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STATE
v.
BROWN et al.

Court of Oyer and Terminer of Delaware. Newcastle County.

February 3, 1896.

Daniel Brown, John J. Swan, and Michael Lynch were tried, on an indictment charging

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murder in the second degree, for the killing of Leon Pisa. Lynch was acquitted, and Brown and Swan convicted.

Robert C. White, Atty. Gen., and Peter L. Cooper, Dep. Atty. Gen., for the State.

Andrew C. Gray, Herbert H. Ward, Walter H. Hayes, and John K. Bradford, for defendants.

Before LORE, C. J., and GRUBB, CULLEN, and MARVEL, JJ.

Messrs. Andrew C. Gray and Herbert H. Ward, counsel for said Brown and Swan made an application to the court, stating that the heart of the deceased was in the possession of the coroner of Newcastle county, and under the control of the attorney general, and that an expert analysis and examination of it was material to the defense, and asked for an order on the coroner and the attorney general to produce said heart (it not to be taken from the custody of the coroner or any person designated by the attorney general), to be examined, in order that their expert might testify in the case intelligently.

The Court (LORE, C. J.). We refuse to so order at this time. The parties have not yet been indicted, and there is no case before this court.

At the trial Walter H. Hayes, representing Michael Lynch, one of the said defendants, stated to the court that there was no rule in the court of oyer and terminer, as there was in the superior court, as to counsel examining and cross-examining a witness, and that in this case he and Mr. John K. Bradford represented Michael Lynch, while Messrs. Gray and Ward represented the other two defendants, Brown and Swan, and asked that one of the counsel for Lynch, and also one of the counsel for Brown and Swan, be allowed by the court to cross-examine the state's witnesses.

It was so ordered by the court.

Atty. Gen. White, being content with the jury as impaneled, reserved his challenges until after the defense had challenged three jurors, and then claimed the right to challenge any objectionable man that might be placed in the box by reason of the exercise of any or all of the three challenges to which the defense were still entitled. This was objected to by Messrs. Hayes and Ward, who contended that the state could not reserve its challenges, and that, having passed them three times, it had thereby exhausted the number of challenges to which it was entitled, just the same as if the right of challenge had been exercised in each case,—citing the unreported case of State v. Farra, about which there was difference of recollection among the members of the bar.

The Court (LORE, C. J.). There is doubt about this ruling in the Farra Case, and we think we should rule upon this matter. If you will think for a moment, you will find that the rule applying in civil cases is that each counsel has an opportunity to pass upon the whole jury, except the last

challenge, and if he passes his right to challenge, there is reason why he should forfeit that right. But here we are confronted with the peculiar case of one party challenging six, and the other only three. The reason which would sustain the rule in a civil case does not hold here, because, as we explained, there (excepting the last man) each side passes upon the entire jury, but here the state passes only upon nine jurors, and the other three men are put in the box irrespective of the right of the state to say whether they are proper men or not. The reason ceases; and I should be very unwilling to be bound by such a precedent as cited, unless it was perfectly clear. We think you have a right to reserve your challenges.

Mr. Ward: After the last challenge?

The Court (Lore, C. J.): Oh, no; when they waive their last challenge, that is the end of it. When you put your last man in, if they waive, they lose their last challenge.

Atty. Gen. White: Does the court rule that we lose our last challenge in any event?

Lore, C. J.: You have a right to challenge until you have exhausted your three challenges.

Mr. Hayes: We ask that they exercise their challenge now, or waive it as to the last man.

The Court (Lore, C. J.): We will not make that ruling. Our ruling is that they have a right to reserve their challenge, and, after three challenges, to exercise it at any time, until their right is exhausted.

Mr. Hayes: As to any member of the jury?

Lore, C. J.: No; as to any new man.

Mr. White: Their theory is, that we are bound either to challenge Mr. Bendler now, or have no other challenge at all.

Lore, C. J.: No; I understand that their position is, if you waive the challenge of Mr. Bendler, you cannot challenge him hereafter.

Counsel on each side here announce that the jury is acceptable, and no further challenges are made.

Attorney General White here stated to the court that it had been the practice in Sussex county, in a case of murder in the second degree (State v. Lodge), to not allow the jury to separate, but to keep them together, under the charge of a bailiff, until the verdict was rendered, and asked that such an order might be made in the present case. Counsel for defendants neither opposed nor assented, but stated that it was a matter for the discretion of the court.

LORE, C. J. A majority of the court think that, in felonies of as high a grade as murder in the second degree, the jury ought not to separate.

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David M. Waples, being produced by the state as a witness, was objected to by the counsel for the defense, on the ground of incompetency to testify, by reason of insanity. After hearing the evidence of Dr. Hiram R. Burton, one of the physicians who had signed the certificate upon which Waples was admitted to the state insane asylum at Farnhurst as a patient, and of Dr. Hammond, assistant physician at Farnhurst, as to his mental condition, and it having been shown by the latter witness that Waples had never been formally discharged from the asylum as cured, but only allowed to leave on parol, Waples was himself questioned by GRUBB, J., and at length by counsel, with a view of testing his sanity, after which, the court, being divided equally upon the question of his competency as a witness, made the following remarks:

LORE, C. J. We are equally divided upon this question. Judge CULLEN and myself are clearly of the opinion that this witness ought not to testify. According to the statute law of this state, he has been proven to be insane, and, as such, has been committed to the insane asylum of the state of Delaware, at Farnhurst, where he was received as such, and for a time coffined. Finding that he was not violent, and therefore could be safely left to the care of his family, upon parol he was permitted to go home, where he has been for some time. Insanity, once proved, remains, until it is removed beyond a doubt. This was decided in the well-contested, hotly-contested case of State v. Thomas, where Thomas was charged with killing his little girl. He was proved by Dr. Black, and other physicians, in their judgment, to be insane a short time—one or two days—before. Judge Comegys, who was the chief justice, maintained that, notwithstanding he may have been insane at that time, unless he was insane at the time of the commission of the act, and they proved such, it would be removed. Mr. Gray contended, with great force, that, insanity once proved, the cloud remains, and must be rebutted with positive testimony; and, after a most elaborate argument, and against the personal conviction of Chief Justice Comegys, the court so ruled. That is the status of the case, upon the facts, of these men before us, and the law governing it; two witnesses, competent, skillful physicians of this state, under the law, having committed him as insane. One of the physicians in charge of the institution says he was not discharged as a sane man, and his judgment is that the insane condition remains to this day, so as to unfit him to give a correct statement of what occurred. These men are being tried, not for their lives, but upon a charge in which the penalty is imprisonment for life, if found guilty. I am not willing, where that cloud once exists, unless it is clearly removed, that any man's life or any man's liberty should depend upon such testimony.

CULLEN, J. I fully concur with the views expressed by my learned Brother, but there are other grounds upon which I rest this case. Unquestionably it is law, recognized by several decisions in our state, that where a man is proved to be insane, it remains, and shifts the burden of proof upon the other side to show the contrary. Notwithstanding that fact, if a person be confined in a lunatic asylum, and is afterwards brought forward as a witness, then it is a matter in the discretion of the court to determine as to his capacity. That capacity is to be determined from the facts adduced before the court. Because the parties cannot produce that evidence is not a matter with "the court. The testimony here, on the part of two physicians, is that this man could not give a correct statement,—that this man was not a man to be relied upon, so far as his statements are concerned. That is Dr. Burton's testimony. Dr. Hammond says that, during the time he was there, reliance could not be placed upon any statement he might make. So far as his testimony is concerned, he says that, excepting upon this occasion, he has not seen him since he left the asylum. If the state had produced witnesses here, and had shown that, though he was utterly unfit at the time to testify, but that reason had been restored, notwithstanding the fact that he remained in the asylum, that would have brought it within the reasoning of Judge Fielding, unquestionably. But what have they here to show us that? Nothing in the world but the testimony of the party himself. Is there anything that goes to contradict, or in any way impair, the impression made upon our minds by the two witnesses who have testified here of this man's inability? For these reasons, I concur with the Chief Justice.

GRUBB, J. The defense have objected to the admissibility of David M. Waples as a witness for the state, on the ground that he is now incompetent to testify by reason of his alleged insanity. On this question we are equally divided. As Judge MARVEL and myself are on the prevailing side, in favor of his admissibility, we deem it proper to present the reasons for our decision, especially as our dissenting associates have expressed their views.

It is the duty of the court to hold impartially the scales of justice between the prisoner and the state, and to guard carefully the rights of both. This objection is now made to a witness for the state. Hereafter it may be urged against a witness for the accused. Hence the importance of its careful decision. It is not the credibility, but the competency, of the proposed witness which is now to be decided. The question Is, not whether what he may say under oath shall be believed by the jury,—that is for a future stage of this oase,—but whether or not he is now mentally competent, so far as to be allowed to testify as a witness for the

state, subject to the right of the accused to show to the jury, by his cross-examination, or by the inconsistency of his testimony with the satisfactory evidence in the case, that he is unreliable, and unworthy of credit, in whole or in part. His credibility is for the jury to determine, while his competency is a preliminary question for the exclusive decision of the court. The only evidence before us touching his competency is that furnished by the certificate of his admission to the state hospital; by the sworn testimony of Dr. Burton, who signed it, and of Dr. Hammond, a hospital medical attendant; and by our own personal examination of the unsworn witness, Waples, himself. It appears, from the testimony, that Waples was admitted, under the statute, to the state hospital, June 5, 1895, upon the certificate of Drs. Burton and Marsh of his then being, in their judgment, a proper subject for hospital care and treatment; that he was an inmate therein at the time of the alleged slaying of Pisa, on October 5, 1895; and that he was dismissed therefrom, though not formally discharged, on November 28th, about three weeks thereafter.

It is now well settled that every person, as a general rule, tendered as a witness, is presumed to be sane, and competent to testify before the jury, until the contrary is shown to the satisfaction of the court. Therefore, in this instance, the onus is upon the accused to show, not only that Waples is insane, but that his insanity is of such a nature and extent as to render him mentally incompetent in respect to relating to this jury the facts of said homicide, which he witnessed at the time of their occurrence, and also in respect to now comprehending the nature and obligation of an oath. Formerly, insanity was very imperfectly understood, and consequently, according to the earlier common-law doctrine, every insane person was deemed to be wholly and absolutely non compos mentis, and incompetent to testify as a witness. But, in more recent times, the courts, keeping pace with the progress of science and philanthropy, have greatly relaxed the ancient rigor of the common law in respect to the insane, and have materially modified the former strictness of the rule regarding their incompetency as witnesses. The modern doctrine was formally adopted and announced, in England, in 1851, in Reg. v. Hill, 2 Denison, Crown Cas. 254 (6 British C. C. 255). In 1882 this doctrine was approved and declared by the supreme court of the United States, in District of Columbia v. Armes, 107 U. S. 519-526 , 2 Sup. Ct. 840, 842, as follows: "It is undoubtedly true that a lunatic or insane person may, from tbe condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must De passed upon by the court, and, to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, while there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not affect individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard.* * *The general rule, therefore, is that a lunatic, or person affected with insanity, is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity." This view has also been adopted by various state courts of last resort, and by text writers of the highest authority, and may now be regarded as firmly established, in both this country and in England. Coleman v. Com., 25 Grat. 865; Holcomb v. Holcomb, **28 Conn. 177** ; 2 Tayl. Ev. § 1875; Whart. Cr. Ev. §§ 370-373. In view of the law as thus established, we, on our side of the court, do not consider that it can justly be held that the defense, by the evidence of said certificate of admission and the testimony of Dr. Burton and Dr. Hammond, especially when taken in connection with Waples' satisfactory personal examination by the court, have satisfactorily proven that, either at the time of said homicide or at this hearing before us, Waples' insanity was or is of such a nature and extent that he is now mentally incapable of apprehending the nature and obligation of an oath, and of giving a correct or reasonable account of the facts of that fatal occurrence.

The claim that the certificate itself affords a prima facie presumption of insanity to that extent is not warranted by either the purpose of the statute or the tenor of the certificate. The design of both is merely to provide for the admission of proper cases for care and treatment in this public hospital, and to exclude all others. In purpose or effect, it never was the legislative design to pass upon either the competency of a witness or the responsibility of one charged with crime. The statute uses the word "insane," not in the ancient, restricted sense, but in the modern, general, and broad sense, of "insanity," embracing various forms and degrees of mental disease and derangement, from total to partial insanity, and from whatsoever cause. If this interpretation be not sound, then the beneficent and reasonable purpose of the statute will be defeated,

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and many really proper and deserving patients, who are totally demented, or absolutely incompetent or irresponsible mentally, must either be now put out, or hereafter kept out, of the state hospital. Hence, since "insanity," as used in the certificate, may mean any form or degree of mental derangement, greater or less, which may, in the statutory contemplation, be proper for care and treatment in the hospital, it follows that said certificate does not necessarily warrant the presumption that the patient named therein is mentally incompetent to testify in any case. Therefore, additional evidence is necessary to establish such incompetency. The only additional evidence offered by the defense for this purpose is the testimony of Dr. Burton and Dr. Hammond. Dr. Burton has testified, in substance, that he does not think Waples was competent to testify to what occurred in his presence on June 5th last, as, also, has Dr. Hammond, that he does not think that reliance could be placed on Waples' memory and judgment during the time he was an inmate of the hospital. Prom these opinions we are asked to infer that Waples is not now competent to testify respecting the facts surrounding the alleged slaying of Pisa on October 5th last. But as we, on our side of the court, do not consider that these opinions are warranted by the facts before us, we cannot so conclude.

Both Dr. Burton and Dr. Hammond have been examined as medical experts. The value of expert testimony depends on the impartiality, learning, experience, and judgment of the expert in respect to the subject of investigation. The court should carefully consider the expert's means of knowledge, and the reasons he assigns for the opinion he has given, and give or withhold credence to his testimony as they may find his qualifications sufficient, and his reason satisfactory, or otherwise. The testimony of experts is to be considered like any other testimony, and is to be tried by the same tests, and receive just so much credit and weight as the court may deem it entitled to, viewed in connection with all the evidence before it. In the present instance Dr. Burton has testified that he is not an expert in mental diseases, and also that he has never examined Waples since he signed the certificate for his admission to the state hospital. The fact is that he never examined him with respect to his competency as a witness, but solely for the purpose of determining whether or not he was a proper subject for care and treatment in said institution. Nor did Dr. Hammond ever examine Waples with any particular reference to his mental competency as a witness. In his testimony he has expressly admitted that he has known nothing of him since he left the hospital, and has no personal knowledge of his present mental condition. Dr. Burton's testimony clearly discloses that his opinion of Waples' mental condition was largely based upon information derived from his family and others, who are not brought here to testify under oath, and subject to the test of cross-examination. His examination of Waples was confined to three visits, all made within 10 days. Upon his first and second visits he was unable to certify that he was a proper subject for admission to the hospital. Upon his third visit he found him distracted by paroxysms of pain in the head, considered him deranged, possibly, as he supposed, by nocturnal epileptic fits, of which he had no proof or information, however, and thereupon determined that he was a proper patient for the hospital, and signed the required certificate.

The only manifestations of Waples' insanity mentioned by Dr. Burton as grounds for his opinion of his incompetency as a witness were violence and neglect of business after the paroxysms of pain in his head, complaints of a conspiracy by others to Injure him, and Dr. Burton's own mere conjecture of nocturnal fits of epilepsy. But the violence and neglect of

business might be the natural result of his paroxysms of pain. The conspiracy was explained in the course of Waples' examination before us, during which it appeared that he had, a few days before Dr. Burton's first visit to him, been temporarily in custody on a criminal charge. Lastly, Dr. Burton's theory of nocturnal epilepsy seems to have been absolutely unfounded, as there is no proof, from Dr. Hammond or any one, in or out of the hospital, that Waples ever suffered therefrom, either there or elsewhere. On the contrary, Waples has stated, in his examination here, that when a young man he suffered from a sunstroke; that occasionally since he has suffered extremely with neuralgia of the head when exposed to the sun; and that, the day before Dr. Burton's third visit, while working in the hot sun, he was seriously affected, and was suffering acutely therefrom when the doctor examined him and concluded to give the certificate. The true theory, therefore, probably is that Waples' mind was at such times temporarily disordered by these occasional recurrences of pain, resulting originally from sunstroke. But this description of insanity, or "mental disturbance," as Dr. Burton termed it, cannot be presumed to be permanent, and to continue until the contrary be shown. Hix v. Whittemore, 4 Mete. (Mass.) 545-547. The only manifestations of Waples' "primary dementia," or of his mental incompetency to testify, detailed by Dr. Hammond in support of his opinions, were that, when Waples first entered the hospital, he "seemed to be depressed," would "sit around and not talk to anybody scarcely," and "did not want or care to see his brother," who was then sick in the hospital. These are certainly slight grounds for the support of such opinions. Dr. Hammond failed to show any instances, during Waples' stay at the hospital, of the violence, nocturnal fits of epilepsy, or conspiracy vagaries,

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upon which Dr. Burton had mainly based his opinion of his insanity and incompetency as a witness. The fact that Dr. Hammond virtually discharged Waples from the hospital so soon after the homicide clearly imports that he was practically restored, and reasonably warrants the inference that he was then, and at the time of that occurrence, mentally competent to observe and relate the facts attending it. For it is highly improbable that he would have been guilty of the grossly culpable, and possibly criminal, negligence of releasing an inmate so insane as not to know, when at large, what he and those about him were doing.

Opposed to this insufficient evidence of his incompetency as a witness is the very satisfactory result of the preliminary examination before us of Waples himself. Subjected, as he was, not only to examination by ourselves, but by the counsel on both sides, pursuant to the established practice in both this country and England, he betrayed no indication of any form or degree of insanity, much less of incompetency to testify in this cause. He not only showed that he comprehended the nature and obligation of an oath, but, in appearance, manner, clearness, coherence, and precision of expression, he proved to be a very superior witness. He promptly apprehended and answered every question, and gave minute details with calmness and accuracy. He stated the day and hour, and with whom, he first went to the state hospital; when and where he met Dr. Hammond and Dr. Hancker there; and the day and hour, and with whom, he left there, and returned to his family. And, although both doctors were then present before us, they have not undertaken to contradict these statements, which show that, when he both entered and left the hospital, he was perfectly competent to testify. In view of these and the other facts I have detailed, and of the law applicable to this question, it seems indubitable that Waples is a competent witness, and should be admitted to testify for the state in this case.

MARVEL, J. I concur with my Brother GRUBB. The question we are called upon to decide is as to the competency of this witness to testify. The defendants set up that, at the time of the transaction for which these prisoners were committed, the witness, though present, was incapable of comprehending acts done, or of remembering them, so as to be able to relate them on the stand, and that he was not able to form such judgment upon said facts as to qualify him to testify now. In support of that, they have brought the certificate of the physicians for his commitment at Farnhurst, which, as Dr. Burton says, he gave after his third examination, saying that he considered him insane, but qualifying it with the statement, "so insane as to be a fit person to be committed to Farnhurst for treatment." Insanity may be of various kinds. The only

evidence we have that his was of such a nature as to render him incapable of remembering the transactions that took place upon that occasion is that of Dr. Hammond. There is no question, if you are able to establish that this man was insane at the time, and insane today,—that he was not capable of comprehending and remembering,—that the jury would have to disregard his testimony. But I am not satisfied in my mind that such a condition did exist. Then it resolves itself upon his present condition. Upon his personal examination, I do not think any one who heard him can doubt his capacity to understand and make sensible answers to questions that you ask him at this time. That being the case, I consider that he is a competent witness to testify. As to the reliability of his evidence,—of his memory of those things which occurred at the time he was committed to Farnhurst,—it would be the right of both the state and the defendants to offer evidence, which the jury may consider, and upon that evidence either to believe or disbelieve his testimony.

LORE, C. J. The court being equally divided, the witness, of course, is admitted.

Mr. Hardesty, a witness, was asked by the counsel for the prisoners whether Oakes, another witness, did not make certain statements to the attorney general, in his presence, when the attorney general was engaged with Oakes in preparing the ease for prosecution. Attorney General White objected, upon the ground that Mr. Hardesty was acting as his private stenographer at the time, assisting in the preparation of the case for trial.

GRUBB, J. The defense proposes to show, by Mr. Hardesty, who was then acting as the private stenographer of the attorney general, for the purpose of contradicting the witness Thomas Oakes, what said witness stated to the attorney general when the latter was engaged with said witness in preparing this case for prosecution. The law will not permit this. The attorney general could not be required to disclose facts coming to his knowledge for the use of the state in its prosecution of the accused; nor can his private amanuensis, or clerk, as Mr. Hardesty then was. To do so would be prejudicial to the public interest, and would in many cases defeat the ends of public justice. When the witness Thomas Oakes, against objection by the state, was permitted, for the purpose of laying a ground for contradicting him, to state what he had said on this occasion to the attorney general, in order to aid him in preparing for the prosecution of this case. 1 considered that the ruling of the court was erroneous. In public prosecutions, witnesses for the state, and those who give information to the prosecuting officer, will not be permitted to disclose whether or not they have given information to such officer. Such communications are regarded as secrets of state,

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ar matters the disclosure of which would be prejudicial to the public interests. They are therefore protected, and all evidence thereof excluded, from motives of public policy. To allow the said witness to state that he had made a communication to the attorney general respecting this prosecution, for the purpose of laying a ground for his subsequent contradiction by now calling Mr. Hardesty to the stand, was then as improper as it is now futile.

THE COURT (LORE, C. J.). The objection is sustained,

LORE, C. J. (charging jury). The prisoners are charged in the indictment with murder in the second degree. Both the first and the second counts charge that all three of the prisoners feloniously assaulted Leon Pisa, the deceased. In the first count it is charged that the mortal wound was inflicted by Daniel Brown; in the second count, by John J. Swan, while the other two prisoners were aiding and abetting in the murder as accomplices. On the 5th day of October last, between 8 and 9 o'clock in the morning, at the state insane asylum, at Farnhurst, in this county, Leon Pisa, an inmate of the asylum, died from injuries received at that time. The state claims to have proved that the prisoner Brown, aided by one Thomas Oakes, took the deceased from the west end of the corridor to the bathroom door in the east end of corridor C to bathe him; that he was there tripped by Brown, thrown down with violence upon the floor, jumped on and punched by the knees of Brown, and kicked in the side by Swan; that his skull, over the temporal bone on

the right side of the bead, was fractured and crushed, and the ninth and tenth ribs on the right side were broken into; that Brown and Swan then roughly picked him up from the floor, Brown pushing him through the door into the bathroom and down upon the floor; that they were then joined by Lynch, who stripped off the clothing of the deceased, and, aided by Swan, threw him roughly into the bathtub; that death resulted from the injuries thus received. The defendants, on the other hand, claimed that Pisa was not maltreated; that, under the rules of the institution, it was necessary to bathe Pisa, and to use so much force as was reasonably necessary to effect that purpose, this being essential to the maintenance of discipline and sanitary regulations of the asylum; that Pisa violently resisted the attempt to bathe him; that, at the bathroom door, he seized Brown by the throat, and a violent struggle there ensued; that when Pisa's grip was broken, he was much exhausted, was lifted up and pushed inside the bathroom door, walked to the end of the bathtub, and there reeled, fell, and received the injuries which caused his death; that he was stripped of his clothing by Lynch, aided by Swan, and placed in the bathtub, but did not revive; that his body was then taken out, dried, and carried across the corridor, practically dead; that in the transaction no more force was used than was absolutely necessary. It is your duty to determine, under the proof in this case, whether the prisoners are guilty of murder in the second degree, as charged in the indictment; or of mar slaughter, of which they may be convicted, under the statute, if the evidence shall warrant; or not guilty.

The grades of homicide applicable to this case are three: Murder in the second degree, manslaughter, and excusable homicide. Murder of the second degree is where a man kills another, without any, or without any considerable, provocation, when the killing is done or the mortal wound is inflicted with a deadly weapon, or arises from any unlawful act of violence from which the law raises the presumption of malice. Malice is the necessary ingredient—indeed, the test—of murder. Unless, from the facts in this ease, malice is proved beyond a reasonable doubt, you may not convict of murder in the second degree. Manslaughter is the killing of a human being without malice, but under such circumstances as cannot render it wholly innocent, or excusable, or justifiable in law. When the killing is done in the sudden transport of passion, in the heat of blood, the law concedes that the act may be incident to the weakness and infirmity of our natures, and thus negatives implied malice, which is essential to the crime of murder in the second degree. Excusable homicide may arise either from misadventure or in self-defense, and, when proved, entitles the accused to a verdict of not guilty. Excusable homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act, unaccompanied by any cruelly careless or reckless conduct. Under the statutes of this state, "every person who shall abet, procure, command or counsel any other person, or persons to commit any crime, or misdemeanor, shall be deemed an accomplice, and equally criminal as the principal offender." Where one is charged as an accomplice, in order to convict, it must be shown beyond a reasonable doubt that he was present, feloniously and maliciously aiding and abetting or counseling the killing of the deceased. If so present, aiding and abetting, the act of one is the act of all, whichever may give the mortal wound, and all are alike guilty.

Let us now apply these rules of law to the case in hand. It must be borne in mind that the deceased was one of that class of poor unfortunates who, in the providence of God, are deprived of reason,—some temporarily, some permanently. Unable to control themselves, and to manage their property, they are thrown upon the mercy of their friends or the public. In this instance they were the wards of the state. Their pitiful helplessness inspires every manly heart with commiseration and sympathy. The state.

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having undertaken their charge, should see to it that their treatment is controlled by enlightened and humane regulations, their comfort cared for, and that skillful and merciful attendants shall be placed in charge of them. It should be remembered, however, that, while insanity is sometimes quiet and harmless in its developments, at other times it is active and violent; that, in the management of such an asylum, so much force must be used in each particular ease as may be necessary to enforce and maintain wholesome discipline and sanitary regulations. The law will not measure with extreme nicety or exact calculation just how much force the attendant may use,

provided he acts reasonably, and without intentional cruelty or viciousness. If you were to bind the hands of the attendant by any such rule, his life might be in the unreasoning caprice of a violent maniac, and the insane would practically rule the institution. The care of the insane is at best no pleasant employment. It is our duty to protect these demented patients by the closest scrutiny, and to punish willful or careless cruelty; but it is equally our duty to protect the attendants, in the discharge of their duty, from officious interference and reflections, and uphold them in the maintenance of reasonable rules. This is absolutely necessary for the proper management of such institutions. On the 5th of October Brown, Swan, and Lynch were lawfully engaged in bathing Pisa. They had a right to take him to the bathtub, and to give him a bath. They had a right to use all such force as was reasonably necessary to effect that purpose. If you believe, from the evidence in this case, they used no more force than was necessary, considering Pisa's strength, resistance, and known disposition, then they were within the line of their duty, and you should acquit them. Where death results under such circumstances, it is misadventure, and no guilt may attach to the prisoners. In like manner you should acquit if Pisa's death resulted from his violence or fault. If, however, they, with criminal carelessness or recklessness, used more force than was necessary, but without malice, it would be manslaughter. If the force used was so grossly reckless as necessarily to raise the presumption of malice, it would be murder in the second degree.

The prisoners are clothed by the law with the presumption of innocence. It is, therefore, the duty of the state to prove every material element of the crime charged beyond a reasonable doubt. If you entertain a reasonable doubt on any material point, you must acquit. To convict of murder of the second degree, you must be satisfied that death resulted from the violence of the prisoners, and that it was maliciously inflicted. To convict of manslaughter, you must be satisfied that death resulted from such violence, and that it was unlawfully inflicted, without malice. It is now for you to say of what crime these men are guilty, if guilty at all. In determining this, you are to depend entirely upon the testimony given in this courthouse from that witness stand, and must not consider any other sources of information whatever. You must divorce your minds absolutely from all sympathy, from all sensational reports, if they have come to you from any source or at any time. Under the solemn sanction of your oaths, you stand, between the state and these prisoners, sworn to consider only the evidence that has come to you, under the statements of witnesses here produced and sworn, whom you have seen and heard, and whose reliability you must determine in reaching your verdict. By that, and by that alone, you must be governed. Wherever there is doubt, where evidence is nicely balanced or conflicting, good character, so far as proved, must inure to acquittal. You may acquit all, or any one, of the prisoners. In like manner, you may convict all, or any one, of them, as in your best judgment, under the law and evidence, you may determine. Your duty is to acquit the innocent and to convict the guilty.

The jury, having retired to their room on Saturday afternoon, remained out until Sunday morning, the court remaining in continuous session without adjournment, when they appeared in court and desired to render their verdict. After due consideration by the court, it was unanimously held that the verdict merely might be taken, and the jury discharged, which was accordingly done, without further proceedings on that day in the case.

Verdict: Not guilty, as to Michael Lynch; guilty of manslaughter, as to Daniel Brown and John J. Swan.

A motion for a new trial was subsequently made by Messrs. Gray and Ward, which motion did not prevail, there being an equally divided court upon that question. (See remarks of Judge GRUBB in pronouncing sentence.)

A motion in arrest of judgment was then made, and urged, on the ground that the court had no jurisdiction to try the accused because the indictment was not found before a grand jury duly summoned to the court of oyer and terminer, and said indictment had not been certified up into the court of oyer and terminer.

GRUBB, J. (MARVEL, J., concurring). At the present session of this court of oyer and

terminer Daniel Brown and John J. Swan were indicted by a grand jury of this court of murder of the second degree, and, after trial here by a petit jury of this court, were found guilty of manslaughter. Thereupon they moved for a new trial upon the ground, inter alia, that this verdict was unwarranted by the law and the evidence. This court being

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equally divided, on this motion, it failed, and the new trial was refused, whereupon the present motion for arrest of judgment was made, upon the following grounds: "(1) That it appears, by the record of the court of oyer and terminer and of said cause, that the court of oyer and terminer had no jurisdiction to try said cause; (2) that it appears, by the record of said court and said cause, that the court of oyer and terminer had no jurisdiction to try the defendants in said cause, under the indictments therein, and had no jurisdiction to render judgment therein; (3) that it appears, by the record of this court and said cause, that the indictment in said cause was found by the grand jury in the court of general sessions of the peace and jail delivery for said state, and was never removed, by certiorari or other process, into said court of oyer and terminer, and that, therefore, under the statutes of said state, the proceedings before said court in said cause were all coram non juice, and that the said court hath no jurisdiction to pronounce judgment in said cause."

It is unnecessary to consider or pass upon the third ground above stated. I have personally examined the record of this court, and find that it appears thereby that said indictment was found by the grand jury, sitting as the grand jury in and for this court of oyer and terminer. This is also corroborated by the statements made to me by the clerk of this court, and to us, in open court, by the attorney general. In this state, jurisdiction of all capital offenses and of murder of the second degree and manslaughter is vested by the laws of the state, pursuant to the constitution, in the court of oyer and terminer, composed of the chief justice and the three associate judges of the state. Its decision is final, and not subject to writ of error or to appeal. It has no regular terms fixed by law, but sits whenever the judges of said court shall issue a precept for holding a court of oyer and terminer. They may include in said precept a direction to the sheriff to summon a grand jury for any such court, or they may omit it, when the said judges shall deem the summoning of such grand jury unnecessary. It is not absolutely obligatory upon said judges to include in said precept any direction for the summoning of a grand jury for a court of oyer and terminer in any case. If they do not deem this necessary, the grand jury in attendance upon the next regular term of the court of general sessions, which is composed of the chief justice and the two of the said judges who do not reside in the county wherein it is sitting, may find the indictment for any of said offenses, which may thereupon be removed to the court of oyer and terminer for trial.

Statutory provision is made that, in the spring of every year, grand jurors for a standing panel, to serve for the ensuing year, shall be selected from the county by the levy court, and drawn by the prothonotary and clerk of the peace, who shall immediately deliver to the sheriff of the county a correct list of the names thereof, etc. The statute also directs said sheriff, upon receiving the said list, to summon in writing each of said persons, at least 10 days before the next ensuing term of the court of general sessions for his county, to serve as the standing grand jurors for that year at the said court. Similar statutory provision is also made for the selection, drawing, and summoning of petit jurors to the court of general sessions, etc. Provision is also made that the sheriff shall make return to the court of the separate panels of the grand and petit jurors summoned by him. The statute also provides that the standing panel of grand jurors for the year "shall be summoned and returned to attend, as grand jurors, at any court of oyer and terminer, when the precept for holding said court directs a grand jury to be summoned." Rev. Code, c. 109, § 11. The statute also provides that, for any court of oyer and terminer, special petit jurors shall, upon notice from the sheriff to the prothonotary and clerk of the peace that such court is to be held, be drawn, summoned, and returned, according to the provisions for the regular petit jurors. So that, whenever the said judges shall deem it necessary to summon a grand jury to attend upon a court of oyer and terminer, they may also include in their precept, designating the time for holding such court, and directing the sheriff to summon the special jurors, the further direction to summon said standing panel of grand jurors to attend therein. While there is no statute expressly directing this course, or prescribing any particular form of precept, yet such has long been the

general practice of this court in such instances. But there is no enactment, expressly or by necessary implication, prohibiting this court from modifying or entirely dispensing with this practice in any particular case, if deemed necessary. Nor is there any enactment expressly declaring illegal, and its indictments void, any such standing grand jury, actually summoned and returned by the sheriff, and serving in this court. Without any precept of the judges of this court, such grand jury would, under the statutes referred to, be in attendance upon the court of general sessions, wherein an indictment for an offense like the present could be found and certified into this court, wherein the same judges who compose the said court of general sessions, under our judicial system, constitute a three-fourths majority. As the general practice throughout the state has been to have this court called to meet at the regular term of the court of general sessions when a court of oyer and terminer is necessary for the trial of any indictment, it is practically immaterial whether a grand jury for this court is ordered or not. For, if not so ordered, the indictment will be just as promptly found in,

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and certioraried for trial here from, the court of general sessions, and therefore the constitutional right of the accused to have a speedy and public trial by an impartial jury will not, substantially, be injuriously affected. Consequently, it may not be of material importance whether or not the practice of including in the precept the direction to the sheriff for summoning the standing grand jury to attend this court be modified or entirely dispensed with in any particular case, where their summoning, return, and attendance are actually secured in a regular manner otherwise, as in the present instance. It is the statute, and not the precept, which makes the standing panel the grand jurors of this court, when, having been legally selected and drawn, they are actually summoned and returned, and serve here. The said practice, therefore, is merely a convenient and reasonably certain mode of notifying the sheriff, and having their attendance when needed. Presumably, the object of the practice, as well as of our statutes, which recognize it, was to secure the attendance of the grand jury in this court with promptness and certainty, when it was deemed necessary to have it here. But if, by mistake or accident, it should be omitted in any instance at the time of preparing the precept, it might save serious delay and detriment, not only to the prisoner, but to the public, if notice to the sheriff could be given with the approval of the court in some other way, whereby the timely summoning and attending of such grand jury could be surely and actually secured. Yet, if the contrary view is adopted, then, in such instances, the object of the practice, instead of being effected, would be defeated.

The general ground, as the argument disclosed, upon which the defense have based their motion in arrest of judgment in this case, is that this indictment was not found by a legal grand jury of this court of oyer and terminer, because, as they allege, the grand jury which found it in this court was not lawfully summoned by the sheriff to attend as the grand jury of this court, and, therefore, that this court cannot lawfully try or render judgment against them on the indictment under which the petit jury have found them guilty of manslaughter. They contend that said grand jury was illegally summoned by the sheriff to attend this court of oyer and terminer, because, as they allege, no proper and lawful precept for summoning said grand jury was made and delivered to that officer. It is not claimed that these grand jurors were not selected by the levy court, drawn by the prothonotary and clerk of the peace, and otherwise qualified in all respects, as prescribed by law. Nor is it contended that they were not duly summoned by the sheriff, nor shown that they did not actually appear in this court, pursuant to his summons, and find said indictment. Neither is it denied that the sheriff received a lawful precept, duly signed by all the judges of this court, attested by the clerk, and under the seal of this court, appointing the time for the holding of the present court of oyer and terminer, and commanding him to summon thereto the requisite special petit jurors, nor that there was written upon the face of said precept, and on the margin thereof, the words, "Summon the grand jurors for the court of oyer and terminer." The sole objection made to the validity of this precept is that the said portion thereof respecting the summoning of said grand jurors was irregular and unauthorized. That the holding of this court and the summoning of the petit jurors was lawful in all respects is undisputed. That this court has jurisdiction, under the constitution and statutes of this state, of the offense charged, and also of the persons of the prisoners, by virtue of their lawful arrest and commitment for trial here, is unquestionable. Hence,

the only objection to the validity of the indictment in this ease is that the grand jury was illegally summoned, because of the alleged irregularity and illegality of that portion of the precept respecting the direction to the sheriff to summon said grand jurors.

But, for the purpose of disposing of the present motion in arrest of judgment, it is not necessary to consider and determine whether or not the precept was, in whole or part, illegal and invalid, nor whether or not the grand jury was illegally summoned by the sheriff. Nor is it material to inquire whether or not the alleged irregularity or invalidity of the precept, in any respect, is a matter appearing of record, because it is now firmly settled, by authoritative adjudications in both this country and England, that, by pleading not guilty to an indictment, and going to trial, without making any objection to the qualification of grand jurors, or the mode of summoning or impaneling them, the objection is waived; and this doctrine of waiver applies as well to cases where such objection appears of record,—all such objections, where no statute makes the proceedings utterly void, to be taken in limine, either by challenge, by motion to quash, or by plea in abatement. It is the prevailing rule that it is too late, after a verdict, to object to the competency of the grand jurors by whom the indictment was found, or to the mode of summoning or impaneling them. Robinson's Case, 2 Parker, Cr. R. 235, 308, 311; State v. Carver, **49 Me. 588** , 593, 594; State v. Stewart, **7 W. Va. 731** ; U. S. v. Gale, 109 U. S. 65-74 , 3 Sup. Ct 1.

Robinson's Case, 2 Parker, Cr. R. 235, is especially applicable to the motion before us. There no precept for summoning the grand jury had been issued by the district attorney to the sheriff, as the law required, though the sheriff summoned them in the usual way, as he did in this ease. But the supreme court of New York nevertheless

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held, after argument by able counsel, that this omission did not affect the substantial rights of the prisoner, and that the objection could not be raised after trial and conviction. Many authorities were referred to in the opinion of the court, and this general statement was then made: "It seems to be well settled in most of the states that an objection to the qualification of grand jurors, or to the mode of summoning or impaneling them, must be made by a motion to quash or by a plea in abatement before pleading in bar." This announcement of the law in Robinson's Case was afterwards quoted with marked approval by Mr. Justice Bradley, speaking for the supreme court of the United States, in U. S. v. Gale, 109 U. S. 65-74 , 3 Sup. Ct 1, decided in 1883. It was equally relied on and approved in the leading case of State v. Carver, **49 Me. 594** , and has since been generally followed in this country.

In the case of State v. Carver, **49 Me. 588** , after verdict of guilty, there was a motion in arrest of judgment, on the ground that it appeared by the venires that at least one of the persons acting on the grand jury which found the indictment was not legally drawn as a grand juror, on account of defects in the manner of notifying the town meetings for the draft of said jurors, etc., and therefore it was not a legal grand jury, and, consequently, had no authority to find the indictment in question. It was contended that, as the objection appeared of record by the return upon one of the venires, the motion in arrest of judgment should be sustained. The motion being overruled by the trial court, the supreme court, on exceptions taken, sustained the decision below. It held (1) that this was not such an objection appearing of record as could be sustained on a motion in arrest of judgment, and (2) that by pleading generally to the indictment, the defendant admits its genuineness, and waives all matters that should have been pleaded in abatement. The court say: "The decisions to this point, both in England and in this country, are numerous; but it is urged that such cases are to be distinguished from the one at bar, because here the defendants deny that there is any indictment, on the ground that there was no legal grand jury. The question here presented has often been raised in this country, and it has uniformly been held that it is too late, after a verdict, to object to the competency of the grand jurors by whom the indictment was found, or to the mode of summoning or impaneling them. All such objections must be pleaded in abatement. The attorney general has cited other cases where the same doctrine is held, and we are not aware of any cases where it has been called in question."

In State v. Stewart, **7 W. Va. 731** , a statute provided that, before any prisoner is tried for felony in a superior court, he shall be examined before an inferior court, unless such examination be waived by his consent, entered of record, in such superior court. In this case the defendant did not make any motion to quash the indictment, or do any other act, before trial or verdict, by which the attention of the court would be directed to the fact as to whether he had been examined by the county court touching said charge. But, even in such a case, where the statute itself made such examination a prerequisite to the jurisdiction of the superior court to try the prisoner, it was nevertheless declared by the supreme court of appeals, in that case, that if a defendant, indicted for felony, desired to claim the benefit of the provisions of said act, he should do so certainly before verdict of guilty, and, perhaps, before the jury to try the cause are selected, impaneled, and sworn. In the same case this court cited with approval the case of Angel v. Com., 2 Va. Cas. 231, wherein the court said: "After verdict against the prisoner, he cannot move, in arrest of judgment, that he was not examined [under the act] for the felony of which he was indicted. The objection comes too late."

In U. S. v. Gale, 109 U. S. 65-74 , 3 Sup. Ct. 1, above cited, Mr. Justice Bradley, in a most able and elaborate review of the authorities, English and American, conclusively establishes the correctness of the doctrine announced in Robinson's Case, as above stated. In this case the supreme court of the United States was required to determine, for the judges of the circuit court of the United States for the Northern district of Florida, whether or not a certain motion in arrest of judgment before them could be sustained. The ground urged in arrest of the judgment was that four persons, otherwise competent, were excluded from the panel of grand jurors who found the indictment, under a provision of the United States Revised Statutes which the defendant alleged to be unconstitutional. The exclusion of these persons for this cause appeared by an amendment of the record made nunc pro tunc, showing what took place; but no objection was taken to the indictment or proceedings on that account until after a plea of not guilty, and a conviction, when the objection was first taken on motion in arrest of judgment. In this case the court, by Mr. Justice Bradley, say: "The question as to the constitutionality of the 820th section of the Revised Statutes, which disqualifies a person as a juror if he voluntarily took any part in the Rebellion, is not an essential one in the case, inasmuch as, by pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection was waived. The defendants should either have moved to quash the indictment, or have pleaded in abatement, if they had no opportunity, or did not see fit, to challenge the array. This, we think, is the true doctrine in cases where the objection does not go to the subversion of all the proceedings

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taken in impaneling and swearing the grand jury, but relates only to the qualification or disqualification of certain persons sworn upon the jury or excluded therefrom, or to more irregularities in constituting the panel. We have no inexorable statute making the whole proceedings void for any such irregularity." Again the same court say: "All ordinary objections based upon the disqualification of particular persons, or upon informalities in summoning or impaneling the jury, when no statute makes the proceeding utterly void, should be taken in limine, either by challenge, by motion to quash, or by plea in abatement. Neglecting to do this, the defendant should be deemed to have waived the irregularity. It would be trifling with justice, and would render criminal proceedings a farce, if such objections could be taken after verdict, even though the irregularity should appear in the record of the proceedings." And, further, the court, through Mr. Justice Bradley, declare: "We think that the doctrine of waiver applies as well to cases where the objection appears of record as where it appears by averments, and that it applies to all cases of objection to the qualifications of jurors, and to the mode of impaneling the jury, but does not apply to cases where the proceeding is wholly void by reason of some fundamental defect or vice therein. In Seaborn's Case, 4 Dev. 305, it was held that, after conviction of murder, it was too late to take advantage of an error in constituting the grand jury, though it appeared in the record. In Robinson's Case. 2 Parker, Cr. R. 235, 308, 311, which was argued by able counsel in the supreme court of New York before Justices Parker, Wright, and Harris, no precept for summoning the grand jury had been issued by the district attorney to the

sheriff, as the law required, though the sheriff summoned them in the usual way. The court held that this omission did not affect the substantial rights of the prisoner, and that the objection could not be raised after trial and conviction." The court then proceeds to repeat the doctrine announced in Robinson's Case, which has already been hereinbefore quoted.

It will thus be seen that the supreme court of the United States has approved and relied upon Robinson's Case which held that the entire absence of the precept, although required by law, for summoning a grand jury, was an omission which did not affect the substantial rights of the prisoner, and which belonged to the class of objections that could not be raised after trial and conviction. As the Robinson Case is substantially identical with that now before us, this convincing array of authority unquestionably warrants this court in holding that the defendants have waived their objection to the grand jury and the indictment now in question. Therefore, their motion in arrest of the judgment must be overruled.

LORE, C. J. In this case a motion was made in arrest of judgment, upon the ground that the indictment was not found before a grand jury summoned to the court of oyer and terminer, and, not being so found, was not certified up into the court of oyer and terminer. By the statute in that behalf, a court of oyer and terminer in this state only exists by virtue of the precept, which is the writ of command from the judges to the sheriff. There are no regular terms of the court of oyer and terminer, and no term of the said court can be held without such precept has been duly issued by order of the judges of the court. A precept, in this case, was duly issued. It contained, however, only the direction to make proclamation of the convening of the court, and a direction to summon the petit jurors. There was, in the body of the precept, no order whatever to summon a grand jury for the court of oyer and terminer. There is, however, an indorsement in red ink, upon the margin of the precept, in these words: "Summon grand jury for court of oyer and terminer." This, however, is not in the body of the precept, and it is within the knowledge of this court that it was not made by order of the judges, but was a memorandum, made by the clerk, of an order given by myself to him verbally, to see that the grand jury was summoned, and so direct the sheriff. As the sessions of the court exist only by virtue of the precept, and grand and petit jurors can only be summoned by authority of its express terms, it is manifest that there was no order of the judges for summoning the grand jury, and that there was no grand jury summoned for the court of oyer and terminer. This goes to the existence of such a grand jury, and is not a matter of irregularity. The indictment, therefore, being found by a grand jury which was duly summoned to the court of general sessions, and not having been certiorated up into the court of oyer and terminer, the indictment was never legally before the last-named court. It follows, therefore, that the trial of the case in the court of oyer and terminer was coram non judice, and, in the opinion of Judge CULLEN and myself, the trial was without warrant of law.

I desire, however, expressly to put on record that no fault whatever attaches to the attorney general or to his deputy, Mr. Cooper, in this matter. The latter expressly called the attention of the court to the usual custom of certioraring indictments into the court of oyer and terminer, and he was informed by the court that it was not necessary, as we then supposed the grand jury had been duly summoned to the court of oyer and terminer. No fault whatever attaches to the sheriff. He faithfully complied with the verbal orders given him. No fault attaches to any one of the three brethren who sit with me. The fault is absolutely and exclusively my own, and I am unwilling that any responsibility in the matter shall rest elsewhere. To constitute

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a legal grand jury in the court of oyer and terminer, the order for its summons must be in the body of the precept. It fact, only a verbal order was given, not by the judges, but by myself only, which was a nullity. Such order gave no authority to the sheriff, and 1 had no authority to give it; but it grew out of the desire to save the trouble of certioraring indictments into the court when we had authority to constitute a court of oyer and terminer in which indictments could be found in the first instance. The grounds urged in arrest of judgment go to the existence of the grand jury, and not to regularity or irregularity in summoning. It is idle, therefore, to speak of the irregular execution of a power, which power was never evoked and never existed. We think the motion in arrest of

judgment ought to prevail.

CULLEN, J. I regret very much that there should be a diversity of sentiment among the members of this court upon the question that is presented for our consideration. But to my mind the facts are beyond all cavil and all doubt. The court of oyer and terminer is a court that is organized, under the provisions of the constitution, for an express purpose; that is, the trial of capital offenses. Its functions are entirely confined to that, and it is regulated entirely by statute. It is not a court that has terms, like the other courts. It is subject, under the provisions of the statute, to be called by what is termed a "pre cept," which has always been the practice. Much has been said here with regard to what has been the practice in this matter. In fact, there never has been but one practice, and that practice always will be just as it has been. Until a few years ago, all these forms were written out. They were not printed. I have never known of an indictment in a capital case that was not found in the court of general sessions, excepting one at the last term here, or the term preceding the last. Heretofore the form of these precepts was drawn up by the judges of the court of oyer and terminer, who would put in some provision with regard to the summoning of jurors. The court of oyer and terminer, acting as such court in the trial of cases, may, of course, act as a distinct court, and have its own grand jury. It may act, in particular cases, on indictments which are found without its having such grand jury. That is left entirely in the discretion of the court, according to the necessities of the case; that is to say, if the indictment is to be found in the court of oyer and terminer, there must be a grand jury summoned for that court, and, if there is not such a grand jury, then it is a nullity, and you are trying a man just the same as if three justices of the peace should summon a grand jury, and send in an indictment here; for you must have something to rest upon. It is not a matter of form. It is a matter of substance. A man has a right, not only to have a fair and impartial trial, but he has a right to a trial according to the law of the land. What is the law of the land? That a court of oyer and terminer shall be called; that it shall try all cases that are found within the court of oyer and terminer, summoned as provided by statute. This is all a question of statute law. Without the statute, it is utterly null and void, and a man tried under those circumstances is tried without law, gospel, or anything else.

With regard to the issuing of this precept: The precept went out, and it stands there as nothing else in the world but a general order to call the court of oyer and terminer. That is all. This indictment was not found by a grand jury summoned by the court of oyer and terminer. That cannot be disputed. There is no doubt about it This indictment was found by the grand jury of the court of general sessions of the peace and jail delivery. Those are facts that are proven here for our consideration. That indictment has never been certioraried or sent up to this court. It is contended here: "Oh! but you did not plead in abatement. If you do not plead in abatement, you waive your right." Plead in abatement to what? To a nullity? Are you bound to enter a plea in abatement in a proceeding that is null and void? All those cases that have been cited refer to cases where there is irregularity. In substance, they are to the effect that, if a person waives his right, where there is an irregularity or an informality, he cannot afterwards, having pleaded, take advantage of it; but where the proceedings are null in their incipient stage, at the very bottom and foundation, then the party can take advantage of it, either by plea in abatement or by motion in arrest of judgment. It is never too late. I know the general idea is, "Yes; but these parties have had a fair and impartial trial." Still we must be governed by law. Once depart from the right path, and where are we? Here are parties that have been tried—admittedly tried—without any law or authority, because you have no court of oyer and terminer unless that court is legally called and legally exists. If it is legally called and legally exists, and eases are found by such court, well and good; but if they are found by another court, then you must follow the provisions of the statute, and the case must be regularly carried up by certiorari. That has not been done in this case.

As to the legality of this precept, the indorsement thereon does not amount to a fig. Northing is in a paper, except it is in the body thereof. The paper, therefore, which is the record itself (and that is what we are trying), discloses that here is an indictment found in the court of general sessions and tried in the court of oyer and terminer without being removed thereto by certiorari, which this court has no more authority to try than we would have to try these men under an indictment for larceny and convict

them of manslaughter. I think, therefore, although I am very sorry to disagree with my brother members of the bench, that the motion in arrest of judgment ought to be granted.

Counsel for the prisoners, Brown and Swan, thereupon raised the point that, the jury having returned the verdict against the above-named defendants, it was necessary for the attorney general to make a motion that sentence be passed.

The court unanimously overruled this point.

They furthermore contended that, the court having been equally divided upon the question of jurisdiction, which had been raised in the motion in arrest of judgment, no judgment could be pronounced by the court.

LOBE, C. J. The motion not prevailing, Judge GRUBB will pronounce sentence upon the prisoners.

GRUBB, J. (Daniel Brown and John J. Swan being sentenced). It has become a general usage for the judge imposing the sentence to make suitable preliminary remarks to the convicted prisoner in even ordinary criminal cases in this state. To pursue this course is peculiarly appropriate and important in the present instance, in view of the public and widespread interest felt in this very notable case, in consideration of the novel questions and uncommon incidents attending this hardly-contested and protracted trial, and in the hope that your conviction and punishment will have a beneficial influence upon those charged with the custody of those hapless and helpless inmates of insane hospitals, here and elsewhere, who desire kindly sympathy and gentle care instead of callous indifference and brutal cruelty.

The grand jury of this county, in attendance on this court, having found an indictment charging you jointly with murder of the second degree, for the felonious killing of Leon Pisa, on October 5, 1895, in the Delaware state hospital, at Farnhurst, in this county, you were both tried and zealously defended, by able and faithful counsel, before an impartial jury, at the bar of this court, and found guilty of manslaughter. On the morning of that day Leon Pisa was an inmate of said hospital. According to the evidence he was a well man, sitting quietly on a seat beside one of the witnesses in this case, when you, Daniel Brown, directed him to go with you and receive the bath required by the hospital regulations. It is not shown that he was then actually demented, or a lunatic of violent or dangerous habits or disposition. He resisted, by holding on by the seat, until he was pulled from it, and conducted along the corridor, by you, Brown, and the witness Oakes, to a point about five feet from the bathroom door, where you, John J. Swan, were then standing, within sight of and immediate reach of him. There Leon Pisa, an unarmed man, not shown to be a violent or dangerous patient, was surrounded by you, Brown and Oakes, and within reach of you, Swan,—all three of you vigorous, trained hospital attendants. It was not shown that he was greatly superior to any of you in either size or strength; nor that the three of you could not reasonably, and without force or violence fatal to his life, have controlled him, and defended your own lives and persons against any serious harm from him. Nor is it shown that, in the struggle which you both testified to, either of you received the slightest wound or injury to your persons. Yet, within a very few minutes after that struggle, Pisa was a dead man in your hands, with a completely fractured skull and two broken ribs. Moreover, although it should have been manifest to Dr. Hammond, if he was a competent physician, that Pisa had not died from natural causes, he was nevertheless hastily buried, without notice to the coroner, and in violation of law. In view of these undisputed facts, in connection with all the evidence in the case, the jury disbelieved your defense, and found that you had feloniously caused the death of Pisa, and were each guilty of manslaughter.

Thereupon, through your counsel, you moved for a new trial, on several grounds, among them that the verdict was unwarranted by the law and the evidence, and also that the court, being equally divided as to the competency of David M. Waples as a witness, erred in admitting him to

testify before the jury, although he was admitted, subject to the right of the jury to judge of the credibility and weight of his testimony, viewed in connection with all the other evidence. To obtain a new trial, the burden was upon you to satisfy a majority of this court, in this instance three, of the sufficiency of the grounds urged in that behalf. This you failed to do; for the court was equally divided on this subject, one-half of us believing that the verdict was in all respects just and legal. Accordingly, a new trial was refused. The prevailing members of the bench, who opposed your motion, were not only satisfied that Waples was not shown to be incompetent to testify, but were also convinced that, under the precedents and settled practice in this and other courts of this state, he was legally admitted by the division of the court as to his admissibility. This principle was established in this very court in the case of State v. Brown, 1 Houst. Cr. Cas. 545, by Chief Justice Comegys and Judges Wootten, Houston, and Wales, sitting in that case, as necessary to the progress of a trial under our judicial system. That their decision is binding upon us as a precedent and course of practice applicable to this case, until reversed at least by a majority of this court,

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which has not yet been done, is firmly believed by our side of this court, consisting of Judge MARVEL and myself. Your application for a new trial having failed, thereupon your counsel moved in arrest of judgment. After argument and mature consideration, that motion failed to secure the support of the requisite majority of this court, and the motion, owing, again, to a divided court, has been overruled; and, judgment not being arrested, sentence, as a matter of course, must now be passed upon you.

That a divided court should produce this result is not new or surprising, in this state or elsewhere. Very recently the supreme court of the United States, the highest judicial tribunal in the land, was equally divided on the question of the constitutionality of the United States income tax statute. Pollock v. Trust Co., 15 Sup. Ct. 673. The result was that the statute stood until, subsequently, a majority was obtained to secure its total annulment. Id. 912. Again, in 1819, in this state, in the ease of Clark v. Kean, **1 Del. Ch. 114** , the high court of errors and appeals by an equally divided court affirmed a decree of the chancellor before it on appeal, and thereupon all the judges unanimously concurred in framing and rendering the required form of judgment of affirmance. They did this as absolutely necessary, under our judicial system, to prevent a deadlock, and consequently miscarriage of justice, in any case before the court. During the three-quarters of a century which have since elapsed, this rule has continued to be uniformly observed in this state by our court of errors and appeals, as well as in this court, as shown by State v. Brown, which I have just quoted. As late as 1888 it was expressly considered and unanimously recognized in the court of errors and appeals in the case of Walker's Adm'r v. Bank, 8 Houst. 258, 10 Atl. 94, and 14 Atl. 819, in which I myself sat with Chief Justice Comegys and Judges Houston and Paynter. So that it is impossible now to question its justice, or disregard its binding authority in this instance, without utterly repudiating the wise and necessary doctrine of adhering to the precedents established in our highest and most authoritative judicial tribunal.

The verdict of the jury in this case, like the decree of the chancellor in the cases I have just mentioned, is presumed to be valid and legal in all respects until the contrary is found by a majority of the court in which it is called in question. Before verdict, the accused person is presumed to be innocent until the jury is satisfied beyond a reasonable doubt of his guilt. After verdict, he is presumed to be guilty until the legal validity of the verdict is impeached, to the satisfaction of a majority of the court, in one of the modes allowed and recognized by the law. Here there are but two modes allowable for this purpose, namely, the respective motions for a new trial and in arrest of judgment. These having been tried by you in vain, and your right to move to challenge the grand or petit jury panels, to quash the indictment, and to plead in abatement before verdict, not having been exercised, you have either exhausted or waived the liberal provisions reasonably allowed by law for the protection of the accused. As the public have rights as well as the accused, the law can justly accord no further delays consistently with the public interest and welfare. Nothing further can now be urged against the legal validity of the proceedings relating to your trial or of the verdict against you. You are, therefore, in legal

contemplation, conclusively presumed to be guilty of manslaughter, and the law will not permit the contrary to be shown. This being so, it is the imperative mandate of the law and the absolute duty of the court to pronounce the sentence of the law for the punishment of the offense found by the verdict. It is not the sentence of the court, but of the law; for the court is but the appointed agent of the law to execute its mandate.

Our statute declares that every person who shall commit the crime of manslaughter shall be deemed guilty of felony, and shall be fined not less than $400 nor more than $4,000, and shall be imprisoned for a term of not less than one nor more than five years. Hence it peremptorily forbids the court to impose upon the person lawfully convicted of manslaughter less than a $400 fine and one year's imprisonment, or more than a $4,000 fine and five years' imprisonment. Between this prescribed minimum and maximum the court is allowed a discretion, but as to whether or not it will impose this minimum it has no discretion. This much must be imposed, whether the court, as a whole or a divided bench, approve of it or not. "Ita lex scripta est." A unanimous (much less a divided) court is powerless to repeal a statute, nor can it lawfully evade its mandate. To attempt this would be to violate the law which the court was created to enforce, and to disregard the duty which it has solemnly sworn faithfully to perform. If persisted in, the consequences of such a course would surely paralyze the administration of justice, subvert social order, and imperil the public safety and general welfare. Wherefore it is that the grave and imperative duty is now devolved upon this court of imposing upon each of you the sentence of the law which you have been legally found guilty of violating. The sentence of the law, as considered by the court, is that you forfeit and pay to the state of Delaware a fine of $400, that you be imprisoned in the public jail of this county for the term of one year, commencing this day, and ending the 17th day of March, A. D. 1897, and that you pay the costs of your prosecution; and you are now committed to the custody of the sheriff until this sentence is fully executed.