

PHASES IN THE DEVELOPMENT OF CRIMINAL
MENS REA.

(Continued).

THE OLDER GERMAN WRITERS ON DOLUS INDIRECTUS.

Sec. 14. *Carpzovius* deals with our question in the very first chapter of his work (*Praxis Criminalis Saxonica*, Part I., *Quaestio* 1.) He put the question, whether, in the absence of direct intention, a person may be capitally punished if e.g. he has struck a blow with a sword, a piece of wood or something similar, "*pravo animo, volens ei injuriam irrogare . . non occidere.*" but, not being able to keep within the limits of his intention, inflicts a wound from which, against his will, the death follows. He replies in the affirmative on the following grounds.

1. (Sec. 29) The common doctrine of the Italians: "he who does something unlawful is responsible for all the consequences which flow from it beyond his intention or will, when the cause tends to bring about the delict which followed, so that the offender probably thought, or could have thought or at least ought to have thought of what easily would ensue from his act."

He requires, therefore, in the first place a *versari in re illicita*, and is in such a case content, if the event could and ought to have been foreseen by the offender.

2. In such a case, he says, the offender is "*in dolo in genere*," for "*dolose agit quod gladio percutit et sic vulnerando dolose causam mortis praebehit*" and according to the doctors (sec. 30) "*dolus in genere*" suffices.

If, as he contends, "*dolus in genere*" suffices and "*dolus in genere*" is present when a person deliberately commits an unlawful act, it is surprising to find him holding the offender liable only for the probable or natural consequences of his act. If "*dolus in genere*" is what he actually implies, then, logically, we would have to adopt *Coke's* view.

3. We may distinguish between *voluntas directa* and *indirecta* according to *Covarruvias*. Indirectly a homicide is willed by him, who inflicts a wound from which immediately death follows. (Secs. 31 and 32.)

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Here too *Carpzovius* infers *dolus* merely from the fact that the wound was the immediate cause of the death. He does not even require, as *Thos. ab Aquino* did, that the death should have been an ordinary or probable consequence of the act. But I suppose that we must assume that he has this case in view.

He rejects *Covarruvias'* opinion that *dolus indirectus* is a less serious kind of *mens rea* and says that it is just as liable to capital punishment as *dolus directus*.

No doubt *Carpzovius* is in this respect more consistent.

4. Dealing with the canon-law regarding the *mandans verberari clericum* (c. fin. *Vlode homicidia*) he says that the *ratio* of the rule—which according to his contention meant that if death follows *mandans* is liable to capital punishment—is because the *mandans in culpa fuit et hoc evenire posse debuerit cogitare.*" (Sec. 33.)

Here he seems to have quite forgotten that he himself considers the *mandans in dolo* and guilty of *homicidium dolosum*.

5. He relies on *Dig.* 48.19.35, sec. 5 (*poculum abortionis* and *amatorium*) *juncto* *Dig.* 48.8.15: "*nihil interest occidat quis an mortis causam praebeat.*" The *ratio* of this rule is no other than that he who gives cause to homicide or some other delict "*tenetur de causato homicidio vel delicto.*" (Secs. 34 and 35.)

If *Carpzovius* had told us when, according to his opinion, it may be said that a particular act was the cause of an effect and had limited the causal connection to cases in which the effect is a natural or probable consequence of the act, then there may be said to be some sense in his reasoning. He, however, quite failed to do so and probably did not realize that, if his reasoning be taken as it stands, the conclusion we may draw from it is, that whenever a certain effect has been brought about by an act, it may be said to have been intended, whether it had actually been foreseen or not, whether it was likely to ensue or not.

6. If (secs. 36 and 37), he says, such weight had to be attached to the question whether the offender had *animum directum occidendi*, the legislator would not have passed it unnoticed, as *Charles V.* did in art. 137 of the *Const. Crim. Carol.* There we read: "Every murderer or person who

kills another forfeits his own life unless he can adduce a lawful excuse." He reads this article as if the concluding phrase were meaningless and completely overlooks art. 146 in which, as regards the question of *mens rea*, the judges are referred to legal experts.

With regard to art. 148 which deals with the famous case of homicide committed by several persons and lays down that if several persons beforehand conspire together "mit fargesetztemund vereynigten willen" to help each other in killing someone, they are all liable to capital punishment, not so however when their acting in concert at a fight did not rest upon a common preconcerted design (so sie ungeschickts . . . bey eynander waren, eynander helfen etc.) in which case only the person who actually committed the homicide forfeits his life, he says: "*etiam eos qui ex inopinatu et non animo occidendi aliquem percutiunt et praeter intentionem occidunt poena gladii affici debere.*"

Carpzovius clearly misconstrues this article. The legislator intended to define the liability of persons acting in concert. If their co-operation rested upon a preconcerted design, they are all liable; if they casually got mixed in a fight only the person who actually caused the death. It is their co-operation which is described as "ungeschiekts," not the killing. If his reading were correct, intentional homicide would always be excluded in case of a fight, which is manifestly absurd.

7. He quotes Genesis 9.6: "Whoso sheddeth man's blood by man shall his blood be shed." These words, he says, are quite general, they do not specify either the manner of execution or the *animus* which accompanied the act. It is sufficient if he struck *ex proposito* or lay in wait (Exod. 21.13.) He also relies on Exod. 21.12: "He that smiteth a man so that he die, shall surely be put to death. In this verse he says, the verb used is "smite" not "kill," from which it appears that it is sufficient if he had the *animus percutiendi*. He further points out that in Numbers 35.16 a person is also put to death even in the absence of *animus occidendi*, because he struck with an instrument which commonly causes death.

It cannot be denied that the old Jewish law held principles which uncommonly resembled the *dolus indirectus*

of the 17th and 18th century. But I don't suppose that anyone will to-day seriously contend that we are bound by the principles of the old Jewish law. If the Bible were to be an authority to be still quoted in our courts surely these texts are not the only ones to be taken into consideration.

8. Finally he points out that many homicides would remain unpunished if the offender could plead that he had no intention to kill and did not think that death would ensue.

What *Carpzovius* actually does is construing a *dolus praesumptus*, not in the sense of a *dolus praesumptivè probatus*, giving the offender the opportunity to prove that he actually did not intend to kill, but a *dolus* which is necessarily implied from the conduct of the offender, in which the question whether the effect had actually been intended did not play any part at all. It is the same as the implied malice of English law. That is his cardinal mistake.

Sec. 15. For a long time his views held sway without being seriously questioned by his successors in Germany. *Leyser* (1683-1752) was, however, the first to criticise them. (*Meditat. ad Pandectas Spec.* 603.) Commenting on the formula of *versari in re illicita*, he says it is unsatisfactory; if a person, working on Sunday, and therefore doing an unlawful act, causes a person's death by his *culpa*, we are not entitled to say, that he did so wilfully.

He is also the first to lay stress on the fact, that we can only say that an effect is *willed*, when it had been foreseen, and that we can call it *intended*, when foreseen, because having foreseen the effect, the offender must be considered to have consented to it. "*Quisquis enim lethifero instrumento vulnus intendat, hic certe, si quidem recta ratione praeditus est, praevidet ex vulnere illo mortem sequi posse. Dum itaque hoc scit et tamen vulneret, in mortem adversarii consentit atque adeo non in culpa sed in dolo est.*"

Leyser is on the right track, his conclusion however that every foreseen effect is intended is too general. This is what *Boehmer*, one of the last of the older German writers which influenced our common law, conceived. *Boehmer's* last great work is his "*Meditationes in C.C.C.*" It is in this work he laid down the opinion to which he ultimately arrived and from this work I will draw in expounding his views. *Leoffler* (1 c., p. 171 and foll.) took his annotations

to *Carpzovius* as basis, in sketching B.'s views and that is the reason why *Loeffler's* conclusions do not coincide with mine.

I will enter into detail as to his views, as, according to my mind, B. was the first to correctly solve the problem, if all superfluous matter be discarded. If his contemporaries and successors had taken the trouble to digest what he learned, many an aberration would have been spared to the science of criminal law, and many a human being would not have met with an untimely death.

In his annotations to art. 137 he deals with our subject. In sec. 4 he says: "*dolum in homicidio in animo occidendi colloco, sine quo nullum datur homicidium dolosum, quod obiectum poenae capitalis esse potest.*" Those who are content either 1 with *dolus generalis*, or 2 require *animus occidendi directum*, or 3 resort to *animus nocendi*, all show lack of clear judgment. The first view handles an obscure expression, which merely complicates matters. For the question, first to be settled, what is to be understood by *dolus*, remains and moreover not every homicide committed *scienter et sponte* is capitally punished. The second view is too narrow, for there are homicides which, in the absence of *animus directus*, are still liable to capital punishment. The last view is too broad and does not sufficiently distinguish between *dolus* and *culpa*, for there are homicides committed *animo laedendi* which are *vere culposi*. In order to avoid these difficulties we must cling to the notion that in the absence of *animus occidendi* there is no *dolus*. However, we must keep in mind that this *animus occidendi* may be present in two forms: 1 the *animus directus*, when the death is directly aimed at and 2 the *animus indirectus*, when the *animus* is directed *principaliter ad laesionem ad necem vero eventualiter (dolus eventualis)*. The *animus directus* is simple, but as regards the *animus indirectus* there is more doubt. (Sec. 5) More specially it is debated whether it is a form of *culpa* or of *dolus*. Some say it is a form of *culpa*, because this *animus indirectus* is inferred from a fact undertaken for some other purpose than the death, and that is exactly the case with *homicidium culposum*, which is said to be present when it flows from an act, which commonly has this result.

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This conclusion is too general according to B. It will depend upon the circumstances of each case whether it is *dolus* or *culpa*. In sec. 6 he sets forth how to distinguish in such cases a *homicidium dolosum* from *culposum*. Before it can be said that a *homicidium animo indirecto commissum* is *vere dolosum* (B. also sees in *homicidium culposum* a case of *homicidium animo indirecto commissum* from which it appears that to him *culpa* is a *vitium voluntatis*) the following conditions must be complied with:—

1. The accused must originally have done something unlawful. This is, of course, mere historical ballast which had already been thrown overboard by *Leyser*.

2. His *animus nocendi* must have been manifested by facts, mere words not being sufficient, for words can never comply with the fifth requisite, viz., that the act should have the propensity, i.e., to cause death. (This is, of course, not true. If anyone knowing another person to suffer from heart disease wilfully frightens him by words in order to cause death, we may very well say that by his words he wilfully killed the patient.) "When I speak of *animus nocendi*," he says, "I merely determine the essence of *dolus*, and at the same time suppose it to comply with the fifth requisite." He, therefore, warns us not to seek in it a general *animus nocendi*, which, as we have already seen, he had discarded.

3. The accused must be shown to have borne a grudge or ill-will against the deceased. In the absence of such ill-will we cannot infer an intention to kill.

B. requires this because he is very careful not to capitally punish unless there is clear proof of the *animus occidendi*. He commits a mistake, very common in former times, to confound the question: what are elements of *dolus* with that of how is it to be proved, the "*begripsvraag*" with the "*bewijsvraag*." If we ask ourselves how *dolus* is to be proved, his hint is a valuable one; as regards the question what *dolus* consists of it is out of place.

4. There should be no provocation on the part of the deceased.

Here too B. is on the wrong track. Provocation does not necessarily exclude the intentional character of the killing, the *animus occidendi*. When a person has been provoked he

is not liable to capital punishment even if he intended to kill the person who gave offence, because we take into consideration the state of excitement he was in. It is from moral motives that in such case the punishment is mitigated. It is, of course, also possible that the provocation caused such an excitement that the person grieved so completely lost control of his senses that he did not actually realize what he was doing. In such case the causing of death would not have been intentional when the accused was, owing to the excitement, in such a state of mind, that he did not actually foresee the possibility of the death ensuing. In so far only provocation affects our question.

5. The deceased must have met with his death from an act of which everyone, possessed of common-sense can understand that it would easily be lethal, even if all possible skill is applied, and ordinarily or, as they say, *per se* produces death.

If we analyse his fifth requisite, which is the most important, we notice that he does not expressly state that the offender ought actually to have foreseen the death. But from his comment on this requisite in secs 6 and 7 it is sufficiently clear that he has in view cases in which the death has actually been foreseen. In sec. 7 *e.gr.*, he says: "He who intends the cause also intends the effect, not only the effect which necessarily follows from the act but also that which is easily and generally connected with it, though *principaliter* he intended some other wrongful act. *Tum utique potius vitam quam mortem mavult, sed ideo non desinit mortem velle, quam inde sequi solere sciebat.*"

In sec. 6 he makes a distinction which is very important. There he says that we can only speak of *dolus indirectus* when the noxious act "*non unice et praeclise cum nece sed aequae cum conservatione alterius connerum sit, reusque hanc praeoptare potuerit.*" If such be the case we may say that the accused preferred to save the other, but at the same time, if this were not possible, *eventualiter* consented to his death. If the act intended "*unice et solum ad destructionem tendit,*" his *dolus* is *directus*. For it is idle to contend that he thought of sparing someone's life, when he subjected him to the necessity of death, although there is just the possibility that he may be saved "*fato et sic per accidens.*"

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Before we can speak of *dolus indirectus* the act must be equally compatible with an intention not to kill the other as with one to kill him. And even then it will be *dolus indirectus* only when he knows, "*ne prudentissimus quidem artifex sibi satis prospicere potest, quominus hoc male cedat.*" (Sec. 8.)

Dolus indirectus is present, such seems to be the legitimate inference, whenever he acts without being convinced that the precautionary measures he takes will prevent the fatal consequences.

He concludes (sec. 8) by saying, "I should like that henceforth people would seek the *ratio in dolo speciali*, and abstain from using the term *dolus generalis*, which often is a meaningless phrase only confusing the discussion, so that we may get to greater clearness. For he who could not but have intended the death *eventualiter* cannot, even if he be guilty of *dolus generalis* as regards the wounding, escape from the fact that he is in *dolo speciali* as regards the death, because he at the same time consented to it. And this is the reason why I require indefinitely *animus occidendi* for *homicidium dolosum*, which *animus* is always present in *dolo directo*, but in *dolo indirecto*, only when the conditions laid down above have been fulfilled. . . . It is in this respect that *Carpzovius* made a mistake in imposing capital punishment on homicides *voluntate indirecta commissa*, whether the offender had *animus occidendi* or not and so not requiring *dolus specialis* in every case."

Loeffler, therefore, is quite mistaken, when he calls B.'s *dolus indirectus* identical with the *dolus indirectus* of his contemporaries. He had an inkling of B.'s real view when on page 173 he states: "The attitude taken up by B. towards the question of proof is a peculiar one. He decidedly rejects the idea that the *dolus indirectus* is nothing else but a *praesumptio doli*." Quite so, the *dolus indirectus* of B. was no implied *dolus*, a *dolus* which the law infers from certain facts, without enquiring into the actual state of mind of the offender. In his *dolus indirectus* he construes an actual *animus occidendi*. As a matter of fact B. was far in advance of his times and if we skip the superfluous matter from his discussion, his fundamental ideas are identical with those of the present-day Dutch and German schools.

And to my mind he adopts a criterion which is a better test to distinguish *dolus eventualis* from conscious *culpa* than many a modern one.

We have now reached a stage to fruitfully sketch the modern views on our subject as regards *dolus*.

THE MODERN DOCTRINE OF DOLUS.

Sec. 16. With regard to the question under what circumstances an effort may in law be said to have been intentionally caused the answer has been sought by modern Dutch and German writers in different ways, of which I will discuss only the two main ones, viz., the *wilstheorie* (will-theory) and the *voorstellingstheorie* (the preconception-theory.) At the outset it is advisable to mark off the debatable ground.

Taking as starting point the state of mind of the agent towards the effect of his act we may distinguish between three possible shades of *dolus* (*opzet*):—

1. The effect is directly aimed at (*oogmerk*), i.e., the wish to attain the particular effect prompted the wilful act or inaction.

2. The effect is foreseen as a necessary and inevitable sequel to the wilful act or inaction, not, however, directly aimed at, nor did the wish to cause it prompt the act: e.g., an officer commanding a submarine orders a torpedo to be launched against a ship, foreseeing that the explosion which is to follow must necessarily and inevitably kill some of the crew, his wish, however, is merely to sink the ship but not to kill the crew or some of them; or a nurse whose duty it is to attend a patient recently operated upon, notices that the bandage does not stop the bleeding and though knowing for certain that if no help is forthcoming the patient will bleed to death, abstains from warning the doctor for fear of raising his temper and the patient dies against her wish.

3. The effect caused by wilful act or inaction is foreseen as a possible consequence, the agent, however, neither wishes it nor aims at it.

The will-theory proceeds from the basis, that we can only then say that an effect has been intentionally caused, when it is willed, i.e., when the will can be said to have been directed towards the attainment of the elements of the crime.

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The upholders of this theory quite well realize that only such consequences may be said to have been willed which the agent preconceived, so that according to that theory the problem is to be stated as follows: "When may the preconceived effects of an act be said to have been willed and therefore intentionally caused and when not?"

The upholders of the preconception-theory which is of a comparatively recent date originally contended, that psychologically only an act can be said to have been willed. Willing is muscular activity, an effect can never be said to have been willed, it is merely preconceived as a possible result of muscular activity. This narrow conception of the act of volition collapsed under the criticism directed against it. The modern supporters have, therefore, discarded the older definition and now maintain that volition is such an obscure conception as to be unsuitable to serve as a basis of criminal responsibility. The effects of human acts are merely preconceived by the actor and it is this notion which is the correct test by which to judge the different shades of *mens rea*. According to them the problem should therefore be stated as follows: "When may it be said that a person has intentionally brought about the preconceived effect of his acts and when not?"

They maintain that they can give a satisfactory answer to this question without making use of the will. *Frenkel* (Bijdrage tot de Leer van het Voorwaardelijk Opzet, *Academ. Dissert.*, 1917, p. 57) quite correctly points out that "willing" is a narrower conception than "preconceiving." "We can preconceive the possibility of the happening of certain events which we do *not* will, which we reject, or which we do not *will*, while they are indifferent to us or cannot be willed by us, *e.g.*, we cannot will that it snows, we can merely wish for it, as the will can only be directed towards events which we can bring about."

If we put the further question whether all preconceived results are always willed, the reply would be, that such is not always the case, and therefore it appears that the mere preconceiving is too wide a notion to define intention. If every effect preconceived as possible is said to have been intentionally caused there would be no distinction between intention (*opzet*) and conscious *culpa* (*bewuste schuld*.)

The supporters of the preconception-theory quite realize this and they have therefore tried to draw the line between these two forms of *mens rea*. How, we will see lower down.

Sec. 17. It is common cause that in the two first cases put above the effect can be said to have been intentionally caused. The upholders of the will-theory find no difficulty in construing intention; the effect has been intentionally caused it has been willed. Psychologically there is no difficulty and it certainly is not stretching the ordinary meaning of willing too far, when we say in the second instance put that the commander of the submarine willed the death of some at least of the crew.

Let us now see how the upholders of the preconception-theory deal with these cases. I will take as an example one of the most eminent modern German jurists, Prof. *von Liszt* (*Lehrbuch des Deutschen Strafrechts*, sec. 39.) He says: "Intention (*dolus*, *opzet*) is the preconception of its effects accompanying volition. Intention is present therefore: firstly, when the effect is aimed at, *i.e.*, when the effect preconceived was the motive of the act, when the agent undertakes the act for the purpose of causing the change in the outer world, when this change was his object, its causing the purpose of his act, when it was aimed at, wished for, striven at."

This is quite true. But it is also quite plain that in explaining why we are entitled to say the effect was intentionally caused *von Liszt* at once discards his own definition of intention as merely preconceiving of the effect. If he had been true to his own definition he ought to have said that it is so because it had been preconceived. Instead he uses terms which exactly coincide with those of the will-theory. Aiming at, wishing for, striving at something is surely not the passive state of mind which characterises preconceiving. And even when we merely take into consideration the explanation he give first, *i.e.*, when the effect was the motive of the act, a circumscription which is a bit more in accordance with the preconception-theory, we notice that the distinguishing element of intention is not laid in the mere act of preconceiving, but in the way in which this preconception influenced the agent's act. He would, therefore, have been more consistent if he had said that the distinction between intention and the absence thereof lies

in the influence which the preconception exercised on the act, not merely in the act of preconceiving.

Secondly he says intention is also present when the agent foresaw the effect, though the foreseen effect was not the motive of his act, (a) when he considered the effect inevitable or (b) when he considered it possible, but in this case only when he did not arrive at the conclusion that it would not ensue (*dolus eventualis*.) (We have already seen that Boehmer practically arrived at the same conclusion as regards his *dolus indirectus*.) Von Liszt says that the same notion of *dolus eventualis* may be expressed in different terms and adopting the formula of Prof. Frank he states: "*dolus eventualis* is present, in case the effect be preconceived as possible, whenever the conviction, that the effect would inevitably follow, would not have deterred the actor from his act."

I must admit that the conclusion to which von Liszt arrives seems to be satisfactory. He, however, quite fails to tell us why in these cases intention is present. If he had tried to do so he would have been bound to make use of the terms of the will-theory.

Sec. 18. The most eminent defender of the will-theory, von Hippel, took up the thread where it had been dropped by the upholders of the preconception-theory. (See *Veigl. Darstellung des Deutschen und Aust. Strafrechts Alg., Teil III.*, p. 503 and foll.) He thinks the conclusion at which the men of the preconception-theory arrive is quite correct and proceeds to prove it as follows.

In ordinary life as well as in law and psychology the word "will" is used in a twofold sense, a narrow and a broad one. In its most narrow sense it denotes the state of mind of a person who strives at something he wishes for. At the same time it is possible—and then we use the term in its broad sense—that he intended at the same time other effects which are to him either indifferent or even undesirable, together with the effect wished for and striven at: *e.gr.*, "a lady buys a hat she keenly desires to possess, notwithstanding she very much objects to the great expense, which might even be painful to her. Did she intend to buy the hat? Naturally so. Did she intend to spend the money? Surely yes, even if she did not like it. If you deny this

you must also deny that the means to attain an end are too intended. This would be absurd." "An effect," he says, "is either intended or it is not, *tertium non datur*."

We may therefore premise: (1) That effects which are either indifferent or unpleasant may be willed together with the desired effect, and (2) that undoubtedly the means to an end are willed as well as all other effects foreseen as inevitable sequel to the act.

Now, can we say, by arguing *a contraria*, that the effects—indifferent or unpleasant—which have been merely foreseen as possible can never have been intended (willed)? Or is it possible that under certain circumstances they also may be said to have been intended and when?

We must keep in mind that we can only call such effects intended the preconception whereof had a practical significance for the actor's decision. It is only when the effect influenced the agent's decision that it can be said to have been intended. Hence it follows: when in a concrete case an indifferent or unpleasant effect foreseen as possible exercised the same practical influence on the decision of the agent as it would have done, if the effect in question had been preconceived as an inevitable concomitant of the effect striven at, then we can also say that it was intended. If an actor foresees the indifferent or unpleasant effect as a sequel to his act, he can only reason as follows: "Do I prefer the desired effect plus the unlawful one to the present state of affairs?" And it is only when the reply is in the affirmative that he will proceed to act. Then, however, psychologically the position is the same as when the effect is foreseen as an inevitable concomitant of the desired effect. It is the complex of all preconceived effects—those desired as well as those not desired—taken as a whole which influenced his conduct and therefore this complex, as a whole, must have been willed *in toto*.

Von Hippel's contention amounts therefore to this. If the actor really did not intend to bring about some of the effects which he foresaw, the possibility of their ensuing ought to have deterred him from action. When it does not exercise this influence though the agent has no reason to suppose that they would not ensue he cannot escape the reproach of having intended them. We are in such a case

not justified in distinguishing between the different foreseen effects.

He ultimately states that it is a case of *dolus eventualis* when the actor prefers the desired effect plus the unlawful effect to abstaining from the pursuit of his own interests.

The opponents of the will-theory specially object to the contention that the foreseen effects which were quite indifferent to the actor can still be said to have been intended. They say that speaking of willing in such a case is a psychological absurdity. Be this as it may, but this much is sure that in this case we have to do with a kind of *mens rea* which may be placed on a par with the other kinds of *dolus*. And to lawyers this ought to suffice.

Sec. 19. In different ways the idea of *dolus eventualis* has been formulated, which I think advisable to quote in order to bring forward clearly the state of mind of the person who acts in *dolo eventuali*. Prof. van Hamel (Inleiding tot het Nederl. Strafrecht, sec. 34, No. 5) says it is *dolus eventualis*, whenever the agent had beforehand consented to or approved of the effect, Prof. Simons (Leerboek v/b. Nederl. Strafrecht, No. 161) when the agent is so keen on the effect that he is prepared to take into the bargain, if need be, the undesired effects, or when the fact that he foresaw the effect as something certain to ensue would not have caused him to abstain from action. According to German jurists, *dolus eventualis* would be present, *i.e.*, when the agent comes to the conclusion: "Well, if the undesired effect ensues I am also game with it," or the agent, imagining the actual ensuing of the effect foreseen as possible, nevertheless proceeds to act at the risk of its ensuing, or if the agent says to himself: "whether it ensues or not, I will do it in any case."

To my mind all these expressions properly describe the mental state of the person who is guilty of *dolus eventualis*.

The writers tell us that it would be *culpa*, when the agent merely undertook a risky enterprise, when he hoped that the effect would not ensue, even if the event were probable and his hope a trivial one, whether it was based on his own skill or on some other circumstances. *Dolus* would be present, if the agent preferred his own interest to an

infringement of the legal order, *culpa* when he acted in the hope that the effect would not ensue; *culpa* it would be, if the hope that the effect would not ensue was the decisive motive of the act, when the agent expected that the effect would not ensue, etc.

To my mind the writers who are content with a mere hope that the effect would not ensue, and as far as I am aware they all seem to be content with this criterion, are on the wrong track. Take even the strongest case, *i.e.*, when the hope that the effect would not ensue was the decisive motive of the act, can we then say that the effect had not been brought about intentionally. I think not. It is *dolus eventualis* whenever the agent prefers the pursuit of his own interests to abstaining from endangering the interests of others, whenever he had consented to the forbidden effect as a sequel to his act. But such a state of mind is quite compatible with the hope that the forbidden effect would not ensue and in 90 out of the 100 cases it will exactly be the hope that it would not follow that turned the balance in favour of action. To take a practical case. A. pursued by a policeman in a street where many people are about, pulls out his revolver to fire at the policeman. He foresees the possibility of hitting some of the other people instead of the policeman; the hope that he would hit the policeman and not one of the public turned the scale in favour of the executing of his purpose, he fires, and hits one of the public instead of the policeman. Can we say that he did not intentionally inflict the wound, even if we know that the hope of hitting no one else but the policeman prompted his act? Can we say that he did not prefer the pursuit of his own interest to abstaining from endangering the life of others, merely because he hoped that it would not ensue? Surely not. If the mere hope were an excuse in 90 out of 100 cases, and perhaps in even more, the agent would quite truthfully be able to say, that without the hope that others would not be injured he would not have acted. But this does not do away with the fact that he acted at the risk of causing the forbidden effect and that he had consented to it in case it would ensue.

To my mind we must go further. We must require that he should have acted convinced that the forbidden effect not

aimed at would not follow. Only in such a case we may rightly say that he did not pursue his own interest at the cost of infringing the law, that he did not beforehand consent to the effect. Such a state of mind is incompatible with an intention to cause the effect, but such a state of mind only and not a mere hope that it would not ensue.

And then the test is such a simple one which can be understood by every person not devoid of common sense. How much more readily a jury would understand the gist of the matter, if it were told, that it could convict the accused of intentionally causing the effect, when they are convinced that he acted without the conviction that the effect would not ensue, than to explain to them that they may do so when the effect caused has had the same practical influence on the decision of the actor as it would have had if it had been preconceived as inevitably connected with the effect wished for?

Sec. 20. In conclusion, a few words on the question of proof and the object thereof. It is the actual state of mind of the wrongdoer at the moment of the act that should be enquired into. Now the state of mind of a particular person is, as a general rule, not outwardly visible. As a general rule we have no other means of proof but circumstantial evidence. Outwardly visible are only a person's acts and in proving his state of mind we generally go by these acts because they commonly are accompanied by a certain state of mind on the part of the agent, according to our experience. We are therefore prone to ask ourselves the question: "What would have been the state of mind of an ordinary person who, situate under the circumstances as the wrongdoer was, acted as he did?" And of course that is the only way of getting at his state of mind. But we must not be blind to the fact, that in making the inference, we run the risk of ascribing to the agent a state of mind, which he actually did not possess, for it is quite possible that he himself was convinced of the fact that the effect would not ensue under circumstances under which an ordinary person would not have come to that conclusion. It may be that he was a bit rash in coming to this conclusion, but that should not be, a reason not to give him the benefit thereof.

Expressly I must warn against the pernicious maxim of the English law that the law infers that a person intends the natural or probable consequences of his acts.

In adopting this maxim we completely whittle away the real difference between *dolus* and *culpa*. If the criterion suggested by me be adopted there is very little chance of a person escaping due punishment. But by all means let us once and for all drop the aberrations of past ages and do away with the notions that it is possible to say that a person intentionally caused effects which he actually did not foresee, though he ought to have foreseen them or that we are entitled in the cases of so-called "implied malice" to punish a wrongdoer for intentionally causing an effect even in the absence of proof that his actual state of mind at the time of doing the act was such that it can be justly said that he intended the effect. Apply the simple test suggested by me and simply ask, whether the offender with the forbidden effect before his eyes, proceeded to execute his purpose, without the conviction that it would not ensue.

If this be done we will no longer run the risk of falling into the pitfalls which had such fatal results in the past and caused the untimely death of thousands of human beings.

H. D. J. BODENSTEIN.

CELEBRATED CAPE TRIALS.

No. 4. WILLIAM THOMPSON AND ARCHIBALD M'MILLAN FOR MURDER.

Previous articles in this series have been concerned with cases tried in the old Court of Justice or in the Supreme Court of Cape Colony; the present deals with a case tried by a Court of Commissioners appointed and authorized by Letters Patent to try within the Colony offences committed on the High Seas. Before these Commissioners and a jury of twelve Cape Town citizens William Thompson, master, and Archibald M'Millan, chief mate, of the barque