. 287), however, Lord Young described culpable and reckless fire-raising as setting fire 'while engaged in some illegal act', or 'while in such a state of reckless excitement as not to care what he is doing' (at p. 291). The analogy with constructive culpable homicide is obvious, but it is not at all certain that culpable and reckless fire-raising can be regarded as being 'on all fours' with culpable homicide. The relation between culpable and reckless and wilful fire-raising, influenced as it is by the restriction of the latter to certain specified subjects, is different from that between culpable homicide and murder; and the recklessness in culpable and reckless fire-raising has generally been regarded as requiring to be of a very high degree indeed, while in the 19th century any carelessness was sufficient for culpable homicide. It may be that a modern authoritative definition of the two types of fire-raising would make them analogous to murder and culpable homicide respectively, and such a definition would be reasonable. But unless and until it is made it would be dangerous to draw any analogies from homicide to fire-raising. That means that we must

seek for the law regarding negligent fire-raising within the boundaries of the cases on fire-raising, and they indicate that negligent fire-raising is not criminal, even if the negligence is gross, so long as it is not so gross as to amount to that wilful disregard which is regarded as the equivalent of intention (cf. supra 290), and that there is no sufficient authority for the view that constructive culpable and reckless fire-raising is analogous to constructive culpable homicide, if indeed it exists at all.

Traffic cases. Alison suggests that improper driving is a crime if it leads to injury to property (Alison, i. 625), but the cases he cites all involve injury to person as well as to property. In M'Allister v. Abercrombie ((1907) 5 Adam 366) a charge of driving recklessly and injuring a horse and cart was dismissed as irrelevant in the absence of any averment of danger to the lieges. The Court in M'Allister seem to have regarded danger to the lieges as a result which must follow reckless driving before there can be a crime, and not as a description of the degree of negligence necessary to make reckless driving criminal, whatever its result. (Cf. Quinn v. Cunningham, 1956 J.C. 22, discussed supra 579.) But in either event, the mere existence of injury to property does not make the driving criminal, so that it is not a crime to injure property by negligent driving, although such injury may be part of the species facti of the crime of driving recklessly to the danger of the lieges.

Other cases. There is no authority to suggest that it is a crime to injure property in any other way unless the injury is wilful and malicious - i.e.

intentional, or displaying that 'deliberate disregard of, or even indifference to, the property' which is regarded as equivalent to intention (Ward v. Robertson, 1938 J.C. 32, Lord Justice-Clerk at p. 36).

Danger to property.

Macdonald states that it is an offence 'to set fire to combustibles in or near buildings in a reckless manner, so as to cause danger of injury to life or property' (Macdonald, p. 82), and there was a conviction on such a charge in the case of Jas. Fleming in 1848 (Ark. 519). But, as was pointed out in the case of Jas. Martin ((1876) 3 Coup. 274) to set fire to combustibles is itself a crime, apart from the danger, which is only an aggravation of the crime. It seems on the whole that it is not a crime to endanger property negligently, even by raising fire.

Bibliography

Law reports and reports of Parliamentary debates are not included.

I - Scots text-books

- Alison, A.J. Principles and Practice of the Criminal Law of Scotland (2 vols.: vol. i. Principles, Edin., 1832; vol. ii, Practice, Edin., 1833).
- Anderson, A.M. The Criminal Law of Scotland, 2nd ed. (Edin., 1904).
- Bell, B.R. A Supplement to Hume's Commentaries on the Law of Scotland respecting Crimes (Edin., 1844).
- Burnett, J. A Treatise on various Branches of the Criminal Law of Scotland (Edin., 1811).
- Glegg, A.T. The Law of Reparation in Scotland, 4th ed., revised by J.L. Duncan and D.M. Walker (Edin., 1955).
- Gloag, W.M. and Henderson, R.C. Introduction to the Law of Scotland, 6th ed., by A.D. Gibb and N.M.L. Walker (Edin., 1956).
- Hume, Baron Commentaries on the Law of Scotland respecting Crimes, 4th ed., by B.R. Bell (2 vols., Edin., 1844).
- Macdonald, J.H.A. (Lord Kingsburgh) A Practical Treatise on the Criminal Law of Scotland: 1st. ed. (Edin., 1867); 3rd. ed., by the author assisted by N.D. Macdonald (Edin., 1894); 5th ed. by J. Walker (now Lord Walker) and D.J. Stevenson (Edin., 1948).
- Mackenzie, Sir. G. The Laws and Customs of Scotland in Matters Criminal, 2nd. ed. (Edin., 1699).
- More, J.S. Lectures on the Law of Scotland (2 vols., Edin., 1864).

- Renton, R.W. and
Brown, H.H. Criminal Procedure according to
the Law of Scotland, 3rd ed., by
F.C. Watt, Q.C. (Edin., 1956).
- Smith, T.B. The British Commonwealth, The
Development of its Laws and
Constitutions, Vol. I, The United
Kingdom: Scotland (London, 1955).

II - Foreign codes and textbooks

- Digesta Justiniani, ed. Th. Mommsen
(2 vols., Berlin, 1870).
- Code Penal Francais, Libr. Dalloz,
47th ed. (Paris, 1950).
- The Pentateuch with Rashi's Commentary,
ed. and trans. M. Rosenbaum
and A.M. Silbermann (2 vols., London,
1946).
- Mishnayoth, ed. and trans. P.
Blackman, Vol. IV -Nezikin (London, 1954);
Vol. VI -Taharoth (London, 1955).
- The Babylonian Talmud: Tractate
Yoma, ed. and trans. L. Jung (Soncino
ed., gen. ed. I. Epstein, London,
1938).
- The Code of Maimonides: The Book
of Torts, ed. and trans. H. Klein
(Yale Judaica Series, gen. ed. J.
Obermann, Yale and London, 1954).
- Gardner, F.G. and
Lansdown, C.W.H. South African Criminal Law and
Procedure, 5th ed., Vol. I (Cape Town,
1946).
- Ranchhodas, R.
and Thakore, D.K. The Indian Penal Code, 15th ed. (Bombay,
1936).
- Schönke, A. Strafgesetzbuch: Kommentar, 8th ed., by
H. Schröder (Munich and Berlin, 1957).

- Thormann, P. and von Overbeck, A. (eds.). Schweizerische Strafgesetzbuch, Vol. I (Zurich, 1940).
- Turner, J.W.C. (ed.) Kenny's Outlines of Criminal Law, 17th Ed. (Cambridge, 1958).
- Turner, J.W.C. (ed.) Russell on Crime, 11th ed. (London, 1958).
- Vabres, H. Donnedieu de Traité de Droit Criminal et de Législation Pénale Comparée, 3rd. ed. (Paris, 1947).

III - Philosophical works.

- Aristotle The Nichomachean Ethics, ed. and trans. J.A.K. Thomson (Penguin Books, 1955).
- Ayer, A.J. Philosophical Essays (London, 1954).
- Butler, Bishop Fifteen Sermons, ed. W.R. Matthews (London, 1953).
- Hume, D. A Treatise of Human Nature, ed. A.D. Lindsay (2 vols., Everyman's Library, 1911).
- Mackinnon, D.M. A Study in Ethical Theory (London, 1957).
- Nowell-Smith, P.H. Ethics (Penguin Books, 1954).
- Prichard, H.A. Moral Obligation (Oxford, 1949).
- Raphael, D.D. Moral Judgment (London, 1955).
- Ross, W.D. The Right and the Good (Oxford, 1930).
- Ross, W.D. The Foundations of Ethics (Oxford, 1939).
- Ryle, G. The Concept of Mind (London, 1949).

IV - Works on criminal theory.

- Beccaria, Marquis. An Essay on Crimes and Punishments, 5th ed. in English (London, 1804).
- Bentham, J. Introduction to the Principles of Morals and Legislation, ed. W. Harrison (published with A Fragment of Government, (Oxford, 1948).
- Hall, J. General Principles of Criminal Law (Indianapolis, 1947).
- Koestler, A. Reflections on Hanging (London, 1956)
- Macaulay, Lord. Notes on the Indian Penal Code (published in Collected Works of Lord Macaulay, ed. Lady Trevelyan, Vol. VII).
- Mannheim, H. Group Problems in Crime and Punishment (London, 1955).
- Michael, J. and Adler, M.J. Crime, Law and Social Science (New York, 1933).
- Radzinowicz L. and Turner, J. W.C. (eds.) The Modern Approach to Criminal Law (London, 1945).
- Stephen, Sir J.F. History of the Criminal Law (Vol. II, London, 1883).
- Vedder, C.B., Koenig, S. and Clark, R.E. (eds.) Criminology, a book of readings (New York, 1953).
- Williams, Gl. L. Criminal Law: The General Part (London, 1953).
- Williams, Gl.L. The Sanctity of Life and the Criminal Law (London, 1958).

V - Medical works.

- East, N. Society and the Criminal (London, 1949).
- Glaister, J. Medical Jurisprudence and Toxicology, 10th ed. (Edinburgh, 1957).

- Henderson, D.K. and Gillespie, R.D. A Textbook of Psychiatry, 7th ed. (London, 1949).
- Maulsby, H. Responsibility in Mental Disease (London, 1874).
- Neustatter, W.L. Psychological Disorder and Crime (London, 1953).
- Radzinowicz, L. and Turner, J.W.C. Mental Abnormality and Crime (London, 1944).
- Smith, S. and Fiddes, F.S. Forensic Medicine, 10th ed. (London 1955).
- Smith, S. and Simpson, K. (eds.) Taylor's Principles and Practice of Medical Jurisprudence, 11th ed. (2 vols. London, 1956).
- Sullivan, W.C. Crime and Insanity (London, 1924).
- Weihsfen, H. The Urge to Punish (London, 1957).

VI - Reports of commissions, etc.

Reports of Her Majesty's Commissioners of the Criminal Law, 1839: Fourth Report, Parl. Papers, 1839, xix (London, 1839); Seventh Report, Parl. Papers, 1842, ix (London, 1842).

Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences; with an Appendix Containing a Draft Code embodying the Suggestions of the Commissioners, C.-2345, 1879 (London, 1879).

Report of the Committee on Insanity and Crime, Comd. 2005, 1923 (London, 1923).

Report of Royal Commission on Capital Punishment, 1949-53, Comd. 8932, 1953 (London, 1953).

Minutes of Evidence Before Royal Commission on Capital Punishment, 1949-53 (London, 1949-51).

Report of Royal Commission on Homosexual Offences and Prostitution, Cmd. 247, 1957 (London, 1957).

Report of Committee of Scottish Health Services Council on Mental Health Legislation, 1958 (London, 1958).

Report of First United Conference on the Law of the Sea, Cmd. 584, 1958 (London, 1958).

European Convention on Human Rights, 1950 (published in (1951) 45 American Journal of International Law, Supplement of Documents, p. 24).

VII - Reports of trials etc.

- Blake, G. (ed.) Trials of Patrick Carragher (Edin., 1951).
- Busch, F.X. Guilty or Not Guilty (London and Melbourne, 1957).
- Cicero, M.T. Pro Milone, ed. and trans. H. Watts (Loeb Classical Library, 1931).
- Critchley, M. (ed.) Trial of Neville George Heath (Edin., 1951).
- Fairfield, L. and Fulbrook, E.P. (eds.) Trials of John Thomas Straffen (Edin., 1954).
- Hall, L. and Glueck, S. Cases and Materials on Criminal Law (St. Paul, Minn., 1-40).
- Sayre, F.B. A Collection of Cases on Criminal Law (Rochester, N.Y., 1927).
- Turkus, B. and Feder, S. Murder, Inc. (London, 1952).
- Wilson, J.G. The Trial of Peter Manuel (London, 1959).
- Wyles, L. A Woman at Scotland Yard (London, 1952).

VIII- Other works.

- Allen, C.K. Legal Duties (Oxford, 1931).
- Cohen, M.R. Reason and Law (Glencoe, Ill., 1950).
- Friedmann, W. Legal Theory, 3rd. ed. (London, 1953)
- Holmes, U.W. The Common Law (London, 1882).
- Jensen, O.C. The Nature of Legal Argument (Oxford, 1957).

- Kant, I. Philosophy of Law, ed. and trans. W. Hastie (Edin., 1887).
- Megarry, R.E. Miscellany-at-Law (London, 1955).
- Murray, Sir J.H.A. (ed.) A New English Dictionary on Historical Principles (Oxford, 1888-1933).
- Pound, R.(ed.). Harvard Legal Essays (Cambridge, Mass., 1934).
- Williams, Gl. L. (ed.) Salmond on Jurisprudence, 10th ed. (London, 1947); 11th ed. (London, 1957).

IX - Articles.

- Brown, H.H. Insanity in its relation to Crime (1916) 28 Jur. Rev., p. 119.
- Christie, J.R. Insanity and Recent Criminal Practice (1907) 19 Jur. Rev., p. 165).
- Collingwood, R.C. On the So-called Idea of Causation, Proceedings of the Aristotelian Society, 1937-8, p. 178.
- Ellenbogen, G. The Principles of the Criminal Law Relating to Insanity, J. Cr. Sc., Vol. I (1948), p. 178.
- Elliott, W.A. Nulla Peena sine Lege, 1956 Jur. Rev., p. 22.
- Gledhill, A. 'Attempt' In Indian Criminal Law, Indian Year Book of International Affairs, 1955, p. 1.
- Goodhart, A.L. Shock Cases and the Area of Risk (1953) 16 M.L.R. p. 6.
- Hampshire, S. and Hart, H.L.A. Decision, Intentions, and Certainty, Mind, Vol. 67 (1958), p. 1.
- Hart, H.L.A. The Ascription of Responsibility and Rights, Proceedings of the Aristotelian Society, 1948-9, p. 171.
- Hart, H.L.A. and Honore, A.M. Causation in the Law, (1956) 72 L.Q.R., p. 58.

- Holmes, O.W. The Path of the Law, (1897) 10 H.L.R., p. 457.
- Logoz, P. Pas de Peine sans Culpabilité, J. Cr. Sc., Vol. II (1949) p. 197.
- MacLagan, W.G. Punishment and Retribution, Philosophy, Vol. 14 (1939), p. 281.
- Mannheim, H. Mens Rea in German and English Law, (1935) 17 J. Comp. Leg. and Int. Law, p. 82.
- Nowell-Smith, P.H. Freewill and Responsibility, Mind, Vol. 57, (1948), p. 45.
- Passmore, J.A. Intentions, Proceedings of The Aristotelian Society, Supplementary Volume, xxix (1955), p. 131.
- Pfander, H. Swiss Criminal Law (1944), 22 Canadian Bar Review, p. 745.
- Prevezer, S. English Criminal Reform and the American Model Penal Code, Current Legal Problems, 1958, p. 53.
- Radbruch, G.L. Jurisprudence in the Criminal Law, (1936) 18 J. Comp. Leg. and Int. Law, p. 202.
- Scott, C. Insanity in its Relation to the Criminal Law, (1889) 1 Jur. Rev., p. 237.
- Smith, J.C. Two Problems in Criminal Attempts, (1957) 70 H.L.R., p. 422.
- Smith, T.B. Mental Abnormality and Responsibility in International Criminal Law, (1952) 37 Transactions of Grotius Society, p. 99.
- Smith, T.B. Capital Punishment, 1953 S.L.T. (News), p. 197.
- Smith, T.B. Malice in Murderland, 1957 S.L.T. (News), p. 129.
- Soshnick, J. Insanity as a Defence, (1956) 36 Boston Law Review, p. 254.

- T.G.C. Comment on Stephenson v. State,
(1932-3) 31 Michigan Law Review,
p. 659.
- Ullman, W. The Reasons for Punishing Attempted
Crimes, (1939) 51 Jur. Rev., p. 353.
- Williams, Gl. L. On the Definition of Crime,
Current Legal Problems, 1955, p. 107.
- Williams, Gl. L. Constructive Manslaughter, [1957]
Cr. L. R., p. 293.