As will hereafter be seen,[1] the hostile act of a belligerent under his sovereign's orders, if not directed by private malice, is imputable to the sovereign.

The subject of marital compulsion has just been considered.[2] The compulsion of a master is no defence to a servant, when charged with crime, unless such compulsion deprived the servant of his free agency.[3]

VII. PERSONS UNDER NECESSITY: SELF-DEFENCE.

Necessity a defence when life or other high interests are imperilled.

§ 95. Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.[4] Homicide through necessity — *i. e.* when the life of one person can be saved only by the sacrifice

837, 838. The language of Willes, J., in this case, seems to be a little too wide, unless it is taken in connection with the particular facts.

(3.) "(SUBMITTED.) A., a civil magistrate, directs B., a military officer, to order his men to fire into a mob. B. gives the order. It is obeyed, and C., a common soldier, shoots D. dead. The question whether A., B., and C. respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe, and did in fact believe, in good faith that what they did was necessary to suppress a dangerous riot. A.'s direction to B., and B.'s order to C., would not necessarily justify B. or C. in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid. Whether C. would commit a military offence if he refused to obey B.'s order, because he rightly thought it unreasonable, is a question which would have to be decided by a court-martial. I should suppose that cases might be imagined in which even a court-martial would hold that a military inferior might and ought to disobey orders on the ground of their illegality."

For *malicious* acts the subaltern is personally responsible. Infra, § 411.

[1] Infra, §§ 283, 310.

[2] Supra, § 78.

[3] See Com. *v.* Hadley, 11 Met. 66; Com. *v.* Drew, 3 Cush. 279; Com. *v.* Gillespie, 7 S. & R. 469; State *v.* Matthis, 1 Hill (S. C.) 37; State *v.* Bryant, 14 Mo. 340. Infra, § 1504.

[4] Stephen's Crim. Dig. art. 32. See R. *v.* Stratton, 21 St. Tr. 1045, cited by Sir J. Stephen.

Necessity has been frequently spoken of as Right against Right, though, according to the more recent opinion in Germany, it is more properly Privilege against Privilege, or Goods against Goods. (Gut gegan Gut.) When two privileges, equally protected by the law, collide, the question arises which is to yield. And the answer is, the lesser must yield to the greater. The greater is that which includes and conditions the other; the present and immediate is greater than the future and possible; if both are equal, self-sacrifice may require the possessor of the one to yield to the

of another — will be discussed in a subsequent chapter.[1] The issue, it should be observed, is not simply whether a particular life is to be sacrificed in case of necessity, but whether it is right for a person to commit a crime in order to save his life. The canon law prescribes that a person whose life is dependent on immediate relief may set up such necessity as a defence to a prosecution for illegally seizing such relief.[2] To the same general effect speak high English and American authorities.[3] Life, however, can usually only be taken, under the plea of necessity, when necessary for the preservation of the life of the party setting up the plea, or the preservation of the lives of relatives in the first degree.[4]

The same reasoning justifies a crew, in cases of necessity, in rising and deposing a master;[5] and a citizen in joining a rebellion, when otherwise his life would be imperilled.[6] On the same reasoning, when any important authorized industry would be imperilled by the observance of laws prohibiting labor on the Sabbath, these laws may be for the occasion disobeyed.[7]

possessor of the other; but the law only requires this surrender in cases where one person is arrayed against several. Otherwise, though there may be an invasion of privileges, there is no invasion of law. Merkel, in Holtz. ii. 137.

[1] Infra, § 510.

[2] See citations infra, § 510.

[3] See Broom's Leg. Max. 10; 1 East P. C. 70; though see 4 Bl. Com. 31; 1 Hale, 565.

[4] Rossi Traité, ii. p. 212. Berner, De impunitate propter summam necessitatem, &c. (1861); Geib, Lehrbuch, ii. 225; and an interesting compendium in Holtzendorff, Ency. ii. 180. See infra, § 510.

[5] U. S. v. Ashton, 2 Sumner, 13; U. S. v. Borden, 21 L. Rep. 100; U. S. v. Hammer, 4 Mason, 105. See infra, § 1878.

[6] See Res. v. M'Carty, 2 Dall. 86; U. S. v. Thomas, 15 Wall. 337.

[7] Com. v. Knox, 6 Mass. 76; Com. v. Conway, 3 Leg. Chron. (Pa.) 27; Murray v. Com. 24 Penn. St. 270; Crocket v. State, 33 Ind. 416.

In Lord Macaulay's Report on Indian Code, p. 52, we have the following: "Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft; yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible

§ 96. It has been sometimes said that necessity can never be advanced as a defence when the necessity is the result of the defendant's own culpable act.[1] This, however, as Berner[2] demonstrates, cannot be accepted as universally true. Thus a person who negligently causes a house to catch fire will not, by this negligence, be barred from setting up necessity as a defence, if, in rushing from a burning chamber, he should crush another in the throng; nor would a trespasser, who, upon stealing fish, should fall overboard, and in his struggle to save himself upset a boat, be barred from setting up necessity, if life should thereby be accidentally lost, because his act which put him in this situation was wrongful. But if the necessity be rashly rushed into, it may cease to be a defence.[3]

Culpability does not preclude defence.

§ 97. The distinction between necessity and self-defence consists principally in the fact that while self-defence excuses the

motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbors. We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence."

It is true that in the great majority of cases of this class the person maintaining, as against another, his own right, might act in accordance with a higher morality if he should sacrifice himself instead of maintaining his own right to the injury of another. But the State does not exact heroism from its subjects, nor does it undertake to teach self-sacrifice. It permits, as much for the interests of good order as from its inability to teach pure morality, its subjects to repel, under due restrictions, assaults on their persons or property, even though in repelling these assaults the aggressor is put in danger of his life. But self-defence, it must be remembered, is not limited to assaults. A person whose house is on fire may seize, without incurring the charge of felony, the hose of a neighbor as a means of extinguishing the fire. A person who is bathing, and whose clothes have been stolen, may snatch up clothing he may find on a clothes-line, so as not to be obliged to enter into a village naked. For these two examples I am indebted to Berner, § 85.

[1] See, to this effect, The Argo, 1 Gallis. 150; R. *v.* Dunnett, 1 C. & K. 425.

[2] Lehrbuch d. Strafrechts (1871), 140.

[3] The Joseph, 8 Cranch, 451; The New York, 3 Wheat. 59.

repulse of a wrong, necessity justifies the invasion of a right.[1] It is, therefore, essential to self-defence that it should be a defence against a present unlawful attack,[2] while necessity may be maintained though destroying conditions that are lawful. In self-defence the attack must be upon interests which it is the duty of the party assailed to defend. But the right is not limited to attacks on his own person. Whatever the law places under his protection, that he may defend according to the law.[3] Self-defence by an individual also differs from preventive punishment by a State in this, that the former hinders the crime, and is prospective, the latter punishes for the crime, and is retrospective. Since to constitute self-defence the attack must be unlawful, as a general rule, the right does not exist as against an officer armed with a legal warrant. Children, also, cannot exercise this right against their parents;[4] nor pupils against their teachers;[5] nor apprentices against their masters;[6] provided the limits of the right of correction by the assailant be not overstepped. It follows that there can be no self-defence against self-defence. Self-defence is only permissible against an *unlawful* attack. If A., unlawfully attacked by B., resorts to violent means to repel the aggression, his repulse of B. is lawful; but if B., in pursuance of the struggle, renews the attack on A., this is not self-defence, since self-defence only obtains against an unlawful attack, and A.'s attack on B. was lawful.[7]

Distinction between necessity and self-defence.

[1] See on this point, Berner, § 86; Levita, Recht der Nothwehr, 1856; Schaper, bei Holtzend. ii. p. 137. The following citations from the Roman law may be useful in this connection: —

"Melius est occurrere in tempore, quam post exitum vindicare." L. 1. c. (3. 17).

"Pudicitiam quum eriperet militi tribunus militares in exercitu C. Marii, propinquus ejus imperatoris, interfectus ab eo est, cui vim afferebat: facere enim probus adolescens periculose, quam perpiti turpiter maluit. Atque hunc ille summus vir, scelere solutum, periculo liberavit." Cicero pro Milon. c. 4. Paullus Rec. Sent. v. 23. 8.

[2] See Filkens *v.* State, 69 N. Y. 101.

[3] Infra, § 98.

[4] Infra, § 631.

[5] Infra, § 632.

[6] Infra, § 634.

[7] Infra, § 485.

The following exposition of the leading theories of self-defence was substantially given by me in the Southern Law Review for 1879, p. 366: —

I. It is maintained that when men enter into society they retain the right to protect themselves in all matters as to which the government constituted by them is unable to afford them aid. The State, it is alleged, is the creature of a social contract. It has only

§ 97 *a*. As will hereafter be seen more fully, the right of self-defence can only be appealed to to ward off a danger that is

such powers as are committed to it. All other powers are reserved. This is the view of Locke, and, as amplified by Kant, has been accepted by the school that follows this great master. The practical consequences of this view are important. If it be correct, wherever the State has not power to defend us, we can defend ourselves. A threatened attack, therefore, can be averted by violence in a thinly settled country, in which preventive justice could not be efficiently invoked; while in a country where the police is active and available, preventive violent private action would not be justifiable. The objection to this view, however, lies in the assumption that the State rests upon a social contract. No doubt our modern constitutions are the results of contracts between the parties by whom they were established. This was eminently the case with the English settlement which called William III. to the throne. The resolutions of the convention which determined his title were as much the results of a compromise between the parties who were represented in the convention as are the terms of any business contract by which several competing parties agree to settle their differences. The same observations apply to the Constitution of the United States, so often called a "compact" by its most eminent expositors. But does the State owe its *institution* to social contract? Did not the English State exist before the convention of 1688, and did not our own States exist before they agreed to establish the Federal Constitution? Is not some kind of organization a condition precedent to a contract by members of the organization? When two men meet together to establish obligatory relations, does not this presuppose an arbiter? Was there ever a time when government of some kind did not exist; and if we have to go back to the time when the family was the sole State, was not the family under the government of its head? There is no era, therefore, so it is argued, to which we can penetrate, in which men, without government, agreed to create a government with particular limitations; and it is clear we cannot point to the time in which this right of self-defence was specifically reserved. Certainly this right, springing as it does from necessity, existed before any of those modern constitutions which are on their face based on contract; and it is absurd to suppose that it was made a contractual part of patriarchal and other despotisms, whose distinctive peculiarity is that they were based on nature, or force, but not on contract. If, therefore, so it is insisted, the right of self-defence rests solely upon social contract, then it must fall with the fiction on which it is so made to rest.

II. The second view, which is taken by Hegel, and is adopted, though in varying terms, by many able writers, is, that self-defence is a retributive act. All wrong, so it is argued, is on moral grounds to be resisted. It is a negation of right, — so is this expressed by Hegel, — and it must be put down, and the right it would overthrow reëstablished. We need not, however, fall back on this peculiar phraseology in order to sustain the view now before us. Justice, it may well be argued, is presupposed by government. To yield to wrong, to refuse to resist wrong, is in itself a wrong. It is true that the State may restrict this right of the individual to resist

actual and immediate; though in determining what is immediate we must be guided by the conditions of each particular case.

wrong; but, unless so restricted, the right continues to exist. The right is not the creature of contract. It is a high moral duty as well as a right. I may be the sole inhabitant of a desert island, and the cruelty which I interfere to stop, under this sense of duty and right, may be that which one wild animal wantonly, and with needless pain, inflicts upon another. Or, under the stress of the same sense of duty, acting in a higher sphere, I may interpose to prevent one savage, who visits the island, from unjustifiably injuring another, or unjustifiably injuring myself. If I so do, I may be acting so as to promote my own interests, yet at the same time I may be acting, and ought to be acting, as an avenger of the right and a foe to wrong. "Resistance to tyrants is obedience to God," is, in this view, no mere meaningless platitude. Tyranny, and outrages of all kinds which involve an invasion of right, I have a right to repel. To this view it is indeed objected that it is substantially lynch law, and justifies volunteer crusaders, for what they call right, doing what would be really a vast amount of wrong. It should, however, be remembered that by the limitation of this very principle it is subject to the law of the land. It can only act in cases in which the law of the land leaves it free to act.

III. A third view is taken by thinkers of the utilitarian and materialistic school. Ignoring, as they do, the existence of a conscience as a supreme rule, — looking to utility, not duty, as the proper spring of action, — they regard jurisprudence as a system adopted simply for the protection of the interests of society, and of the individuals of which it is composed, and self-defence as the creature of jurisprudence. Deriving, as they claim it does, its authority exclusively from the State, — referable in no sense either to the law of nature or to a social contract prior to government, — it is limited by the State, from which alone it springs. "Right," in this sense, to quote from one of the most recent advocates of this scheme, "is simply the protection of rights. It results from positive law. It is practical. Its object is the maintenance of the common good, involving the maintenance of the welfare of the individual. But wrong constantly puts itself in opposition to right. It is necessary, therefore, for right not only to issue its rules for the maintenance of the rights it undertakes to protect, but to enforce these rules. For this it must have its own organ. To individual voluntary action it cannot trust. Individual strength is, in most cases, not sufficient for this purpose; individual purposes are not systematic and constant enough. The State is the organ through which the repression of wrong is to be effected. For this purpose it works through several instruments. It employs for this purpose schools, sanitary agencies, and police agencies; and it also employs penal discipline; for punishment thus inflicted is inflicted for the protection of rights, and the hindrance of injuries to such rights. Self-defence is a method of preventing such injuries. The State, as the organ of right, appointed to protect the property and persons of its subjects, cannot see them assailed without intervening. It cannot, it is true, put down all such assaults, but it certainly will not hinder such assaults from being hindered; it will interpose no obstacle in the way of such hindrance. It is true that

The fact, however, that an attack has been expected does no preclude me from repelling it when it comes. A public man,

self-defence is not an original, natural right, independent of the State. But this does not conflict with self-defence being a right licensed, and hence authorized by the State. If, in its exercise, the rights of others — their property or their persons — be necessarily impaired, this is incident to the discharge of the functions which the State thus imposes. The party under this necessity is the agent of the State in hindering an unlawful act. It is not necessary, in order to enable him to intervene, that his mode of defence should be proportioned to the value of the interests attacked, or that the attack should have been unforeseen by him, or that it should have been impossible for him to have avoided the collision." [The above is a condensed translation of the position taken by Janka, in his treatise on Nothstand. Erlangen, 1878.]

Let us next consider what acceptance the theories just stated have met with in the United States.

I. *The social-contract theory*, which was generally adopted by the English Whigs, was brought by the colonists to this country, and is frequently referred to by our early writers as the basis of government. So far as the *origin* of government is concerned, this theory, as we have seen, cannot be sustained. So far from government being started by contract, there is no contract that does not presuppose a government. But all governments must rest, mediately or immediately, on the will of the people, and are susceptible of modification, from time to time, as this will prescribes. And all governments with which we have to do are more or less limited. Certain specified powers are vested in the government, and all others are reserved. This is eminently the case in the United States. By express limitations of the Federal Constitution, "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Analogous provisions are contained in the several state Constitutions.

Government in this way being confined to the exercise of certain specified powers, the right to exercise all other functions remains to the people; and as one of these functions may be mentioned self-defence. Not merely may the person be thus defended from assault; not only may property be thus secured; but nuisances may be abated by any member of the community whom they affect. In fact, when we glance at the cases in which invasions of rights are repelled, we find that, in by far the greater number of instances, this repulsion is by private act. A libel, for instance, is rarely met by public prosecution; the party libelled, if repelling the attack at all, usually repels it by denial and retort. A stone lies in my path in a public highway; I throw it off the path, without calling on the public authorities to effect a removal. Deodorizing compounds are used in multitudes of cases, by private persons, to correct unhealthy exhalations outside of their premises, though in most of these cases prosecutions for nuisance might lie to abate the nuisance. An unwelcome visitor in a house can be ejected by force if he refuse to leave peaceably. Collins *v.* Thomas, 1 F. & F. 416; Overdeer *v.*

for instance, as was the case with the Duke of Wellington during the Reform Bill riots, may have good grounds to expect an attack on his house; but this does not prevent him from vigorously defending his house when the assault is actually made.[1] It has also been said that the right does not exist when the party attacked had an opportunity of calling on the public authorities to intervene. This, however, is not universally true. As

Right may be exercised even though public authorities might have been called upon previously.

Lewis, 1 W. & S. 90. Infra, § 621. As to assaults, we have only to walk the streets in the neighborhood of tippling-houses to be convinced that there are a hundred cases of assault that are settled out of court, to one which is brought to the courts to settle. But when a man insists upon continuing a nuisance, under the protection of fire-arms, then adequate force may be used to compel him to desist. I have a right to stop, by my own action, whatever impairs my rights, unless the exclusive right to do so is ceded to the State. And, for the purpose, I have a right to use appropriate force wherever this is requisite.

II. *Retribution.* — The second theory, by which the right of self-defence is based upon the duty to cancel or extinguish wrong wherever it exists, unless when restricted by the State (the Hegelian view), meets with little response in our jurisprudence. We must *hinder* wrong, when such wrong takes the shape of a felony, whenever the attempt is made to perpetrate it in our presence. But after wrong is committed, we have no right to step in and punish the offender. The only exception is that, when crime has been committed, it may be lawful to bring upon it, by publications suitable for the purpose, public disgrace. The action of the New York newspapers, in 1874, in unearthing the villainy of Tweed, would have exposed those concerned in these publications to prosecutions for libel had it not been that such exposures were properly within the range of the duty of an independent press. The numerous cases, also, in which privilege is a defence to indictments for libel are illustrations of the same right. In such cases, the severest retribution may be inflicted by private persons. A man's life may be made wretched by a privileged publication; and this publication may be designed, and may operate, as a punishment for crime. Yet privileged communications are held justifiable by the law. Parents, also teachers, guardians, and officers of prisons are authorized to inflict chastisement by way of punishment. In no other cases, however, are private persons permitted to punish an offender after the offence has been committed.

III. *Prevention.* — However plausible may be the justification of self-defence on this ground, it cannot obtain under a government such as our own, with limited powers. If the State cannot constitutionally prevent crime by arresting and confining, in advance, persons who are supposed to have a tendency to crime, *a fortiori*, this function does not belong to private individuals. See supra, §§ 7, 8–9. The right of self-defence only applies to the repulsion of an attack actually in progress. Infra, § 493.

I conclude, therefore, that self-defence is a natural right, subject to restriction by the State.

[1] See R. v. Scully, 1 C. & P. 319. Infra, §§ 487–496.

there are few attacks which the injured party could not have more or less clearly expected, it would be incumbent on him, if the position here contested is sound, to call on the government for protection in every case, or else to lose his right. But to call on the government for aid is only necessary when such aid can be promptly and effectively given. There are many cases of suspicion, also, in which a prudent man would decline to call in governmental aid, feeling that the case is not sufficiently strong to justify so extreme a remedy. As a rule, therefore, we cannot say that self-defence cannot be resorted to when the party asserting the right could have protected himself by calling in the government.[1] Of this position we have abundant illustrations in cases of nuisance which a private citizen is authorized to abate without appealing to the law.[2] "At common law," so speaks a learned New Jersey judge,[3] "it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it adjudged such by a legal tribunal. . . . . This common law right still continues. Any citizen, acting either as an individual or as a public official under the orders of local or municipal authorities, ... may abate what the common law deems a public nuisance."[4] We must not push this right so far as to sustain deliberate aggressions on others. But we ought to maintain it so far as is proper for the defence of self. There is no pebble in our way on the highway that we could not remove by action of law. But there is no pebble on the highway as to which an action of law would not be absurd. We kick it out of the way, just as we exert the right of self-defence in innumerable other cases in which going to law would be equally absurd. And we may in like manner forcibly remove an intruder from a house or a railway car without stopping to call in a magistrate.[5] If so we may defend life and limb, though the attack is one we may have so far anticipated as to have been able to call in official aid in advance.[6]

[1] It was on this reason that the clause in the German Code, limiting in this respect the right of self-defence, was ultimately stricken out. See Berner, § 86; and see infra, § 487. Evers *v.* People, 6 Thomp. & C. 156; 3 Hun, 716; State *v.* Doty, 5 Oregon, 491.

[2] See infra, § 1426.

[3] Manhattan Man. Co. *v.* Van Keuren, 23 N. J. Eq. 251.

[4] See Brightman *v.* Bristol, 65 Me. 426; Earp *v.* Lee, 71 Ill. 193.

[5] Infra, §§ 621–22; Overdeer *v.* Lewis, 1 W. & S. 90.

[6] As illustrating the principle in the text may be mentioned a case in North

Objects for which self-defence may be exerted.

§ 98. Whoever possesses a right is entitled to defend that right. No matter what may be the character of the right, it cannot lawfully be taken from the owner by violence; and violence applied for this purpose he may violently resist. The Roman law is emphatic on this point, making the right to defend one of the incidents of the right to possess. "Vim vi repellere licet, idque jus natura comparatur."[1] "Ut vim atque injuriam propulsemus, juris gentium est."[2] "Vim vi defendere omnes leges omniaque jura permittunt."[3] Nothing, as has been well said,[4] can be more general than these utterances. In our own law there have been tendencies to limit the right to the defence of home, of person, and of relatives in the first degree. No doubt there is a peculiar sanctity attached to these conditions which justifies even the taking of life in their defence. But this circumstance must not make us insensible to the fact that wherever a right has any value, then its possessor may protect it forcibly from assault.[5]

Flight not necessary to self-defence.

§ 99. It has also been said that a party who can fly from an aggressor is bound to fly, and cannot set up self-defence. This, as we will hereafter see,[6] is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life. But as an elementary proposition it is not true that if I can evade an attack by flight then I must fly to evade the attack. If this were the law, few persons in times of trouble could remain at their posts. This, however, by confining the right of self-defence to attacks of which there could be no prior suspicion, would virtually abrogate the right. For it would be to say that the right of self-defence only exists when there is nothing to defend. And besides, the fundamental principle is that right is not required to yield to wrong.[7]

Carolina decided in 1878, where it was held that the owner of land has the right to arrest and repress, as a nuisance, a person using loud and obscene language on the highway in front of such land; and when the person so offending is armed with a pistol, the limitation *molliter manus* does not apply. State *v.* Davis, 80 N. C. 351; citing State *v.* Perry, 5 Jones, 9; State *v.* Robbins, 78 N. C. 431.

[1] L. i. § 27 D. de vi.

[2] L. 3. D. de just. et jure.

[3] L. 45. D. § 4, ut leg. Aq.

[4] Berner, § 87.

[5] Infra, §§ 480, 495–508; and see particularly § 501.

[6] Infra, § 486.

[7] This is a settled rule of Roman law. See Clarus, Rec. Sent. Levita, p. 237; and see cases cited infra, §§ 486–501.

§ 100. We must remand to future sections the discussion of the question, what degree of violence may be used in defence of home.[1] It is only necessary here to repeat what has just been said, that the right to property of all kinds may be forcibly defended when it is forcibly attacked, and that the degree of force to be used is to be measured not by the value of the article, but by the degree of force used in the attack. Were it otherwise, the property of the poor would be discriminated against, and the right to defend property limited only to those rich enough to possess property of value. Nor is it possible to gauge our attachment to any piece of property by its mere money standard. An article of no money value may conduce greatly to my comfort and happiness; and beside this, I have a right to repel spoliation even of things of little value, on the ground that yielding to spoliation in little things is a yielding to spoliation in all things.

Defence of property justifiable.

The right extends also to mere possession, so that the bare possessor of a thing has a right forcibly to repel a forcible attempt to take it from him.[2] Thus, a party having a right to the use of a well, though such right be not exclusive, may repel by force an intruder attempting to draw from it.[3]

§ 101. An interesting question, which will be hereafter more fully discussed, arises as to the extension of the right of self-defence to injuries to honor. The cases which have heretofore been adjudicated in this relation have been mainly those in which persons whose character has been assailed have assaulted or killed the assailant. On these facts it

But not violent defence of honor.

[1] See infra, §§ 495–508, 1112. That an assault in defence of personal right is justifiable, see infra, §§ 501, 621. R. v. Mitton, 3 C. & P. 31; R. v. Driscoll, C. & M. 214; State v. Elliot, 11 N. H. 540; State v. Miller, 12 Vt. 437; Com. v. Kennard, 8 Pick. 133; Com. v. Clark, 2 Met. (Mass.) 23; Com. v. Power, 7 Met. (Mass.) 596; Com. v. Dougherty, 107 Mass. 243; Com. v. Mann, 116 Mass. 58; Filkins v. People, 69 N. Y. 101; Parsons v. Brown, 15 Barb. 590; State v. Gibson, 10 Ired. 214; State v. Covington, 70 N. C. 71. See, however, Hendrix v. State, 50 Ala. 148. The law is thus stated by Sir J. Stephen (Steph. Dig. Cr. L. art. 200): "Any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is, notwithstanding, continued, he is in the position of a person assaulted in the employment of lawful force against the person of another." Infra, § 486 *a*.

[2] See infra, § 501.

[3] Roach v. People, 77 Ill. 25.

has been uniformly held, as an elementary principle, that no words, no matter how insulting, will excuse an assault.[1] At the same time insults of all kinds, words as well as blows, are to be taken into consideration in determining how far hot blood can be considered to exist.[2] It is easy, also, to conceive of cases in which a party insulted is entitled to remove the instrument of insult; and we may adopt as sound law the rulings of a German court,[3] that a person insulted by a libel has a right to remove it from a wall on which it is posted.[4]

Danger must be immediate and defence not to exceed attack.

§ 102. A future danger, as we will hereafter see, cannot be anticipated by an attack upon the expected aggressor, unless this be the only means of warding off the attack.[5] Nor is the party attacked excusable in using greater force than is necessary to repel the attack,[6] remembering that the danger of the attack is to be tested, as will be hereafter noticed, from the stand-point of the party attacked, not from that of the jury or of an ideal person. Whoever, by his misconduct, puts another in a condition in which the mind cannot act with reasonableness, cannot complain that such reasonableness is wanting. If the injured party acts negligently or unfairly in coming to the conclusion that he is in danger of life, then he is liable for the consequences if he exceed the limit of self-defence; but if his conclusion be honest and non-negligent, then the party assailing him must bear the consequences of the mistake. This view has been maintained by the German courts;[7] and will be vindicated fully hereafter.[8] The same lim-

[1] See infra, § 619.

[2] Infra, §§ 455 *et seq.*

[3] Archiv. 1848, p. 575.

[4] See also Du Bost *v.* Beresford, 2 Camp. 511; cited Whart. on Evid. § 253; and infra. § 501.

[5] See infra, §§ 484, 493, 498.

[6] Com. *v.* Dougherty, 107 Mass. 243; State *v.* Ross, 26 N. J. L. 224; State *v.* Lazarus, 1 Const. C. R. 34. Infra, § 624.

[7] Archiv. 1848, p. 592.

[8] See infra, §§ 488–491.

In the same connection we may notice the following striking remarks from a leading German commentator: —

If the State would not expose to spoliation the rights she undertakes to protect, — rights such as life, limb, freedom, honor, chastity, property of all kinds, family relationships, — she must leave the limits of self-defence to be determined, not by the tribunal by whom the case is ultimately to be coolly tried, but by the individual assaulted himself, according to his capacity as exercised in the excitement, the confusion, and the surprise of the attack. It is particularly to be kept in mind that in self-defence the con-

itation, prohibiting an excess of force, applies to the private abatement of nuisances.[1]

When the danger is over, it is scarcely necessary to add, the right of self-defence ceases.[2] It follows that when a thing which is the object of attack is finally taken from him, the loser cannot ordinarily use violence to recover it. For this purpose he must resort to process of law. The technical right extends to the defence of a thing before it is taken; not to its recovery after it is taken. "Quamvis vim vi repellere omnes leges et omnia jura permittant, — tamen id debet fieri *cum moderamine inculpatae tutelae, non ad sumendam vindictam*, sed ad propulsandam injuriam."[3] If, however, he can retake it without undue violence he may do so.[4] But an assault on his person he cannot punish when the danger is over. His right is defence, not retribution.[5]

§ 103. The inference to be drawn from the weapon used[6] applies with peculiar force to cases of self-defence. A man who, when attacked, draws out a pistol and shoots down his assailant, cannot, under ordinary circumstances, claim that he was surprised by the attack. No

Inference to be drawn from weapon.

flict is not simply between power against power, but between superior and prepared against inferior and unprepared power; that the assailant is rarely able to convince the assailed that the attack has an object less destructive than at the first glance it appeared to be; that the assailant knew this when he made the venture; that he in this way knowingly exposed his life and limbs to the violence, wild and frantic as it would necessarily be, which he himself called forth in the person assailed. Schaper, in Holtz. Straf. ii. 139.

[1] Infra, § 1426. See State *v.* Paul, 5 R. I. 185; State *v.* Parrott, 71 N. C. 311.

[2] See infra, §§ 484 *et seq.*

[3] C. 2. x. De homic. v. 12. c. 18. eod. Berner, § 88. Infra, § 462.

[4] State *v.* Elliot, 11 N. H. 540.

[5] See infra, § 487. R. *v.* Driscoll, C. & M. 214; R. *v.* Mitton, 3 C. & P. 31; Com. *v.* Ford, 5 Gray, 475; People *v.* Caryl, 3 Parker C. R. 326; State *v.* Lawry, 4 Nev. 161; Territory *v.* Drennan, 1 Montana, 41.

The right (self-defence) can only be exercised at the moment of the attack. It cannot, therefore, be exercised against the absent, though they be instigators of an actual attack. But between those present and acting among the assailants the assailed is not bound to distinguish between the several degrees of activity or responsibility. Nor is he bound to call upon any of them to say what they purpose, and in what way they mean to carry out their purpose, since this depends upon contingencies which no one of them can preascertain. Nor does retreat of the assailant by itself neces-

[6] Infra, § 122.

one in a civilized society, where the law gives protection to those in danger, is entitled to carry concealed weapons, in order to meet an attack which he could avert by the ordinary processes of law. If, however, the weapon is one which it is customary to carry, or if it is caught up on a sudden, in fright or in hot blood, by the assailed, then no inference of premeditation can be drawn.[1]

sarily exclude the idea of a perilous attack. An assailant may retreat as a feint, as is sometimes the case with robbers in attacks on country seats, and it may be added in other cases of malicious assaults. Schaper, in Holtz. Straf. ii. 145.

[1] See fully Whart. on Crim. Evid. § 764; and infra, § 484 *et seq.*