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RECENT CRIMINAL CASES

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EVIDENCE—ADMISSIBILITY OF EXPERT TESTIMONY ON BALLISTICS.—[OHIO] The defendant was indicted for first degree murder and upon a plea of not guilty was placed on trial and convicted of murder in the second degree. Testimony was admitted, over the objection of the defendant, of a witness who had made guns his "hobby" and who identified the gun, admittedly used previously by defendant, as having projected the bullet found in the victim's body. The identification was made by comparison of the rifling of the revolver barrel with certain markings found on the fatal bullet. *Held:* on appeal, that the judgment be affirmed: *Burchett* v. *State* (Ohio 1930) 172 N. E. 555.

A number of cases can now be cited in which there has been a decisive recognition of the admissibility of evidence based on the science of ballistics: *Evans* v. *Commonwealth* (1929) 230 Ky. 411, 19 S. W. (2d) 1091; *State* v. *Boccardoro* (N. J. 1929) 144 Atl. 612; *Commonwealth* v. *Best* (1902) 180 Mass. 492, 62 N. E. 748; *Laney* v. *United States* (Ct. of App. D. C. 1923) 294 Fed. 412; *State* v. *Vuckovich* (1921) 61 Mont. 480, 203 Pac. 491; *Galenis* v. *State* (1929) 198 Wis. 313, 223 N. W. 790; *People* v. *Beitzel* (1929) 207 Cal. 73, 276 Pac. 1006; Note (1930) 66 A. L. R. 373; see *People* v. *Fiorita* (1930) 339 Ill. 78, 89, 170 N. E. 690, 694; *People* v. *Fisher* (Ill. 1930) 172 N. E. 743. But *cf. People* v. *Berkman* (1923) 307 Ill. 492, 139 N. E. 91.

A high degree of care in the determination of the qualifications of a proffered expert in this field is without doubt necessary: *Goddard* "Forensic Ballistics" Popular Science Monthly, Nov. 1927; *Gunther* "Markings on Bullets and Shells Fired from Small Arms" Mechanical Engineering, Feb. 1930, 107. An examination of the cases, however, divulges divergent and conflicting views as to the qualifications required of such a witness, if the evidence be admissible at all. It has been held that markings, etc., on bullets tending to identify the gun used by the accused is a matter of common knowledge of men and need not be the subject for expert testimony: *People* v. *Mitchell* (1892) 94 Cal. 550, 29 Pac. 1106; *cf. People* v. *Weber* (1906) 149 Cal. 325, 86 Pac. 671. More recent cases, however, consider evidence on ballistics a matter which requires more than general experience, and hold that a witness qualifying as an expert must possess certain requirements of special experience: *Jack* v. *Commonwealth* (1928) 222 Ky. 546, 1 S. W. (2d) 961; *People* v. *Fiorita* (1930) 339 Ill. 78, 170 N. E. 690 (the court saying: "While the science of ballistics is now a well recognized science both in this country and abroad, testimony based upon it should be admitted with the greatest care"); 1 *Wigmore* "Evidence" (2d ed. 1923) secs. 555-561.

At this point may be noted an error that the courts must necessarily avoid. In certain cases, facts tending to identify the weapon used by the defendant have been testified to by so-called gun experts. A careful analysis of these cases will disclose that the identification has not been made by the science of ballistics, but by certain observations of the witness as to the operation of guns which might indicate the gun used by the accused; *cf. Moughou* v. *State* (1876) 57 Ga. 102 (testimony as to how much time had elapsed since gun of defendant

had been fired); *Collins* v. *State* (1918) 15 Okla. Crim. 96, 175 Pac. 124 (comparison of bullet taken from victim's body with bullet found in defendant's pistol as to calibre); *Pemberton* v. *State* (1909) 55 Tex. Crim. Rep. 464, 117 S. W. 837 (testimony as to whether gun had recently been fired); *State* v. *Casey* (1923) 108 Ore. 386, 213 Pac. 771 (testimony that bullet was fired from a Colt's army revolver—not that it was fired from the revolver of defendant).

The stages through which the question of the admissibility of expert testimony on ballistics has passed, is nowhere more distinctly traceable than in Illinois. In the earliest of the three cases on the doctrine in Illinois, the court characterized the probative value of evidence that a certain bullet was fired from a certain 32-calibre revolver by comparison of the rifling characteristics, as being "preposterous": See *People* v. *Berkman,* supra, at 500, 139 N. E. at 94. The holding might be justified on other grounds, however, due to the fact that the witness who testified was devoid of the qualifications of an expert, and the further facts that there had been a failure to identify the bullet as having been taken from the victim's body and a failure to prove that the revolver introduced in evidence was one belonging to the defendant. In the second case in which the court was confronted with the admissibility of this type of evidence a basis was laid for complete adoption of a ballistics expert's testimony: See *People* v. *Fiorita,* supra, at 89, 170 N. E. at 694. The court in that case, however, refused to accept the testimony upon the basis that there had been an insufficient showing of the qualifications of the witness as to special experience, scholastic training, or other general abilities. It was clear from the case that the testimony of a ballistics expert would be admissible upon a proper showing of the qualifications of the expert. Whatever doubt existed as to the admissibility of the testimony of a properly qualified expert on ballistics in Illinois has been removed by the late decision of *People* v. *Fisher* (1930) 172 N. E. 743. In this case, after listing the expert's qualifications at length, but without mention of the case of *People* v. *Fiorita,* supra, the court held the evidence admissible and declared that such evidence was within the field of expert testimony. It should be noted that the court also admitted in evidence the testimony of the expert that he was able to tell by the shotgun shells found, and the shotgun offered in evidence, that the shells were fired by that gun. This identification was made by the expert by a microscopic examination of the imprint of the firing pin of the shotgun in evidence on the caps of the discharged shells found in the automobile of the defendants. It may be seen from this case that there has been a complete recognition in Illinois of the science of ballistics

Whether the instant court was justified in admitting the testimony offered by one who had made guns his "hobby," is a question open to conjecture Certain it is that such a witness might add proof of probative value as to certain phenomena that his experience with guns had divulged, *e. g.,* distance of projection, recentness of firing, calibre of shell used, etc. It may be questioned whether a knowledge of the science of ballistics might also have thus been acquired, that would qualify the witness to testify on this technical subject. However, the trial court had the opportunity of a personal observation of the witness and the determination of the witness' special experience; the qualification of experts rests largely in the discretion of such court and its determination will not be disturbed upon review unless there is a clear showing of an abuse of such discretion: *People* v. *Sawhill* (1921) 299 Ill. 393, 132 N. E. 477; 1 *Wigmore* "Evidence" (2d ed. 1923) sec. 561. HAMILTON O. HALE.

CRIMINAL LAW—SELF-DEFENSE—BURDEN OF PROOF—INSTRUCTIONS—[Federal] The defendant and the deceased, one Sparrow, had engaged in a quarrel in the course of which mutual threats against each other's lives had been exchanged. The following night the two men met at the house of the defendant's wife, who was living apart from him under another name. A second quarrel was begun in which the defendant shot and killed Sparrow. The defendant claimed that the deceased advanced upon him with a hammer upraised to strike and that he (the defendant) shot in self-defense. There was the testimony of two witnesses to the effect that the deceased made no attack but that the defendant shot him without warning.

The defendant was tried for murder in the first degree and at the trial pleaded self-defense. With reference to this plea the defendant asked for an instruction that he had a right to stand his ground and resist an attack made upon him, even to the extent of taking the life of his assailant. The court refused this request and gave the following instruction: "Before a person can avail himself of the defense that he used a weapon in defense of his own life, the jury must be satisfied from the testimony that the defense was necessary; that the defendant did all he could consistently with his own safety to avoid it and it was necessary to protect his own life or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." The defendant was convicted and appealed. *Held*: On appeal, that the decision should be reversed. The above instruction was declared to be erroneous in that it placed an undue burden on the defendant by requiring him to establish self-defense by a preponderance of the evidence. All that the defendant should be required to do was to present sufficient evidence to raise a reasonable doubt in the minds of the jury: *Frank* v. *United States* (C. C. A. 9th, 1930) 42 F. (2d) 623.

The question of the burden of proof in establishing self defense, and the so-called "shifting of the burden," has been the source of much contrariety of opinion in American jurisdictions. Much of the difficulty seems to arise from a looseness of terminology and a certain vagueness as to just what is meant by the term "burden of proof." The double meaning implied in the use of this term has been thus expressed by one author: First, that the "burden of proof" may mean "the peculiar duty of him who has the risk of any given proposition on which the parties are at issue,—who will lose the case if he does not make his proposition out, when all has been said and done." And, second, this term may mean "the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion:" *Thayer*, "A Preliminary Treatise on Evidence at the Common Law" (1898) p. 355. The party on whom such a burden of proof rests discharges it by establishing a *prima facie* case by means of evidence, legal presumptions, or a combination of the two. When this is accomplished the "burden" or duty of going forward in evidence to rebut and overcome the case thus set up "shifts" to the adverse party. With reference to this so-called "shifting," the same author says that "presumptions 'shift the burden of proof' in a familiar sense of that phrase, importing the duty of going forward in the argument, or in the giving of evidence. This is the only sense of the 'burden of proof,' in which, having once been fixed, it can ever shift." *Ibid.*, p. 383.

It appears that the practice generally followed is that the burden of proving self-defense is on the defendant: *United States* v. *Armstrong* (C. C., D. Mass., 1855) 24 Fed. Cases No. 14,467; *Baugh* v. *State* (1928) 218 Ala. 87, 117 So. 426; *People* v. *Spraic* (Cal. App. 1927) 262 Pac. 795; *State* v. *Roberts* (1922) 294 Mo. 284, 242 S. W. 669; *State* v. *Barringer* (1894) 114 N. C. 840, 19 S. E. 275; *Szalkai* v. *State* (1917) 96 Ohio St. 36, 117 N. E. 12; *Commonwealth* v. *Nelson* (1929) 294 Pa. 544, 144 Atl. 542; *State* v. *Gandy* (1919) 113 S. C. 147, 101 S. E. 644; *People* v. *Stern* (1922) 201 App. Div. 687, 195 N. Y. Supp. 348; *Lamb* v. *Commonwealth* (1925) 141 Va. 481, 126 S. E. 3. Keeping in mind the distinction made above, further investigation makes it appear that in most jurisdictions what is meant by the "burden of proof" is substantially the duty of going forward in the argument or with the evidence, and that the "burden of proof," strictly speaking, remains on the State, in criminal cases, to establish the charge preferred, and to establish guilt beyond a reasonable doubt: *State* v. *Little* (1919) 178 N. C. 722, 100 S. E. 877; *Baugh* v. *State,* supra; *Commonwealth* v. *Colandro* (1911) 231 Pa. 343, 80 Atl. 571; *People* v. *Stern,* supra; *Lamb* v. *Commonwealth,* supra. But *cf. State* v. *Roberts,* supra (holding that this burden is not on the State). Some courts make the distinction that the burden "shifts" to the defendant where the killing is admitted: *Szalkai* v. *State,* supra; *State* v. *Barringer,* supra; *State* v. *Burton* (1916) 172 N. C. 939, 90 S. E. 561; or where the killing is clearly proved by the evidence; *Commonwealth* v. *Nelson,* supra; *Proctor* v. *State* (1923) 22 Okla. Cr. 445; 211 Pac. 1057. Such holdings are consistent with the theory that the burden of proof, in strict terminology, is on the State, but that the duty of going forward in evidence may "shift" to the defendant. Some courts maintain that by pleading self-defense, the defendant sets up an "affirmative defense," and that it must be proved by him: *Commonwealth* v. *Lockett* (1927) 291 Pa. 319, 139 Atl. 836; *State* v. *Roberts,* supra. Statutes in some of the States place on the defendant the burden of proving circumstances of mitigation or justification where the crime is proved unless the evidence of the State tends to show that the crime amounts only to manslaughter or that there were such circumstances of mitigation or justification: *Jones* v. *State* (1921) 20 Okla. Cr. 233, 202 Pac. 187 (R. L. Par. 5902, 1910); *People* v. *Fowler* (1918) 178 Cal. 657, 174 Pac. 892 (Pen. Code 1915, § 1105); *State* v. *Skinner* (1909) 32 Nev. 70, 104 Pac. 223 (Comp. Laws 1919, § 4687). This is tantamount to saying that it is incumbent on the defendant to go forward in evidence, under certain circumstances.

As to the amount of proof required by a defendant who thus assumes the burden of going forward in evidence, it is held in the majority of jurisdictions that the defendant has discharged this duty when he has raised a reasonable doubt whether or not the killing was done in self-defense: *United States* v. *Armstrong,* supra; *State* v. *Skinner,* supra; *Roberson* v. *State* (1913) 183 Ala. 43, 62 So. 837. Other courts go farther and hold that a reasonable doubt is not sufficient, but that the defendant must establish his plea of self-defense by a fair preponderance of the evidence: *Commonwealth* v. *Palmer* (1908) 222 Pa. 229, 71 Atl. 100; *Szalkai* v. *State,* supra; *State* v. *Mellow* (R. I. 1919) 107 Atl. 871; *State* v. *Yokum* (1899) 11 S. D. 544, 79 N. W. 835. Still other courts hold that self-defense must be established to the "satisfaction of the jury": *State* v. *Little,* supra; *State* v. *Roberts,* supra; *State* v. *Pepe* (1910) 24 Del. 232, 76 Atl. 367.

It is held in many cases that the State must prove beyond a reasonable doubt that the defendant is guilty as charged, in manner and form: *People* v. *Downs* (1890) 123 N. Y. 558, 25 N. E. 988; *State* v. *Watson* (1912) 26 Del. 273, 82 Atl. 1086; *Baker* v. *State* (1923) 19 Ala. App. 432, 98 So. 213; *State* v. *Shea* (1898) 104 Iowa 724, 74 N. W. 687. This general burden on the State is phrased in various ways; it is sometimes said that the State must prove that the homicide was felonious: *State* v. *Scarborough* (1922) 152 La. 669, 94 So. 204 (if the homicide was in self-defense, it was not felonious). It is frequently held that the State has the burden of proving that the defendant was not free from fault in bringing on the difficulty which led to the homicide: *Huff* v. *State* (Ala. 1930) 126 So. 417; or that the defendant was at fault in bringing on the difficulty: *Buffalo* v. *State* (1929) 219 Ala. 407, 122 So. 633. A further variation is that it is incumbent on the State to show that the homicide was not committed in self-defense: *State* v. *Linden* (1923) 154 La. 65, 97 So. 299; *People* v. *Coughlin* (1887) 65 Mich. 704, 32 N. W. 905; *Turley* v. *State* (1905) 74 Nebr. 471, 104 N. W. 934; *Johnson* v. *State* (1912) 67 Tex. Cr. 441, 149 S. W. 165. "It is the duty of the State to prove that there was no justification or excuse in law, and this necessarily means that the State must negative any justification or excuse and on the whole establish defendant's guilt beyond a reasonable doubt": *State* v. *Hoerner* (1927) 55 N. D. 761, 215 N. W. 277. Again, "On principle it [the burden of proof] must rest upon those who affirm that he has committed the crime for which he is charged. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case": *Henson* v. *State* (1896) 113 Ala. 383, 21 So. 79. Some courts declare in terms that the defendant does not have to prove anything: *Zipperian* v. *People* (1905) 33 Colo. 134, 79 Pac. 1018; *People* v. *Duncan* (1924) 315 Ill. 106, 145 N. E. 810; *State* v. *McPherson* (1911) 114 Minn. 498, 131 N. W. 645. But, at the same time, it is held that the defendant has the duty to raise a reasonable doubt: *People* v. *Duncan,* supra. "While the burden of proof is not on the defendant to show self-defense, it is his duty to produce the proof on which he relies as showing his defense": *People* v. *Stern,* supra.

Even where the State's evidence shows elements of self-defense, the burden does not "shift," but it is incumbent on the State to overcome this evidence and show that the act was criminal: *People* v. *Willy* (1921) 301 Ill. 307, 133 N. E. 859; *Jones* v. *States,* supra; *State* v. *Patterson* (1873) 45 Vt. 308 (quoting from McKie's case, 1 Gray 61: "Where the defendant sets up no independent fact in answer to the criminal charge, but confines his defense to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful"). Where the defendant admits the killing, the burden still remains on the State and does not "shift": *People* v. *Fowler,* supra. In these cases, as in the cases in which the defendant relies on independent facts to show self-defense, all that he has to do is to raise a reasonable doubt: *Males* v. *State* (1927) 199 Ind. 196, 156 N. E. 403; *People* v. *Duncan,* supra; *Gravely* v. *State* (1894) 38 Nebr. 871, 57 N. W. 751. It has been held further that erroneous instructions on the burden of proof are not cured by other instructions, concurrently given, which place on the State the general burden of proving the defendant guilty beyond a reasonable doubt: *People* v. *Cathay* (1922) 220 Mich. 628, 190 N. W. 753; *Covington* v. *Com-*

monwealth (1923) 136 Va. 665, 116 S. E. 462; *Perry* v. *State* (1924) 211 Ala. 458, 100 So. 842.

To summarize, the general principle may be stated thus: the burden of proof, in the strict sense of proving the charge made in manner and form, is on the State and never shifts; and that the burden of proof, in the looser sense of going forward with the evidence may, and in many cases does, shift to the defendant to compel him to set out his case with reference to his plea of self-defense and to adduce evidence to support the same to the amount required in the jurisdiction in which the trial takes place.

In the instant case, the defendant was required, by the trial court, to establish self-defense to the "satisfaction of the jury," which would mean by at least a preponderance of the evidence. The Circuit Court of Appeals held that this was too great a burden on the defendant and that all he should be required to do was to raise a reasonable doubt in the minds of the jury. This is in accord with the weight of authority on the subject. It may be noted that this is consistent with the general principle that the burden on the State is to prove the defendant guilty beyond a reasonable doubt, and the burden on the defendant is to go forward in evidence on a plea of self-defense to raise such a reasonable doubt in the minds of the jury.

STUART C. ABBEY.

CRIMINAL LAW—PRIOR CONVICTION—BAUMES' LAW.—[New York] Petition for a writ of Habeas Corpus. The relator, as a fourth offender, upon a plea of guilty to a charge of grand larceny in the first degree for the theft of an automobile, had been sentenced to life imprisonment. The alleged prior convictions were these: On June 27, 1921, he pleaded guilty to the crime of attempted grand larceny in the second degree for the attempted theft of a motorcycle. Sentence was suspended. On April 22, 1922, he pleaded guilty to the crime of burglary in the third degree for breaking and entering a chicken house and stealing chickens. Again sentence was suspended. On the same day in the same court, he pleaded guilty to the crime of burglary in the third degree for breaking and entering a garage and stealing automobile accessories. He was sentenced to three years and six months. The Penal Law [Consolidated Laws of New York (Cahill 1930) ch. 40] sec. 1942 provides: "A person who, after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits a felony within this state, shall be sentenced upon conviction of such fourth, or subsequent, offense to imprisonment in a state prison for the term of his natural life." *Held:* on appeal, by a majority of four to three (Cardozo, C. J., Pound and Crane dissenting) that a person, having thrice pleaded guilty, but sentence having been twice suspended, was not thrice convicted within the terms of said statute, as the finality of judgment is not present to establish such prior convictions: *People* ex rel. *Marcley* v. *Lawes, Warden, et al.* (1930) 254 N. Y. 249, 172 N. E. 487.

The term "conviction" is subject to two interpretations. The term sometimes is applied to finding a person guilty, and sometimes is used to indicate a final judgment: See *State* v. *Will* (1918) 103 Kan. 59, 172 Pac. 1003. It has a popular as well as technical legal meaning. As popularly used it implies nothing more than a finding of guilty by a jury, but as technically understood it means

both the ascertainment of the guilt of the accused and judgment thereon by the court. *Judge* v. *Powers* (1912) 156 Iowa 251, 136 N. W. 315; *Commonwealth* v. *Minnich* (1915) 250 Pa. St. 363, 95 Atl. 565; *Smith* v. *Commonwealth* (1922) 134 Va. 589, 113 S. E. 707.

The word "conviction" in its ordinary sense may therefore be said to mean the ascertainment of the fact of guilt in a criminal prosecution, in the mode prescribed by law, which mode most generally is a verdict of a jury on a plea of not guilty: *Blair* v. *Commonwealth* (1874) 25 Grat. (Va.) 850; *Commonwealth* v. *Lockwood* (1872) 109 Mass. 323; *Munckley* v. *Hoyt* (1901) 179 Mass. 108, 60 N. E. 413; *People* v. *Adams* (1893) 95 Mich. 541, 55 N. W. 461; *State* v. *Henson* (1901) 66 N. J. L. 601; In re *Friedrich* (N. D. Washington, 1892) 51 Fed. 747. Thus, it has been held that a verdict of a jury in another prosecution is sufficient to sustain a plea of former jeopardy: *United States* v. *Gibert* (1834) 2 Sumn. 40; *Sheperd* v. *People* (1862) 25 N. Y. 406. Likewise, in a prosecution for a second offense it is sufficient to allege and prove that a verdict was rendered in a former prosecution: *State* v. *Hines* (1878) 68 Me. 202; *People* v. *Adams* (1893) 95 Mich. 541, 55 N. W. 461; *Stevens* v. *People* (1841) 1 Hill (N. Y.) 261. Also, under Vernon's Annotated Code of Criminal Procedure (1916 Texas) Articles 865b, 865d, 865f, providing for a suspended sentence in case the accused has never before been convicted of a felony, where the accused had been convicted of a felony and was on liberty under a suspended sentence, submission of the question of suspended sentence to the jury was held improper on the ground that a judgment of guilty in a felony case accompanied by a suspension of sentence is a conviction of felony: *Calloway* v. *State* (1922) 91 Tex. Cr. R. 504, 240 S. W. 554; *Hill* v. *State* (1922) 92 Tex. Cr. R. 312, 243 S. W. 982. In like manner, it has been held that one who has been adjudged guilty of the crime of burglary in the third degree, which is punishable by imprisonment in a state prison, but is given a suspended sentence, is one "convicted" of a crime within Prison Law [Consolidated Laws (N. Y.) ch. 43 sec. 211] entitling every person to a parole who has never before been convicted of a crime punishable by imprisonment in the state prison: *Lewis* v. *Carter* (1917) 220 N. Y. 8, 115 N. E. 19.

However, in some cases the term "conviction" has been construed in its strict sense as meaning the sentence and judgment of a court on a verdict or plea of guilty. Thus, it has been held that a verdict or a plea of guilty not followed by sentence or judgment is insufficient to constitute a conviction that may be utilized to affect the credibility of a witness: *Commonwealth* v. *Gorman* (1868) 99 Mass. 420; *Marion* v. *State* (1884) 16 Neb. 349, 20 N. W. 289. Likewise, it has been held that a verdict or a plea of guilty is an insufficient conviction to disqualify the accused as a witness, unless it is followed by sentence or judgment: *Faunce* v *People* (1869) 51 Ill. 311; *Blaufas* v. *People* (1877) 69 N. Y. 107; *State* v. *Valentine* (1847) 29 N. C. 177; *Sorrell* v. *State* (1914) 74 Tex. Cr. R. 505, 169 S. W. 299. In like manner, a person is not disqualified as a voter by reason of a prior conviction of a felony unless a sentence or judgment has been rendered: *Gallagher* v. *State* (1881) 10 Tex. App. 469; *People* v. *Fabian* (1908) 192 N. Y. 443, 85 N. E. 672.

It can be seen that with authority on either side of the question the court could choose that interpretation of the word "conviction which it felt would carry out the purpose of the statute. However, by a majority of four to three, in an opinion which shows clearly a desire to evade the rigor and mandatory

nature of the "Baumes Law," the court adopts the narrow and technical meaning of the word and holds that in those cases where a man pleads guilty and a merciful judge, who still believes the offender can be reformed, suspends sentence on said offender pending good behavior, then such conviction, although no question remains as to the guilt of the accused, does not count as a prior conviction in the sense of the statute. This decision remains true even where the individual shows such perverse and unsocial tendencies as manifest themselves in a second, third and even fourth offense. To quote from the opinion (instant case at p. 488): "If the sentence under review stands, the relator who is twenty-five years of age, because he had previously stolen chickens, certain automobile parts, and a motorcycle, must spend the remainder of his days in a state's prison." The court then relies solely on the authority of *People* v. *Fabian,* supra, which is a case involving the interpretation of the word "conviction" as used in the state constitution in a provision taking away the right of suffrage from those convicted of a felony, to reach the following decision (instant case at p. 488): "The case cited, therefore, is directly in point to establish that the relator, by the prior pleas and suspensions, was not 'convicted' of felonies, and that the provisions of Section 1942, with their dire consequences, are not applicable."

The case is not without precedent in New York, for we find several earlier New York cases in the lower courts to the same effect: *People* v. *Shaller* (1928) 224 App. Div. 3, 229 N. Y. S. 492; *People* ex rel. *Friedman* v. *Kaiser* (1929) 134 Misc. 786, 235 N. Y. S. 432; *People* ex rel. *Robideau* v. *Kaiser* (1929) 134 Misc. 468, 235 N. Y. S. 629: But *cf. People* ex rel. *Cohen* v. *Rattigan* (1915) 172 App. Div. 957; *People* ex rel. *Bierbaum* v. *Jennings* (1930) 135 Misc. 809, 240 N. Y. S. 91 (execution of sentence suspended). The above cases distinguish section 1941 of the Penal Laws (increasing punishment for second offenders) from section 1942, both re-enacted and amended to their present form in 1926, by reading in connection therewith section 470b of the Code of Criminal Procedure as amended in 1918, and hold that while a plea or verdict and suspension of sentence does not count as a conviction in the sense of section 1942, it does count as a conviction in the sense of section 1941. Thus, under two sections of the same act, enacted by the same legislature at the same time, the anomalous result is reached that such a plea or verdict and a suspension of sentence are convictions when a second offender is tried, but in the case of a fourth offender, whose tendency to commit crime is only more clearly shown, do not count as a conviction: *People* v. *Lawes,* supra; *People* v. *Shaller,* supra.

The statute in question, popularly called the "Baumes Law," was enacted in 1926 by the New York Legislature in an attempt to provide a more effective method of dealing with the recidivist in crime. The tenor of the legislation proposed is illustrated by the conclusion of the Report of the Joint Legislative Committee on the Co-ordination of Civil and Criminal Practice Acts [Vol. 17, N. Y. Legis. Documents No. 84—1926] of which Committee Caleb H. Baumes was chairman: "Resolute and courageous action is needed. Organized crime needs to feel the cold steel of even handed justice administered in just as cool and calculating a manner as the potential assassin who enters the dwelling at dead of night with a gun loaded for action, or pokes a pistol in the face of the unsuspecting, in the bank, in the store or the office or on the highway. Security of person and property and the peace of society should no longer be measured

by 'easy bail,' light sentences, nor the sentimental administration of the law." The abolition of commutations and compensation in reduction of sentences was one of the recommendations of the Committee. (Sec. 24 of Report.) The result was section 1942 as amended to its present form making the life sentence mandatory.

In speaking of the habitual offender, the author of the Baumes Law stated to the N. Y. Bar Assn.: "When a man has been convicted of four serious crimes he has furnished abundant—yes, positive proof that he is incurable; he is non-reformable. That is to say, he is what we call 'anti-social.' Either he cannot, or will not, submit to the fixed and settled rules of society. He will not conform to those rules that civilization has created and which really keep us going, and it matters not whether it is because he cannot or because he will not conform to those rules, the result is just the same. He is an habitual criminal, a menace to society, and as such we say should be segregated from society for the benefit of society and it may be for his own benefit as well": Caleb H. Baumes (1930) 53 Reports of N. Y. Bar Assn. 91. In view then, of the purpose of the act it would seem that an opinion contrary to that of the majority of the court would more nearly carry out the intent of the legislature. However, this law, like other laws of a similarly severe nature, fails for the want of popular approval and the resulting difficulty in its enforcement. The law has been criticized, largely because it leaves no discretion to the trial judge as to the imposition of the life sentence but makes it mandatory. Gov. F. D. *Roosevelt*—1 N. Y. St. Bar Bul. (Nov. 1929) 420; A. M. Herzog, 43 Medico-Legal Journal 129; Moley, "Our Criminal Courts" (1930) xiii. Mr. Herzog describes the situation clearly by stating, "The august law-makers who are responsible for this new law, carried away by hysteria, mass instinct and what not, except of course a sense of justice, fairness or logic, first of all overlooked the fact that severity in punishing a few of our criminals will not remedy matters any more than at the time when, in Merrye Old England, he who stole a pocket handkerchief was broken on the wheel, this severity of punishment stopped pocket picking": 43 Medico-Legal Journal, at 131. In view of the above criticism and the result reached in the case under discussion, it seems reasonable to believe that the law may soon be modified.

HARRY R. POSNER.

CRIMINAL LAW — SELF-DEFENSE — DUTY TO RETREAT.—[Federal] The deceased, one Sparrow, complained to peace officers that the defendant had created a disturbance by quarreling with his (the defendant's) wife, who was then living apart from him, under an assumed name. The defendant sought out Sparrow, accused him of having made such complaint, and mutual threats against each other's lives were exchanged. The following night, the defendant, while armed, went to his wife's house and was admitted by one Marie White, who, immediately upon his entrance, seized the defendant and held him against the door. While in that position, the defendant claims that Sparrow advanced upon him with a hammer upraised to strike, that he, the defendant, believed that Sparrow was about to kill him, and that in pursuance of such belief, he shot Sparrow. There was the evidence of two witnesses that Sparrow made no attack but that the defendant shot him while he was unarmed and as soon as the defendant had entered the house.

The court below gave the instruction that "the jury must be satisfied from the testimony that the defense was necessary; that the defendant did all he could consistently with his own safety to avoid it and it was necessary to protect his own life or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger." This qualification was added with reference to the duty to retreat: "This general rule, however, must be taken with the qualification that it is the duty of a person when attacked to retreat as far as the fierceness of the assault will permit." On appeal after conviction, this instruction was held to be erroneous as assuming that the defendant did not have a right to be in the place where he committed the alleged crime: *Frank* v. *United States* (C. C. A. 9th, 1930) 42 F. (2d) 623.

American jurisdictions are not in accord on the doctrine of the duty to retreat in cases where the issue of self-defense is raised. In general, it may be said that a person attacked is under a duty to do all in his power to avoid taking the life of his assailant, and that this duty includes the duty to retreat as far as the fierceness of the assault will permit: *Allen* v. *United States* (1896) 164 U. S. 492, 17 Sup. Ct. 154; *Beard* v. *United States* (1895) 158 U. S. 550, 15 Sup. Ct. 962; *Madison* v. *State* (1916) 196 Ala. 590, 71 So. 706. The decisions indicate, however, that there is no duty if the defendant, when he committed the alleged crime, was in a place where he had a right to be. As a matter of law, a person has a right to be in his dwelling and under no duty to retreat therefrom: *People* v. *Tomlius* (1914) 213 N. Y. 240, 107 N. E. 496; *State* v. *Gough* (1919) 187 Iowa 363, 174 N. W. 279; *People* v. *Newcomber* (1897) 118 Cal. 263, 50 Pac. 405. Extending the doctrine of the dwelling as a place where the defendant has a right to be the courts have included: *Huff* v. *State* (Ala. 1930) 126 So. 417 (defendant's single room); *State* v. *Sorrentino* (1924) 31 Wyo. 129, 224 Pac. 430 (room in boarding house); *State* v. *Leeper* (1924) 199 Iowa 432, 200 N. W. 736 (assailant occupant of same house as the defendant); *Lawler* v. *State* (Ala. App. 1928) 117 So. 605 (guest attacked by a third party in the house of his host); *Beard* v. *United States,* supra ("curtilage" of dwelling). The place of business or employment has been held to be a place where the defendant may have a right to be, and therefore he is under no duty to retreat: *Brown* v. *United States* (1920) 256 U. S. 335, 41 S. Ch. 465; *State* v. *Feltovic* (1929) 110 Conn. 303, 147 Atl. 801. Although the following cases cannot be considered as extensions of the doctrine of the sanctity of the dwelling, they can be grouped as recognizing a property right in the defendant which will constitute the place one where the defendant has a 'right to be': *State* v. *Borwick* (1922) 193 Iowa 639, 187 N. W. 460 (defendant's automobile); *State* v. *Ballou* (1898) 20 R. I. 607, 40 Atl. 861 (defendant assaulted on public road). But *cf. Terry* v. *State* (1917) 15 Ala. App. 590, 74 So. 756 (defendant attacked on public ferry); *Caldwell* v. *State* (1919) 203 Ala. 412, 84 So. 272 (person attacked on public carrier held required to retreat).

It follows that where a person is assaulted in a place where he has no right to be, *e. g.,* as a trespasser, he must retreat to avoid attack: *Reed* v. *State* (1909) 2 Okla. Cr. 589, 103 Pac. 1042; *State* v. *Flory* (1929) 40 Wyo. 184, 276 Pac. 458. Where the defendant operates an unlawful business, *e. g.,* still, he is under a duty to retreat as being in a place in which he has no lawful right to be: *Hill* v. *State* (1915) 194 Ala. 11, 69 So. 491. *Cf. State* v. *Feltovic,* supra; *Brown* v. *United States,* supra.

A distinction is made according to the nature of the attack, *i. e.*, whether such attack is one with a felonious intent or not. This distinction seems paramount to the doctrine which concerns the right of the defendant to be in the place where he commits the alleged crime, for the obvious reason that the nature of the attack made may destroy the whole purpose of retreat and therefore render the place of the attack immaterial. Accordingly, it has been held that where the attack is sudden, violent, and with felonious intent, there is no duty to retreat, and the person attacked may stand his ground and defend himself even to the extent of taking the life of his assailant: *People* v. *Newcomer,* supra; *Johnson* v. *State* (1922) 184 N. C. 119, 113 S. E. 617; *Erwin* v. *State* (1876) 29 Oh. St. 186. Where retreat would be vain, or where it would increase the peril of the person assaulted, or where it reasonably appears that his peril would be increased thereby, there is no duty to retreat: *People* v. *Buccufurri* (1913) 159 App. Div. 186, 143 N. Y. S. 62; *State* v. *Borwick,* supra; *Bingham* v. *State* (1919) 203 Ala. 162, 82 So. 192. Obviously, where a retreat is cut off, regardless of the place of the assault, the person attacked is under no duty: *State* v. *Glenn* (1929) 198 N. C. 79, 150 S. E. 663. Where, however, the case involves an ordinary assault, with no felonious intent, there is a duty to retreat to avoid attack: *State* v. *Kennedy* (1884) 91 N. C. 572; *Madison* v. *State,* supra. Here also the place of the attack seems to yield to the paramount consideration of the nature of the attack.

In some of the recent cases, there seems to be a more elastic conception of the doctrine of retreat—that the failure to retreat is a circumstance to consider along with all the other attendant circumstances. In *Brown* v. *United States,* supra, at p. 343, the court said: "Rationally, the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature." This language was quoted with approval in *State* v. *Davis* (Iowa 1929) 228 N. W. 37, at p. 39.

Concerning the instructions to the jury, it has been held that a refusal to instruct that the defendant was under no duty to retreat is not error: *State* v. *Flory,* supra (holding that where there is evidence that the defendant was a trespasser [and hence would be under a duty to retreat], the refusal of an instruction that he was under no duty to retreat was not error); *Crawford* v. *State* (1928) 177 Ark. 1108, 9 S. W. (2d) 800 (where charge was based on the nature of the attack, not place of attack). Even where it appears that the defendant was on his own premises when attacked, and hence would be under no duty, a refusal to instruct that he was under no duty has been held valid, the emphasis being placed on the nature of the attack: *State* v. *Tubbs* (1928) 101 Vt. 5, 139 Atl. 769; *Collins* v. *Commonwealth* (1929) 227 Ky. 387, 13 S. W. (2d) 263. Where the instructions given merely omit to mention retreat at all, or the place of attack, it has been held that it is not error: *Ayers* v. *Commonwealth* (1922) 195 Ky. 343, 242 S. W. 624; *Adams* v. *State* (Ala. 1930) 129 So. 705. *Contra: Beasley* v. *State* (1913) 181 Ala. 28, 16 So. 259; *Scott* v. *State* (1902) 133 Ala. 112, 32 So. 623; *State* v. *Ballentine* (1924) 130 S. C. 123, 125 S. E. 291. An instruction which proceeds on the theory that the defendant had a right to be where he was is not erroneous because it does not take into consideration the right of the defendant when attacked in a place where he had no

right to be: *Colondro* v. *State* (1919) 188 Ind. 533, 125 N. E. 27. However, where the evidence is such that it is a question for the jury whether the defendant was under a duty to retreat or not, an instruction that, as a matter of law, the defendant was under such a duty is error: *State* v. *Davis,* supra; *State* v. *Dills* (1929) 196 N. C. 457, 146 S. E. 1; and the refusal to give such an instruction is not error: *State* v. *Cleland* (1928) 148 S. C. 86, 145 S. E. 628; *Walters* v. *State* (Ala. 1930) 126 So. 604. These instructions, in effect, assume the very question which should be left to the jury.

In the instant case, there was evidence from which the jury might infer that the defendant had a right to be in the place where he was and hence would be under no duty to retreat. The instruction which was given and which stated that he was under such a duty assumed a question which ought to have been left to the determination of the jury and was therefore erroneous. The decision of the superior court in holding that this instruction was erroneous, for the reason given, is in accord with the recent cases holding that the duty to retreat is to be considered together with other attendant circumstances and is not in itself a categorical proof of guilt: *State* v. *Davis,* supra; *Brown* v. *United States,* supra, and also with the cases holding that it is error to give instructions which assume that the defendant was under a duty to retreat when there is evidence to show that he may not have had such duty: *State* v. *Dills,* supra; *Walters* v. *State,* supra.

STUART C. ABBEY.

CONSTITUTIONAL LAW—LIBERTY UNDER FOURTEENTH AMENDMENT—FREEDOM OF SPEECH.—[California] The defendant had charge of the Communist Party's camp for children, and at that camp displayed the flag of the Third International (a red flag with the Soviet hammer and sickle). The children were taught to say, when saluting it, "I pledge allegiance to the Workers' Red Flag and to the cause for which it stands . . ." The camp, moreover, had a library containing, among other printed matter, pamphlets advocating violent overthrow of the government. The defendant was convicted for violation of a statute providing that "any person who displays a red flag . . . as an aid to propaganda that is of seditious character is guilty of a felony." Cal. Penal Code (Deering 1919) sec. 403a. *Held:* on appeal, that the pamphlets were seditious and therefore the use of the flag constituted a violation of the statute: *People* v. *Mintz* (Cal. App. 1930) 290 Pac. 93.

It was contended by the defense that the guaranty of liberty in the Fourteenth Amendment to the Federal Constitution protected the defendant in her use of the red flag. Some states have enacted similar statutes but only one has been tested in the courts. This was in Massachusetts where a statute prohibits the carrying of a red flag in a parade. Mass. Stat. (1913) Ch. 678, sec. 2. In a prosecution for violation of the statute it was held to be constitutional and not in contravention of the Fourteenth Amendment: *Massachusetts* v. *Karvonen* (1914) 219 Mass. 30, 106 N. E. 556. In a Michigan case the defendant, knowing that his carrying of a red flag would lead to disturbances, nevertheless carried one in a parade and was found guilty of violating a municipal ordinance prohibiting disturbances and riots (City of Hancock Ord. No. 10). The state Supreme Court held that the defendant was not protected in carrying the flag by the "liberty clause" in the Fourteenth Amendment: *People* v. *Burman* (1908) 154 Mich. 150, 117 N. W. 589.

Another defense was raised in the instant case—that the use of the pamphlets was protected by the guaranty of free speech in the Fourteenth Amendment; but that the amendment includes freedom of speech is not clearly settled. In *Fiske* v. *Kansas* (1927) 274 U. S. 380, 47 Sup. Ct. 655, it was held that the amendment included freedom of speech; in *Prudential Insurance Co.* v. *Cheek* (1922) 259 U. S. 530, 543, 42 Sup. Ct. 516, the opposite conclusion was reached. The court refused to decide the question in *Gitlow* v. *New York* (1925) 268 U. S. 652, 45 Sup. Ct. 625, and in *Gilbert* v. *Minnesota* (1920) 254 U. S. 325, 41 Sup. Ct. 125. The general assumption is, however, that the amendment does impose a restriction upon the states and protects freedom of speech. See *Warren* "The New Liberty under the 14th Amendment" (1926) 39 Harv. L. Rev. 431.

What is seditious and what falls within the guaranty of freedom of speech amounts to the same question, and various tests have been employed by the courts. One test, whether the words create a clear present danger, is occasionally followed by the Federal Supreme Court: *Schenk* v. *United States* (1919) 249 U. S. 47, 39 Sup. Ct. 247; *Masses Publishing Co.* v. *Patten* (C. C. A. 2d. 1917) 246 Fed. 24. But the court has an alternate test—whether there is in the propaganda a remote tendency to cause disturbance: *Gitlow* v. *New York*, supra; *Abrams* v. *United States* (1919) 250 U. S. 616, 40 Sup. Ct. 17; see *Willis* "Freedom of Speech and of the Press" (1929) 4 Indiana L. Jour. 445. Some cases hold that the defendant must be shown to have advocated violence: *Fiske* v. *Kansas*, supra; *Whitney* v. *California* (1927) 274 U. S. 357, 47 Sup. Ct. 641. And yet, in an opinion delivered on the same day as the last two cases cited, the defendant was convicted although he had not advocated violence: *Burns* v. *United States* (1927) 274 U. S. 328, 47 Sup. Ct. 650. *Accord: Pierce* v. *United States* (1920) 252 U. S. 239, 40 Sup. Ct. 205; *cf. People* v. *Lloyd* (1922) 304 Ill. 23, 136 N. E. 505.

Adopting the rule most liberal to defendants, that of *Schenk* v. *United States*, supra, the present decision seems erroneous because this camp for children certainly did not create a clear present danger. But, even under the less liberal rules, the question still remains whether the flag was an aid to seditious propaganda. The type of case which would ordinarily fall within the statute is that of a speaker using a red flag to attract a crowd in order that he might disseminate propaganda. But in the present case the flag was not needed to attract attention, and the pamphlets could have been distributed to the children without its use. Regardless, then, of the question of the constitutionality of the statute it is open to conjecture whether or not its use amounted to an aid to propaganda of a seditious character.

ALLAN R. BLOCH.

CRIMINAL LAW—FORM OF VERDICT—SUFFICIENCY OF GENERAL VERDICT WHEN INSANITY IS DEFENSE.—[Maryland] Appellant was charged with murder and pleaded not guilty, defending on the ground of temporary insanity. The jury was instructed that it might return any of six possible forms of verdict, among them being: (1) Guilty, (5) Not Guilty, (6) Not Guilty by reason of insanity, insane at the time of the commission of the offense, and insane at time of trial. A general verdict of "Guilty of murder in the first degree" was returned, no mention being made as to the sanity of the defendant. On appeal, it was contended that this verdict was insufficient to support the judgment and sentence

of death. It was argued that Section 6, Article 59, of the Code of Public General Laws of Maryland (1924) required separate findings by the jury on the questions of both guilt and sanity. The statute provided: "When any person indicted for a crime, offense, or misdemeanor shall allege insanity in his or her defense, the jury impanelled to try such person shall find by their verdict whether such person was at the time of the commission of the offense or still is insane, or otherwise." *Held,* on appeal: That the judgment be reversed and a venire de novo granted: *Price* v. *State* (Md. 1930) 151 Atl. 409.

English practice is very similar to that required by the decision in the princpal case. In England, however, the forms of verdicts in criminal trials when insanity is the defense are regulated by statutes: [46 & 47 Vict. Ch. 38, Section 2 (1)].

In the United States there have been very few cases involving the exact point decided in the principal case, i. e., whether a general verdict of "guilty" will be sufficiently conclusive as a finding that the defendant was sane when he committed the act charged. It has been held that a general verdict of guilty will be sufficient: *Anderson* v. *State of Georgia* (1871) 42 Ga. 9. In a case invoking the interpretation of a statutory provision, (Gen. Stat. of S. C. (1883), Sec. 1589), which authorized a judge "to send to the lunatic asylum any person who shall upon trial before him prove to be non compos mentis," it was *held,* that a special finding on the insanity issue was not required: *State* v. *Coleman* (1883) 20 S. C. 441. Logically, a general finding of guilty of the crime charged would include an affirmative finding on every essential element of the crime, and in the principal case, the jury by its verdict of "Guilty" must necessarily have found that the defendant committed the acts charged, and was capable of forming and did form the guilty intent.

It is the general practice in the United States to require a special finding upon the issue of insanity of the defendant at the time of committing the act only when such insanity might be the basis for a finding of "Not Guilty": *State* v. *Jones* (1871) 50 N. H. 369; *State* v. *Bartlett* (1861) 43 N. H. 224; *Commonwealth* v. *Molton* (1911) 230 Pa. 399, 79 A. 638. At common law such a special finding was not required, and since a general verdict of "Not Guilty" failed to disclose the possible basis of insanity at the time of commission of the act, criminally insane defendants were often loosed upon the community. To remedy this situation, the English Criminal Lunatics Act of 1800 (39-40 Geo. III Ch. 9 sec. 4), upon which this section of the Maryland Code was modeled, empowered the trial court to order confinement to an asylum of any accused person found to have been insane when he did the act charged, and who had not yet recovered his sanity; and if the accused was found to have recovered his sanity he was fully discharged as at common law: *Price* v. *State,* supra, at p. 413; *Wagner* v. *Baltimore* (1919) 134 Md. 305, 106 Atl. 753; 1 *Russell* "Crimes" (8th ed.) 84. See *Rex* v. *Machardy* (1911) 2 K. B. 1144; *Rex* v. *Ireland* (1910) 1 K. B. 654, 2 Cox. C. C. 322 (practice at common law and under the modern English statutes). These statutes, then, are directed toward the correction of defects in the general verdict of "Not Guilty," and have no application as the majority opinion in the instant case believed, to a verdict of "Guilty." It is submitted that the minority were correct in stating that to so interpret the statute adds to the complications of criminal trial procedure without advantage and contrary to the legislative intent.

LAWRENCE R. BLOOMENTHAL.