

PHASES IN THE DEVELOPMENT OF CRIMINAL
MENS REA.

PHASES IN THE DEVELOPMENT OF
CRIMINAL MENS REA.

Sec. 1. When a forbidden effect has been caused by a responsible human being the law as a general rule requires, before punishment, that there be a certain connection between the psyche of the actor and the forbidden effect, caused by his act. It is not sufficient to show that the act committed was the cause, or one of the causes, of the effect; we must also be able to say to the wrongdoer: you should not have done what you did, you ought to and could have prevented the crime. We must be able to blame the person for his conduct, there must be, to use the terminology of the English lawyers, a *mens rea* on the part of the agent.

At the present day the almost generally accepted doctrine is, that in criminal law there are only two forms of *mens rea*, viz., *dolus* and *culpa*, or in Dutch phraseology "opzet" and "schuld." The former is the more serious form.

As to the essence of the latter form (schuld) the present day writers agree that it is either lack of foresight or lack of care. It is lack of foresight in so far as we may blame the doer for not having foreseen the consequences of his act, whereas he could and ought to have done so, or for having formed an incorrect conception of them, whereas it was not only his duty but also in his power to correctly judge of these consequences. It is lack of care, whenever the actor does not apply to his actions the conscientiousness, skill, adroitness, prudence, caution, etc., which may be reasonably expected from him. This lack of care would appear from the fact that he, under given circumstances, acted or abstained from action or from the manner in which he so acted or abstained. *Culpa* or "schuld," as Prof. van Hamel (Inlciding tot het Nederl. Strafrecht, sec. 35, No. 14), correctly points out, is either a non-application or a faulty application of various psychic faculties such as of reasoning, feeling, willing, etc.

With *dolus* we have to do with the most serious blameworthy state of mind in which the *will* is at fault, inasmuch

as the agent's will is directed towards the realization of the constitutive elements of the crime. The term *dolus* (opzet) therefore is used to denote the relation between the psyche of the agent and the forbidden consequences of his act, whenever we can blame him for having *intentionally* caused the forbidden effect, whereas the term *culpa* denotes the blameworthy state of mind in cases in which the forbidden effect had been brought about *unintentionally*.

In order, therefore, to decide whether a particular act is at all punishable, and if so, in what degree, it is, at the present day, incumbent on lawyers to draw a line (1) between the cases in which the unintentional causing of an effect is blameworthy or not, to distinguish accident (*casus fortuitus*) from culpable negligence and (2) to distinguish *dolus* from *culpa*.

To this result we have come after ages of development which have to be briefly sketched for the proper understanding of what is to follow. It is a known fact that the criminal law of western Europe is a blend of Germanic and Roman law-principles, influenced by some of the maxims of the Canon law. In order, therefore, to fully grasp the subject, it is necessary to trace the most characteristic elements of the different systems with reference to the principles concerned.

GERMANIC LAW.

Sec. 2. The most primitive form of reaction against wrongs was revenge, taken by the person wronged or his kin. No distinction was thereby made based on the state of mind of the wrongdoer. So long as that state of affairs existed there was no room for the doctrine of *mens rea*. And even when in later times people came to dimly realize that punishment is only justified in case of guilt, the old principle—deep-rooted as it was—maintained its place there, where the revenge of the injured party played a prominent part. This was so in ancient Roman as well as Germanic law.

In historical times the Germanic peoples are, however, past that stage. Private and public criminal law exist side by side; the acts which were directly detrimental to the community as a whole or bore witness to a low or mean

character were punished publicly; those which affected merely the interests of private individuals were considered the private concern of the parties involved.

Now it is a noticeable symptom in the history of the doctrine of *mens rea* that it first receives consideration with the crimes against which the community as a whole reacts. The community, as such, is much less sensitive, much more free from passion than the individual, and therefore better capable of cool judgment.

Moreover, it is so much stronger than the individual, that it can more readily disregard an unintentional breach of its peace than an individual a wrong done to him, without fear of being taunted with cowardice. (Loeffler, *Schuldformen des Strafrechts*, sec. 1. p. 25 and foll.). The old Germanic law bears this out. As regards private crimes it has, for ages, been the rule that composition had to be paid whether the wrong had been intentionally inflicted or not. This composition comprised two elements. It is partly fine (punishment), partly compensation for the damage done. In later times the state of mind of the wrongdoer is in so far taken into consideration that it became customary to allow feud only when the appropriate wrong had been intentionally inflicted.

As regards public crimes it would appear that public punishment was, as a rule, inflicted only for intentional breaches of the peace. We should, however, be very much mistaken if we were to infer from this, that the Germanic public criminal law had, in early times, reached so advanced a stage of development, that the most important factor considered in crimes was the *will* and that the effect played a minor part. *The old Germanic peoples did not enquire in each particular case into the state of mind of the offender.* When a person had caused a forbidden effect the presumption was that he did so intentionally. Neither did it in each particular case allow him to prove that the breach of the peace was not wilful. Certain types of acts only were classed as casual, unintentional. They were such as bore on the face of them the stamp of absence of intent. To avoid the possibility of even these acts being considered unintentional, whereas they were in fact intended, the agent

had to openly avow the deed and to make oath that it was an accident. Although, therefore, in principle only the crimes committed intentionally were punished; in practice the effect was as a general rule decisive. More stress was laid on the external peace and order, the visible consequences of the act, than on the individual will (Wichmann *Ontwikkeling van het Strafbegrip*, p. 44.)

Although there are to be found, especially in the private criminal law, traces which go to show that it was realized that in the domain of unintentional acts a distinction may be made between effects due to *culpa* and pure accident, still it may be broadly stated that the Germanic private criminal law did not distinguish between *casus fortuitus* and *culpa*.

Sec. 2 (a.) When we trace the development of the Germanic principles in the middle ages, before the influence of the Roman law was felt in all its weight, we find no uniformity. In the domain of private criminal law there is a tendency to reduce the composition in case of unintentional wrongs; on the other hand we find that the whole composition had still to be paid, sometimes in cases where, according to our present day notions, there was no question of *mens rea*.

With the public criminal it is very much the same. In most cases public punishment was inflicted for wilful breaches of the peace only, but we find marked instances in which the idea that public punishment requires at least some form of guilt on the part of the wrongdoer is completely ignored. Sometimes we see some weight attached to the fact that an unintentionally committed wrong was due to the wrongdoer's negligence and not purely an accident, but sometimes the distinction between *culpa* and *casus fortuitus* is not taken into account at all.

In the old Dutch statutes, privileges and charters of the middle ages we find a variety of expressions to denote the state of mind of the wrongdoer in case of wilful wrongs (Frederiks, *Oud Nederl. Strafrecht*, cap. 2, p. 25 and foll.). As a general rule they are more descriptive of the feelings which prompted the act ("*temeritas*," "*hoger moed*," "*mit, fan or bij ira mode*," "*cum iracundia, ex indignatione*, in toornen moede, in vrede, in arren mode"), of the motives which led to the crime (in haesten mode, mit

PHASES IN THE DEVELOPMENT OF CRIMINAL 327
MENS REA.

haestiger hand, om haet, or haestiger toorn), of his moral state (in evelen wille, in quaden mode, in boosheit, *ex malitia*) or of the more or less deliberate character of the act (met bedachten mode, met beraden rade, met geleider lage, met voorrade) than indicative of the essentials of an intentional act. Such expressions as "willende," "willens en wetens," "met sinen wille," "moetwillig," "moed-willens," however point to the fact that it was well understood that the more serious form of *mens rea* is based on the will of the wrongdoer to cause the effect and on his consciousness of the effect.

The unintentional wrongs are described as "unwille dade," "*incoluntarium factum*," the person is said to have acted "onwillens," "bi unwille," "onnoesel en onwetende," the effect is said to have been caused "*per infortunium*," "bi ongevalle," "bi avontuere," "bi snoeder or kranker avontuere." To distinguish *culpa* from mere accident the terms "forsuminge," "versumenisse," "*negligentia*," "ungameliched," "wrangede," "wanhod," etc., were used.

In broad traces these terms indicate the forms of *mens rea* also known to us.

This much is clear that the characteristic difference between the two forms is this: that in the one case we can blame the wrongdoer for having willed the forbidden effect, whereas in the other this reproach is out of place.

The men who first undertook this task were the Italian jurists of the 13th and following centuries under the influence of the revived study of the Roman law. On account of the prominent part it played in the history of the subject under discussion and still plays in our law it is absolutely necessary to deal at some length with the Roman law.

ROMAN LAW.

Sec. 3. When we consult these Italian jurists we find that they recognise the two well known forms of *mens rea* (*dolus* and *culpa*), that it was from the Romans they took over this classification and that passages from the *Corpus Juris* served them to define the limits of either form. Some modern jurists, however, have thought it fit to accuse the

Commentators of lack of knowledge and true appreciation of the Roman law principles. Quite recently (in 1918) in a dissertation to acquire the doctor's degree, (Schuld en Schuldverband in het Rom. Strafrecht), H. M. Vrijheid at length goes into the question whether the Romans did, in principle, acknowledge *culpa* as a form of criminal *mens rea*. He comes to the conclusion (p. 57) that in the Roman criminal law, contained in the *Corpus Juris*, the only distinction made in principle and consistently applied was that between *dolus* and *casus* (not punishable). A few cases of *casus* designated as *culpa lata*, *luxuria*, *lascivia* or *cupiditas*, were removed from the latter class and rendered punishable, not because it was realized that in these instances we had to do with a second kind of *mens rea*, but merely from motives of expediency and as a measure of prevention. "In the whole of the Roman criminal law no trace whatever is to be found of the second kind of *mens rea* which we recognise in *culpa*." On p. 59 he expresses himself in even stronger terms and says that in Roman criminal law *casus* and *culpa* were identical, i.e., both not punishable.

It is true that the Romans, in common with other peoples in that stage of development, at one time, under the influence of their sacred law, considered crimes merely from the subjective point of view. So long as the priests play a prominent part in the making and application of law and punishment bears a sacerdotal character, it is not to be wondered at that crimes were, as a rule, looked upon merely from an ethical point of view, and that the only form of *mens rea*, which is recognized, is *dolus*, that the guilty will is the basis of the doctrine of imputation and that no distinction is made between *culpa* and *casus*. Only when crimes are considered from a social point of view it is realized that the task of the lawgiver is not identical with that of the moralist, that public interest requires repressive measures, not merely against immoral, but also against unsocial conduct. We then grasp that public interest requires punishment not so much because the offender is so strongly to be blamed morally, but in order to spur him on to greater caution. Now, when Vrijheid says, that the Romans did punish certain cases of *casus* from motives of expediency

PHASES IN THE DEVELOPMENT OF CRIMINAL 329
MENS REA.

and in order to prevent acts detrimental to the community, he certainly is quite correct, because the Romans were past the stage of identifying crimes with ethically objectionable conduct. They realized that the interests of the community were not sufficiently safeguarded when the will is the only test by which to distinguish punishable acts from those not punishable. On the other hand they were not so devoid of common-sense to think that it is expedient to punish a man, whatever be the relation between his psyche and the forbidden act. We, therefore, notice that they do not punish mere *casus fortuitus*, but require a blameworthy state of mind of the wrongdoer, which they designated by the terms alluded to. How it can be concluded that they did not realize that this particular state of mind was a kind of *mens rea* is beyond my powers of conception.

Vrijheid contends that the distinction between *dolus* and *casus* only was founded in principle, not, however, that between *casus* and *culpa* or *culpa* and *dolus*. By this apparently is meant that the Romans have attached only practical consequence to the first distinction, that the general rule of law was that only *dolus* is punished, not *culpa*; that they did not recognise a general principle according to which every culpable causing of a forbidden effect is to be punished. If he is to be understood in this sense, we may equally well say that in no present-day legal system is *culpa* recognized in principle as a form of *mens rea*. For to my knowledge only certain kind of crimes are punishable in either form, not every possible one. Now that is exactly the position we also find in the Roman law. In certain cases causing a forbidden effect, not wilfully, but culpably, is punished: e.g., selfmaiming by a soldier (*Dig.* 49.16.6) house-burning (*incendium*) (*Dig.* 47.9.9 and 11, 48.19.28, sec. 2, 1.15.3, sec. 1, *Collatio* 1.15.3, sec. 1), allowing prisoners to escape (*Dig.* 48.3.12 and 14, pr. and secs. 1 and 2, *Dig.* 1.18.14), injury to property under the *lex Aquilia*,* and homicide (*Dig.* 48.8.4, sec. 1, *lex* 3, sec. 2, *Dig.* 1.18.6, sec. 7, *juncto Paul*, *Rec. Sent.* 5.23.19, *Paul*,

* The action *ex lege Aquilia* was penal in its nature (*Dig.* 9.2.23, § 8, *Inst.* 4.3.9.) the penalty was inflicted not merely for *dolus*, but also for *culpa* (*Dig.* 9.2.30, § 3, *Inst.* 4.3.3.)

Rec. Sent. 5.23.12 and 14, *Cod.* 9.16.1, *Dig.* 48.19.38, sec. 5.)

The opinion of some writers, based on *Dig.* 48.8.1, sec. 3. 48.8.7, *Cod.* 9.16.1 and 4 and other passages outside the *Corpus Juris*, that we are not justified to lay down the rule that, in principle, every culpable homicide is punishable, seems to me to be unfounded. It is merely by arguing *a contrario* that they can come to this conclusion, and, in the face of the different passages referred to above which lay down the rule that culpable homicide was punished, this argument is hardly convincing. To my mind they seem to overlook the development in the notions as to *mens rea* which the *Corpus Juris* bears witness to.

The Roman lawyers are careful to state that they do not punish mere *casus fortuitus*; their repressive measures are directed at the *culpa* of the wrongdoer. In each particular case they carefully either expressly mention this requisite or state circumstances from which it appears, that the wrongdoer was at fault.

"DOLUS" IN ROMAN LAW.

Sec. 4. Before going into the question what the Romans understood by the term *dolus* in their criminal law, it is advisable to point out that the term comprises two elements and denotes not merely the relation between the psyche of the agent and his act and its consequences, but also his state of mind regarding the unlawful nature of his conduct. This latter aspect of *dolus* I will leave untouched in this article, for it would lead me too far to prove that in Roman law one of the elements of *dolus* was the knowledge on the part of the wrongdoer that his act was wrongful, a proposition which is a very debated one amongst modern exponents of the Roman law, and which is to my mind quite unwarrantably rejected by many.

We will confine ourselves to the first element of *dolus* and give an answer to the question: When did the Romans consider an effect to have been caused *dolo*?

There is no difference of opinion as to the reply. In Roman criminal law an effect is said to have been caused *dolo*, whenever the will of the agent was consciously directed

PHASES IN THE DEVELOPMENT OF CRIMINAL 331
MENS REA.

towards the attainment of the effect, when the effect was directly aimed at by him.

There are, however, three passages in the *Corpus Juris* which played a very prominent part in the history of our subject, and became the basis of a doctrine of *dolus* which materially differed from the pure and simple conception of the Romans.

In *Dig.* 48.8.3, sec. 2, it is laid down that keeping for sale poison *hominis necandi causa* is a capital crime under the *lex Cornelia*. It then proceeds: "*sed ex Senatusconsulto relegari iussa est ea, quae non quidem malo animo sed malo exemplo medicamentum ad conceptionem dedit, ex quo ea, quae acceperat, decesserit.*"

The woman is punished not for having caused the death *malo animo*, i.e., *dolo*. She administered drugs to further conception. Later lawyers laid special stress on the supposed innocuous character of the drugs.

In *Dig.* 48.19.38, sec. 5 (*Conf. Paul Rec. Sent.*, 5.23.14), we find a passage fraught with fatal consequences: "*Qui abortionis aut amatorium poculum dant, etsi (id) dolo non fariant, tamen, quia mali exempli res est, humiliores in metallum, honestiores in insulam . . . relegantur. Quod si eo (Sent. ex hoc) mulier aut homo perierit summo supplicio adficiuntur.*"

Here too, as expressly stated, according to Roman notions, there was no *dolus* on the part of the person who administered the drugs. From their point of view the crime—administration of noxious drugs—is aggravated by its serious consequences, thence the capital punishment.

The third passage is *Cod.* 9.12.6, dealing with the *lex Julia de Vi*. In the preamble the attention is drawn to the fact that the term violence comprises many crimes, and that often wounds are inflicted and homicides committed as the result of the efforts on the parties either to impose violence or to resist it. Then it is laid down that in case anyone be killed either of the party of the invaders or of the party invaded the *auctor violentiae*, who gave cause to the troubles, should be capitally punished.

It is plain that the *auctor violentiae* is punished for violence, not for *homicidium dolosum*; the capital punishment

is inflicted because the violence is aggravated by the death which ensued. When, however, it is assumed, as is done by many a later writer, that he is punished for *homicidium dolosum*, it is very difficult to reconcile this passage with the doctrine that in Roman law *dolus* is the will directly aimed at the effect. As a matter of fact, the Romans never intended it to be considered a case of *homicidium dolosum*, it was merely an aggravated form of violence. These three passages merely show that in these instances the seriousness of the consequences is an element to be taken into account as far as punishment is concerned. They are exceptions to the general rule: in *maleficiis voluntas spectatur, non exitus* (*Dig.* 48.8.14).

"CULPA" IN ROMAN LAW.

Sec. 5. With those crimes which were punishable only when committed *dolo* there was no need to distinguish between *casus fortuitus* and *culpa*. Therefore, we find many passages in which a distinction is made only between *dolus* and *casus*, the latter term comprising *casus fortuitus* as well as *culpa*. But to infer therefrom that the Romans in crimes only distinguished between *dolus* and *casus* is totally beside the mark. For, with regard to those crimes which were punishable in their culpable form the distinction between *casus* and *culpa* is sufficiently brought to light to enable us to set forth its elements.

In Inst. 4.3.3, dealing with the *actio ex lege Aquilia*, it is distinctly stated *qui casu occidit hac lege non tenetur, si modo culpa eius nulla inveniatur*. And so also *Gaius* (III., sec. 211), dealing with the same *lex* says: *itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit*."

In these passages therefore the threefold distinction which we also make is expressly recognised.

In other passages *culpa* is distinguished from mere *casus* in various ways: as regards self-maiming (*Dig.* 49.16.6), it is punishable if the soldier acted *lapsus per vinum aut lasciviam*, as regards *incendia* the punishable element is sought in the actor's *negligentia* (*Dig.* 47.9.9, *Dig.* 48.19.28, sec. 12, *Dig.* 1.15.3, sec. 1), *lata culpa* (*Dig.* 47.9.11), or because the *incendia vitari possent* (*Dig.* 48.19.28, sec. 12), as regards

PHASES IN THE DEVELOPMENT OF CRIMINAL 333
MENS REA.

allowing prisoners to escape it is distinctly stated, that it must be enquired into *utrum nimia negligentia evaserit an casu*, and that the soldiers had to be punished *pro modo culpae*, and to be absolved if the prisoners were lost *fortuito* (*Dig.* 48.3.12 pr. and 14, secs. 1 and 2). As regards culpable homicide (*homicidium culposum*) the *culpa* on the part of the wrongdoer is sought in the *malum exemplum* he sets (*Dig.* 48.8.3, sec. 2, *Dig.* 48.19.38, sec. 5, *Paul Rec. Sent.* 5.23.14), in his *lascivia* (*Dig.* 48.8.4, sec. 1, *Coll.* 1.11.1—3), in his *imperitia* (*Dig.* 1.18.6, sec. 7), in his not sounding a warning note (*non proclamaverit ut vitaretur*) (*Paul Rec. Sent.* 5.23.12), and he is said to go off free if the death had been caused *casu fortuito* (*Cod.* 9.16. 4 (5) and *sola fortuna potest culpari*.*

From the above passages we learn that negligence, lack of skill, blameworthy conduct (*malum exemplum*), recklessness (*lascivia*), the power of the actor to avoid the injurious consequences of his act, distinguish *culpa* from *casus fortuitus*. It was, however, in dealing with the penal action *ex lege Aquilia* that the Romans fully worked out their conception of criminal *culpa*. In *Dig.* 9.2.31 it is said: *culpam esse quod cum a diligenti provideri potuerit non esset provisum*. *Culpa* is therefore lack of foresight, which is blameworthy, because an ordinary prudent man would not have lacked it.

From concrete decisions it appears that *culpa* also comprises: lack of care in doing acts which might be injurious to others, *e.g.*, not taking the required measures to prevent the injury. (*Inst.* 4.3.5 and 6), (*Dig.* 9.2.30, sec. 3, *lex* 31), undertaking anything dangerous, not being in possession of the required skill (*Inst.* 4.3.7 and 8, *Dig.* 9.2.7, sec. 8, *Dig.* 9.2.30, sec. 3), or the power (*Inst.* 4.3.8, *Dig.* 9.2.8, sec. 1), to ensure harmlessness, doing dangerous acts under circumstances in which damage is likely to ensue (*Dig.* 9.2.11 pr., *Inst.* 4.3.4, *Dig.* 9.2.30, sec. 3), or omitting to do what under the circumstances duty required (*Dig.* 9.2.30, sec. 3, *lex* 27, sec. 9, *Dig.* 9.2.44 and 45 pr., *Inst.* 4.3.6).

* Rescript of Theodosian II and Valentinian a.d. 445, cited according to Loeffler l.c. p. 86. If it had not been for the preceding passages this rescript and *Cod.* 9.16.4 might be so construed as only to distinguish between *casus* and *dolus*. But in the face of these passages it is to my mind going too far to say that in those passages we are not allowed to consider *casu fortuito* a *casus* in which all *culpa* is excluded and in which *sola fortuna potest culpari*, i.e. when the killing is a mere accident.

DISTINCTION BETWEEN CASUS FORTUITUS AND CULPA.

Sec. 6. If *culpa* consists of *not foreseeing* what a diligent man could and ought to have foreseen, it will be *casus fortuitus* when the event could *not have been foreseen* by human diligence (*Dig.* 9.2.30, sec. 3); when what *could and ought to have been prevented* is said to have been caused *culpa*, it will be *casus*, if it were impossible to avoid the damage owing to circumstances apparently beyond human control (*Dig.* 9.2.29, secs. 2 and 4), or where the act causing damage was not a voluntary one (*Dig.* 9.2.7, sec. 3). If *culpa* is *lack of care* in doing dangerous acts, it will be *casus*, if the required care had been taken to prevent damage (*Dig.* 9.2.30, sec. 3).

Under certain circumstances it appears that according to Roman notions a person, even in doing dangerous acts, is relieved of the duty of taking care not to hurt others. This is the case when his act is done at the proper place by a person entitled to do it, or at a place where it is not likely to cause damage. In *Inst.* 4.3.4, it is laid down that if someone kills a slave when playing or exercising with spears, we must distinguish between different cases. If the slave had been killed by a soldier on the grounds set aside for exercise, it would be *casus*; if he had been killed by a civilian or by a soldier throwing spears in some other place, it would not be considered an accident. So too, if a woodcutter lops trees at a place which people are not accustomed to frequent, and kills someone by throwing down a branch without warning, it will be *casus* (*Dig.* 9.2.31), "*cum dicinare non potuit an per eum locum aliquis transiturus sit.*"

In these cases it seems as if the question, whether the accident could have been foreseen and avoided, was not gone into. It is rather a formal way of deciding the question, which also recurs in other passages. In *Dig.* 9.2.9, sec. 4, it is laid down that if a slave ventures upon a field where people are exercising spear-throwing and is killed, the throwers are not liable, for the slave "*non debuit per campum juculatorium iter intempestive facere.*" In *Dig.* 9.2.52, sec. 4, the *actio ex lege Aquilia* is said not to lie, when a young slave, running in amongst ball players to catch the ball, gets knocked down and breaks his leg. It seems as if the contri-

PHASES IN THE DEVELOPMENT OF CRIMINAL 335
MENS REA.

butory negligence of the party injured always freed the other party from liability, unless the injury were caused wilfully (*Dig.* 9.2.9, sec. 4).

To us this seems to be going too far. There is no objection to not holding the person liable in such cases, whenever the accident is due to so-called unconscious *culpa*, i.e., when the accident had not been actually foreseen, but could have been done so, if the person had taken care. In the cases set forth above there is no special reason for the soldiers, spear-throwers, woodcutter or ball-players, etc., to reckon with the possibility of damage being caused, and, therefore, if they *did not actually foresee* the damage, it seems reasonable not to hold them liable, *even if they could have foreseen it*, in case they had taken the trouble to look round. The Roman law is, however, unsatisfactory as regards cases of so-called conscious *culpa*, i.e., when the possibility of the accident is foreseen, in so far as it holds the offender liable only in case the accident is wilfully caused. Surely the mere fact that you are a trespasser does not entitle the other party to partially disregard your existence of which he is aware? By trespassing you do not surely become a partial out-law in this sense that you only enjoy the protection of the law partially? To me it seems that in these passages the Romans did not fully appreciate the question to be solved, and that they failed to apply their own rule of law, that a person is to be blamed for causing damages which *he could and ought to have avoided*.

THE CANON LAW.

Sec. 7. One particular Canon-law doctrine played and still plays such a prominent part on the subject of our enquiry, that it cannot pass unnoticed. It is the so-called doctrine of *versari in re illicita* (see Dr. Horst Kollmann, *Die Lehre vom versari in re illicita*, *Zeitschrift für die Gesamte Strafrechtswissenschaft* 35 (1913) pp. 46 and foll.)

This doctrine is crisply formulated by the canonist *Huguccio*, the teacher of *Bernard Papiniensis*, to whom this doctrine, before the article of Dr. Kollmann appeared, was usually ascribed, but which was shown by Dr. Kollmann to

have been a rule of ancient standing in the canon law, dating already from the 7th century, as follows:—

An effect can either be caused *dolo aut casu*. "*Si casu aut culpa procedente vel interveniente aut non. Si culpa praecesserit vel intervenierit, imputatur, si non, non imputatur. Quid qui casu committit homicidium aut insistit rei licitae aut illicitae. Si illicitae, sive adhibeat diligentiam aut non, imputatur ei. Si licitae, aut adhibeat diligentiam omnem quam debuit aut non. Si non adhibuit, imputatur ei, si adhibet, nullo modo imputatur ei.*"

It is plain that here an attempt is made to distinguish *casus* from imputable acts. If *culpa* precedes, the act is imputed, otherwise not. But this rule is not consistently applied, for if the original act be unlawful, the effect is imputed even if the agent applied all diligence. It is only when the original act was in itself lawful, that the question was gone into in how far the effect may be said to have been due to the *culpa* of the agent. From the mere fact that the original act was unlawful the inference is drawn that the agent was in *culpa* as regards all the consequences which came from it. This also is a very formal way of looking at our question, inasmuch as it is not required that there should be a blameworthy connection between the mind of the actor and the consequences of his acts.

The rule was used to decide the question whether a priest, who had been the cause of the death of a person (or of some other forbidden effect) was still entitled to officiate as such. If, *e.gr.*, a priest, when hunting, should unintentionally kill someone, say by shooting at a hare, then, if he was entitled to hunt as he did, it would be enquired into whether the accident could have been foreseen and avoided by him or not. If he were in no way to be blamed for the death, he would not become irregular. If, however, he had been preying, the question whether he could in any manner have foreseen the accident and avoided it, was not gone into at all. The mere fact that he originally acted unlawfully was sufficient to impute to him the subsequent death and to render him irregular.

Compared with the primitive stage, in which the consequences of the act only were looked at, this doctrine is a step in advance, in so far as it requires *culpa* on the part of the wrongdoer when the act willed was lawful. In so far as

PHASES IN THE DEVELOPMENT OF CRIMINAL 337
MENS REA.

it did not require specifically a blameworthy connection between the state of mind of the offender and the forbidden consequences, but was content with the fact that the original act intended was unlawful, it maintained the old principle of liability for the consequences merely. This part of the rule is commonly explained as a concession of the church to popular opinion at a time when people were inclined to attach more importance to the effect caused than to the state of mind of the wrongdoer towards the effect.

In its formal nature it reminds us of the opposite Roman doctrine which we have discussed above.

THE ITALIAN DOCTRINE.

Sec. 8. The Italian jurists who were the first to pay special attention to the different forms of *mens rea* in criminal law, and became the fathers of modern science of criminal law were not the Glossators, but the post-Glossators or Commentators. They were practical lawyers, trained in Roman law, who undertook, as far as possible, to engraft upon their native law the principles of the Roman law. That they always understood the Roman law, or that the solutions they arrived at were in each case the *summum* of wisdom, I would not like to contend, but this much is certain that they were the first to consciously and keenly combat, in the Germano-Roman world, the indiscriminate criminal liability for the effect.

According to their own testimony the rule of their statute law, in which Germanic principles were prevailing, was: "*statuta per Italiam puniunt factum et non animum*," as *Angelus Aretinus* has it, or in the words of *Bartolus*: "*in poenis statutaris non inspicitur animus sed factum*."

We must assume that they knew the law of their own times. It would therefore appear that the Germanic law, however much in principle only willed acts were punished, in practice made the impression as if the effect only were decisive.

CULPA AND CASUS.

Sec. 9. With this state of affairs they were not content. They contended that punishment required at least *culpa* on

the part of the wrongdoer. It was therefore their task to distinguish *casus fortuitus* from *culpa*. The Glossators (Engelmann, *Die Schuldlehre der Postglossatoren*, p. 207 and foll.), dealing with the Roman law and following its terminology, spoke of two kinds of *casus*: 1, *casus cui culpa praecessit*, which was punishable, and 2, *casus cui nulla culpa praecessit*, not punishable.

According to Engelmann the Glossators and many of the older post-Glossators, though not distinctly stating that what they understood by these terms was not the canon-law doctrine of *versari in re illicita*, as a matter of fact considered a *casus culpa praecedente* a *casus* directly due to the *culpa* of the agent, inasmuch as he could and ought to have avoided it. It is evident, however, that they were on a very slippery road, using terms which so closely resembled those of the canon law. When, through the *Speculum* of *Durantis* (a canonist of the 13th century), they became acquainted with the canon-law doctrine as to *versari in re illicita*, confusion was bound to follow, and actually did follow. Henceforth the terms: *aut dabat operam rei illicitae* or *licitae* play a prominent part. Some authors adopt the canon-law rule in full as applicable to the lay criminal law. *Gandinus*, for instance, says (*Tract. Malef. de Homicidio* No. 21): "*maleficium casu commissum nullo modo punitur*," and adds: "*distinguendum est secundum Bernardum et jus canonicum*," and, following *Durantis's* distinctions, he continues: "*si dabat operam rei illicitae, sive adhibuit diligentiam sive non, semper ei imputatur*." In case the original act was unlawful he does not require that the effect should be directly due to the *culpa* or the wrongdoer. He is content with a remote *culpa praecedens*.

His authority at first caused its adoption in practice. The better jurists of the following period, however, such as *Baldus* and *Bartolus* energetically opposed its indiscriminate application. Even if a person *versatur in re illicita*, so they contended, he is not to be held liable for the consequences, unless what he did, "*tendit verisimiliter ad eventum secutum*." They realized that it would be a monstrous doctrine to hold a person liable for the consequences of his unlawful act, whatever be the state of his mind in regard to those consequences. The canon law had therefore to be restricted,

and, clearly marking the weak spot, they confined the rule to cases, in which the consequences were likely to ensue from the unlawful act. Only in such cases the agent is to be blamed for not having foreseen them, "*quia potuit et debuit praevidere.*"*

Having discarded the canon-law method of distinguishing *culpa* from *casus* the Commentators proceeded to put the distinction on a proper basis. Although *Jacob de Belvisio* and *Cinus* (see *Engelmann* 1 c, sec. 31), had already realized that the proper criterion is to be sought in the circumstance whether the effect could or could not have been foreseen, *Bartolus* and *Baldus* were the men who laid down the rules which afterwards became the *communis opinio*. *Bartolus* (ad *Dig. vet. Depos. lex quod N. No. 7*), held that a forbidden effect can be said to have been culpably caused only when "*per diligentiam hominis potuit praevideri,*" whereas "*casus fortuitus praevideri non potest.*" The *culpa praecedens* should have been the real cause of the *casus* (ad *Dig. vet. Commend. lex si ut, certe sec. interdum*). Even if the actor *versatur in re illicita* his guilt cannot increase merely from the fact that quite accidentally the result was more serious than he intended: "*nec ei debet ex post facto casu delictum crescere.*" If you slightly wound someone with a small stone or key, you are not liable for his death when, owing to negligence or accidentally, fever sets in and the person dies (*Tract. de Malef. fol. 159, Nos. 5, 7 and 8*). Even if the act of a person be the immediate cause of the injury, it cannot be imputed if it could not at all have been

* To students of the English law it will be interesting to note that through *Coke* the canon-law doctrine of *versari in re illicita* was also introduced wholesale into English law (*Stephen*, "History of Criminal Law," Vol. III, p. 57). But English jurists have up to now not yet realised where the fault lay, and are, even to day, quite content with or at least incapable to refute *Sir Michael Foster's* finding, that the rule is to be confined to cases where the original unlawful act was a felony. Even *Stephen*, who very much regrets the doctrine, according to which, in English law, the agent is liable in such a case as if he had wilfully caused the effect, does not realize that it is so unsatisfactory, because it completely discards from consideration the relation between the psyche of the offender and the consequences of his acts. Ages ago the Spanish lawyer, *Covarruvias*, himself a canonist, had attacked this doctrine in its weak spot (see *Relectio Clem. si furiosus, de Homicidio*, Pars. II § 4, No. 9) by showing that it laid stress on a *culpa* which stood in no connection whatsoever with the consequences imputed, inasmuch as the priest was declared irregular *ex priore culpa*, seeing that he is held liable even if, in doing the unlawful act, he had exercised all due care to avoid harm.

foreseen (*ad Dig. nov. de Quæstionib. lex 2 § quæstionis enf. ad Dig. nov. ad. leg. Cornel. de Sic. lex poena parricid.*).

According to *Baldus*: "*casus fortuitus est quem humana providentia prævidere non potest,*" or "*accidens quod per custodiam vel diligentiam mentis humanæ non potest evitari.*" "*Culpa est non intelligere, non cognoscere futurum casum,*" in so far as it could have been foreseen. (*IV. Cod. de pign. act. l. quæ fortuitu, initio*). He lays no stress whatsoever on the unlawful nature of the act originally intended. In criminal law the distinction to be observed was whether the act itself was likely to cause the forbidden effect. "*Aut culpa non est ordinata ad casum et excusatur per casum; aut culpa est ordinata ad casum et tunc non excusatur per casum.*" (l.c.) If the act intended were of a nature to be likely to cause the effect the agent could and ought to have foreseen and avoided it. The *casus* which was punishable he called "*casus imprævisus,*" not punishable *casus* was "*casus fortuitus.*"

When *Bartolus* speaks of "*diligentia hominis,*" by which the *casus* could have been foreseen, he has in view not every possible care and foresight, but merely due care and foresight. (*Engelmann l.c. § 1, p. 18*).

DOLUS AND CULPA.

Sec. 10. Dealing however with the question how to distinguish *culpa* from *dolus* they were less fortunate in their methods. Not that the older jurists at least really intended by their distinction to draw the line between *dolus* and *culpa*, but the result at which they arrived very much looked like it, and was the cause of much confusion, which even at the present day makes its influence felt in several legal systems.

The pernicious doctrine of *versari in re illicita* had been successfully excluded in distinguishing *culpa* from *casus*. They failed, however, to completely discard it in other respects. Instead of consistently applying the *criteria* which they had laid down to distinguish *casus* from *culpa*, and instead of punishing a delinquent for a culpable (not a wilful) breach of the law when he did not wilfully, but merely culpably cause the forbidden effect, they adopted the canon-law doc-

PHASES IN THE DEVELOPMENT OF CRIMINAL 341
MENS REA.

trine, modified however, in deciding the question of the punishment to be inflicted. Their doctrine is clearly stated by *Angelus de Ubaldis* (ad Cod. 9.12.6, No. 7), in the following manner, in answering the question whether a person may be punished for a crime which went beyond his intention: "*Aut dabatur opera rei licitae et tunc delinquendo praeter cogitatum et culpam non tenetur: aut dat operam rei illicitae et tunc cogitatum tendit verisimiliter ad finem secutum et tunc punitur secundum finem . . . aut cogitatum non tendit verisimiliter ad finem secutum et tunc non punitur quis ultra cogitatum.*"

The rule, therefore, of the canon law that you are held liable for all the consequences of your unlawful act is limited to the case in which the unlawful act had the propensity to cause the forbidden effect.

We have seen above that the same criterion had been applied to distinguish *casus* from *culpa*. In order to avoid repetition I will call this doctrine the common doctrine. It is plain from the manner in which this common doctrine is formulated that, if the act intended was unlawful, the ordinary punishment was inflicted. The wrongdoer was punished *secundum finem*, i.e., not his animus, but the effect was decisive. This also appears from the dicta of the founders of this common doctrine, *Bartolus* and *Baldus*. *Bartolus* (ad *Dig. nov. ad Leg. Cornel. de Sic. lex diris* No. 7), says quite plainly: "*si quidem delictum quod principaliter facere proposuerat tendit ad illum finem, qui secutus est . . . tunc inspicitur eventus.*"

What he means hereby appears from what precedes (I c. No. 1). He there states that the *auctor violentiae* of Cod. 9.12.6 is punished "*secundum eventum, quia verisimiliter illud delictum tendit ad vulnera et homicidia.*"

On the same grounds *Baldus* (IV. Cod. *Mandati. lex si mandati*) holds the *mandans vulnerare* with something "*aptum ad inferendum mortem,*" liable, "*ac si habuisset animum occidendi.*" Many other passages could be cited to the same effect, which, for the sake of brevity, I will omit. Their doctrine therefore amounts to this, that if the original act intended were unlawful and had the propensity to cause

the forbidden effect, the ordinary punishment was inflicted, irrespective of any intention on the part of the wrongdoer to cause it. *When the act intended was in itself lawful, the punishment was, under the same circumstances, an extraordinary one.* Hence this inconsistency?

The reply is not far to seek. In their statute law the maxim was: "*in poenis statutariis eventus inspicitur non animus.*" They found the church holding in the doctrine of *versari in re illicita*, a view which took no offence at punishing even in the absence of any guilt. In the historical passages of the Roman law cited above the extreme penalty was inflicted in *confesso* in the absence of *dolus*. And, as the Roman law was to them the *ratio scripta*, we need not be surprised to find that they had no ambition to outdo it. They would not have been men of their own times if they, under such circumstances, took offence to the infliction of the ordinary punishment on a *wrongdoer*, who was seriously to be blamed for what happened. Only a person who originally did something lawful got the benefit of their sounder insight in the nature of *mens rea*. They thus attained that the indiscriminate liability for the effect of their statute law was rejected in case the original act was a lawful one and, when unlawful, it did not tend, according to common experience to bring about the effect. If, however, the unlawful act was likely to cause the effect the ordinary punishment was inflicted, and the rule of their statute-law applied.

Sec. 11. The rule of the Roman Law: "*in maleficiis voluntas spectatur non exitus,*" taken in this sense that the ordinary punishment is justified only when an effect had been directly intended, they neither could, nor wish to, import as a rule of practice. I think it a mistake when *Loeffler* (c., p. 146), and others contend that the Italians, finding the Roman law *dolus* too narrow, in that it considered an effect to have been caused *dolo* only when it had been directly aimed at, widened this conception so as also to comprise cases in which the effect had been foreseen, thus substituting the *knowledge* of the possibility of the effect ensuing for the *will* to cause it. If such were the case the Italians would have laid stress on the fact that the effect which ensued had *actually been foreseen*, and not merely on the fact that the act was "*ordinatum ad eventum secutum.*" We have already

PHASES IN THE DEVELOPMENT OF CRIMINAL 343
MENS REA.

seen that this requisite was at least, not taken up in their formulation of the common doctrine.*

From many passages it appears that they realized that they were punishing not for *dolus*, but merely in the same manner as if the act had been committed *dolo* (*Baldus IV. Cod. Mandat. lex si mandati, IX. Cod. de Accusation, et Inscription, No. 29, Angelus de Ubaldis ad Cod. 9.12.16, Nos. 1 and 2*). *Raphael Cumanus* (ad *Dig. nov. 48.8.14*), states quite boldly: "*quando verisimiliter ex ictu potuit et debuit sequi homicidium, non curatur an habuerit animum occidendi.*" Such is the case, not merely, as we might be inclined to infer from the cited passage, when the effect is something inevitable, but also "*quando ex actu non debeat sequi regulariter mors, poterat tamen verisimiliter.*"

And when the older authors pay any attention at all to the question, whether the effect had been foreseen, they also make it quite clear that, to them, it was not essential that the effect had been actually foreseen. So *Baldus* says (*IV. Cod. Mandat. lex si mandati*), that, when the weapon used was apt to cause the death, the agent, "*debuerit cogitare illud posse evenire, non sufficit igitur delinquenti dicere, non putavi, quia putare debuit.*" So *Salicetus* too (ad *Cod. 9.12.6, Nos. 1-6*), thinks that the ratio of the rule regarding the *auctor violentiae* is, "*quia violentia est crimen ordinatum ad hoc et caetera similia . . . quod scivit et scire debuit et sic fuit in lata culpa, si non praecogitavit.*"

The common doctrine was, therefore, applicable even when the agent *non praecogitavit*.

It is because *Loeffler* and the other jurists who made the Italians an object of study took it for granted, that the ordinary punishment could only be inflicted when the crime had been committed *dolo*, and were so sincerely convinced of

* *Cinus* ad *Cod. 9, 1216, nos. 2 and 3*, holds the *auctor violentiae* liable, "*quia violentia est crimen ordinatum ad illud et alia facinora,*" it would be otherwise if the unlawful act intended was "*non ordinatum ad illud delictum,*" *Bartolus* (ad *Dig. nov. ad Leg. Corn. de Sic. lex divus no. 1*) because "*verisimiliter illud delictum tendit ad verbera et homicidia*"; *Baldus* (*VI Cod. de Furt. et Servo corrupto, lex 20, no 2*) states: *delictum quandoque se extendit ad casum improvisum propter ipsius facti naturam* (not because of the agent's will) *quae ad talem casum verisimiliter se extendit*"; *Angelus de Ubaldis* (ad *Cod. 9.12.6 nos. 1 and 2*) thinks the ratio of the liability of the *auctor violentiae* lies in the fact that "*licet principaliter violentia non esset ad hoc ordinata, tamen eius natura est, ut in ea solent intervenire caedes et vulnera.*"

the absurdity to say, that an effect had been wilfully caused, when the agent had not, at the very least, been conscious of the possibility of its ensuing, that they ascribed to the Italians notions which they actually did not yet entertain, and which, even at the present day, have not yet found general acceptance. It is true writers on criminal law in Germany and Holland have realized that an effect can never be said to have been willed unless i.e. the agent had at least actually foreseen it, but the French lawyers had not yet attained that stage. Garçon in his *Code pénal annoté* (par. 1, art. 1, No. 90, edit., 1901), still says that, if a person intentionally commits a crime, he is, in principle, held liable for all the consequences which are such in the natural and habitual order of things, and which he therefore *could* and *ought to have foreseen* (*qui sont dans l'ordre naturel et habituel des choses et que des alors il pourrait et devrait prévoir*). And Garraud (*Traité theor. et prat. du droit pénal français* I. pp. 545-46), states that *dolus indeterminatus* comprises the ordinary and usual consequence, which if not actually foreseen, *could and ought to have been so* (*si elle n'a pas été précisément prévue, elle pourrait et devrait l'être*).

And to take an example nearer home, in art. 140 (a) of the Native Territories Penal Code of 1886 (Act 24, 1886), culpable homicide (i.e., unlawful homicide), is said to be murder, "if the offender for any unlawful object does an act which he knows or *ought to have known* to be likely to cause death, and thereby kills any person."

It is true some of the older jurists, such as Albericus de Rosato and Oldradus, in dealing with Cod. 9.12.6, seek the ratio of the punishment of the *auctor violentiae* not so much in the fact that the death ensuing aggravated the crime of *vis*, and thus justified the severe penalty, as in the fact that the death may be said to have been willed, in case resistance was met with, but their view did not find general recognition.

Sec. 12. It was only a century and a half later, after the older commentators had succeeded in breaking the rule of their statute law, that others began to ask how the common doctrine could be reconciled with the rule "*in maleficiis voluntas spectatur, non exitus*." Caepola, a jurist of the 15th century, undertook the defence of the older doctrine against the attacks aimed at it. (Cons. 4). But even he was quite

content to hold the offender liable, "*si verisimiliter potuit cogitare*," that out of a minor delict a greater could follow, or "*quia debuit cogitare*." In a famous case (that of John ab Aggere, *Consilia*, 34-38), he fully goes into the question. The facts were as follows: John had instructed his servant to wound and mark some one who had given offence, not however to kill. The attendant so carelessly executed his instructions that he killed the man instead of only marking him. *Caepola* holds John liable to the sentence of death on two grounds: 1. Because it may be said that he had *animus occidendi tacite*, inasmuch as he had ordered something from which death could easily follow. For, he says, he who gives a mandate seems to order everything, "*quod est vicinum mandato*," and the lethal effect of a wound is "*vicinum ipsius vulneris*." It is of no avail to him that he expressly warned his attendant not to kill, "*quasi sibi ipsi sit contrarius*." Therefore, "*quia debuit cogitare mortem evenire posse et videtur velle*."

His argument is not very convincing. It is all very well to play with fictions in private law, but in criminal law it becomes a very dangerous method. It is a mere *petitio principii* to say that a person tacitly consents to all possible consequences of his act. There can be no consent, if the effect is not foreseen. But in our case that element was present, for although *Caepola* states that John ab Aggere *debuit cogitare*, etc., as a matter of fact he had foreseen the possibility of the death, and, therefore, specially ordered his servant not to kill. If now he knew his servant not only to be a reliable swordsman, but also a faithful servant, who would in no case exceed his orders, how can we say that in ordering not to kill he is "*sibi ipsi contrarius*"? If he were convinced that his *manus ministra* was capable and determined to keep within the limits of his instructions, and that, therefore, death would not follow, how can we say that he tacitly willed it?

Moreover, the expression "*animus occidendi tacite*" is a nonsensical phrase. There are two kinds of *animus*, an ordinary and a tacit one. It may be that the offender did not in any way outwardly visible specially exhibit his will—and this is the general rule—but that is no reason for us to

.. speak of a tacit will, or to consider this kind of will as something different from the other.

.. In the second place, he says, that even if the master had no intention to kill, he is still liable to capital punishment under the common doctrine of *Bartolus*.

.. In this argument the whole idea that the death is intended is dropped.

.. The first counsel for the defence, *Franciscus de Capitibus Listae* (*Caepola*, Cons. 36), attacked the common doctrine. If it were correct a person who orders his servant to box someone's ears would be liable to capital sentence if a fight follows and someone is killed, for it is a common saying: "*alapa expectat relationem gladii*." He could, therefore, have foreseen that death was likely to follow. That would be manifestly absurd. Therefore, he says, the common doctrine "*non ita supine intelligenda, sed cum grano salis*." But what this grain of salt should be he does not tell us. According to him it is a case of *homicidium culposum*.

Angelus de Castro (*Caepola*, Cons. 37), contended that the true reading of the common doctrine is, that the effect may be taken into account in fixing the punishment, so that the offender may not merely be punished for his intentional crime, but that the consequences too may be considered in order to inflict a heavier punishment, not however the ordinary one, as if the effect had been wilfully caused. (I have already pointed out above that this contention is not correct; according to the common doctrine undoubtedly the ordinary punishment was inflicted). If the common doctrine went further than this, it is wrong, for the ordinary penalty may only be inflicted in case of *dolus*, and in this instance there is merely *culpa* on the part of the offender.

The reasoning of these advocates made considerable impression when *Caepola's Consilia* were published. Henceforth every writer of importance discusses it, and either adopts or rejects it. It was adopted by the well known writers *Davius* (Cons. 482), *Hippolytus de Marsiliis* (*Singularia* No. 176, and Cons. 67), and *Julius Clarus* (*Sent. Lib. sec. v, homicidium* no. 6). To them the ordinary punishment is only justified in case of *dolus*, and *dolus* is present only when the effect had been directly aimed at.

This new doctrine, however, did not meet with general

PHASES IN THE DEVELOPMENT OF CRIMINAL 347
MENS REA.

approval. To the contrary, the old doctrine still remained the *communis opinio*. The reason is not far to seek. The new doctrine was too narrow, and, therefore, unsatisfactory. It meant that in any case, whatever be the state of mind of the wrongdoer towards the consequences of his acts, he was punished merely for a *delictum culposum*, unless the consequences were directly aimed at. It included cases in which the conduct of the wrongdoer was so reprehensible that the extraordinary punishment gave no satisfaction. Neither the upholders of this doctrine nor its opponents realized that it was possible to distinguish between the different cases; they had no other choice than to bring all these cases indiscriminately either under *culpa* or *dolus*. We will hereafter see that it is possible to discriminate and so reconcile the extreme views.

Though the new doctrine had been rejected it had this wholesome effect, that by some authors at least greater attention was paid to the question whether in fact, under the circumstances required by the common doctrine, the effect had been actually willed. Their attempts in this direction, however, were not very successful.

Sec. 13. The man who founded, or at least tried to found, the common doctrine on a scientific basis was the Spanish lawyer of the 16th century, *Govarrucias* (Loeffler l.c., p. 158 and foll.). For this purpose he made use of the expositions of *Thomas ab Aquino*, as to when it may be said that an effect had been willed. *Thomas ab Aquino* first enquires into the question when a certain effect may be said to be due to a particular cause. This is the case when from an act a certain effect follows, "*per se aut ut in pluribus*," not however when such is the case "*per accidens aut ut in paucioribus*." A particular act can therefore be considered the cause of some definite effect whenever it necessarily or usually is a sequel to that act, not however when it ensures rarely or merely by accident. Then he proceeds to answer the question, when there may be said to be any connection between the will of the agent and the effect. He considers two possibilities: 1, the effect is either directly intended, or 2, the act is intended which is the cause of the effect (cause understood in the sense just laid down). In the latter case

the effect is *indirectly* willed, because "*voluntas potuit prohibere sed non prohibuit.*"

It is plain that *Thomas ab Aquino* premises that the effect had actually been foreseen by the actor, for otherwise he could not say that the will could have prevented it but did not do so. His doctrine amounts therefore to this, that if an effect is foreseen either as an inevitable or a probable consequence of an act, it may be said to have been intended. As regards consequences foreseen as inevitable he certainly is correct, as regards consequences foreseen as probable his conclusion is too general, as we will show lower down.

Thomas ab Aquino considers his indirect will a less serious form of *mens rea*.

Covarruvias (*Relectio de Homicidio Pars II, Initium* Nos. 1 and 2), adopts these rules. He distinguishes between *voluntas directa* and *voluntas indirecta*. A homicide is *voluntarium* not merely "*cum occidens implicate tendit ad occisionem et occidere vult, sed et quotiens eius voluntas tendit in eum actum ex quo per se ac immediate mors sequitur, non per accidens.*"

We must not take him to mean that *voluntas indirecta* is present only when the death is inevitable, follows *per se*. This appears from other passages. In No. 1. (l.c.) he says "*dicatur autem magis vel minus indirecta voluntas in homicidium quoties actus per se volitus aut voluntate comprehensus magis vel minus tendit ad ipsius homicidii periculum* (conf. no. 2 l.c., and sec. 4 l.c., dealing with casual homicide). He lays no stress whatsoever on the fact that the effect should have been foreseen, and evidently does not require it. This appears from the manner in which he sets forth and approves of the doctrine of *Thomas ab Aquino*: "*Id manifeste sensit Thos. ab Aquino, qui docet peccata aggravari ex eventibus qui postea succedunt, non solum quando illi sunt praecogitati sed etiam quando praeter intentionem successerunt, si illi eventus per se et necessario sequuntur ex priore opere aut saltem ut in pluribus ita illi eveniunt*" (l.c. No. 1. and conf. Rubrica Alma Mater Pars. I sec. 10 No. 16). He simply infers that the natural or probable consequences of any act deliberately done are intended. We know that this is also a maxim of the English law.

In common with *Thos. ab Aquino* he considers the *vol-*

untas indirecta a less serious form of *mens rea*, only entailing an extraordinary punishment. Capital punishment is only to be inflicted "*quando quis (directe) habet animum occidendi et haec est perfecta propriaque homicidi malitia.*" So, as a matter of fact, he rejects the common doctrine, though he actually comes to the conclusion that even with *voluntas indirecta* the effect may be said to be intended.

Through *Carpzovius* the doctrine of *dolus indirectus* found its way into the German law, and thence into our common law, for, as a mere glance at our authorities will show, his influence on our common law writers was very strong.

(To be Continued.)

H. D. J. BODENSTEIN.

THE LEGAL ASPECTS OF "AFRIKAANS."

By virtue of Section 137 of the South Africa Act equal rights are accorded to English and Dutch as the official languages of the Union, and Section 152 of the same Act provides that no alteration or amendment of Section 137 shall be effected except in a certain manner therein provided. No alteration or amendment in the manner prescribed has as yet been effected.

Some time ago in the Transvaal a summons was issued out of a Resident Magistrates' Court in the form of language which has come to be known as "Afrikaans," that is to say, a form of Dutch language somewhat simplified, and also corrupted, owing to various causes peculiar to South Africa. An objection was raised to this summons on the ground that it was not drawn in either of the official languages of the Union. This objection, however, was overruled, seemingly on the ground that it was in Dutch, though rather bad Dutch. Yet it is not impossible, even taking this view, that another Magistrate might have held that, though even a considerable number of grammatical errors might not vitiate a summons, yet when it was intentionally drawn in such a manner that its language constituted a distinct departure from the official