CRAFT v. ELDER & JOHNSTON CO.
Court of Appeals of Ohio, Montgomery County, 1941.
38 N.E.2d 416.

[Action by Craft against Elder & Johnston Co. for alleged breach of contract. From a judgment of dismissal plaintiff appeals.]

BARNES, JUDGE.... On or about January 31, 1940, the defendant, the Elder & Johnston Company, carried an advertisement in the Dayton Shopping News, an offer for sale of a certain all electric sewing machine for the sum of $26 as a "Thursday Only Special". Plaintiff in her petition, after certain formal allegations, sets out the substance of the above advertisement carried by defendant in the Dayton Shopping News. She further alleges that the above publication is an advertising paper distributed in Montgomery County and throughout the city of Dayton; that on Thursday, February 1, 1940, she tendered to the defendant company $26 in payment for one of the machines offered in the advertisement, but that defendant refused to fulfill the offer and has continued to so refuse. The petition further alleges that the value of the machine offered was $175 and she asks damages in the sum of $149 plus interest from February 1, 1940....

The trial court dismissed plaintiff's petition as evidenced by a journal entry, the pertinent portion of which reads as follows: "Upon consideration the court finds that said advertisement was not an offer which could be accepted by plaintiff to form a contract, and this case is therefore dismissed with prejudice to a new action, at costs of plaintiff."

Within statutory time plaintiff filed notice of appeal on questions of law and thus lodged the case in our court....

It seems to us that this case may easily be determined on well-recognized elementary principles. The first question to be determined is the proper characterization to be given to defendant's advertisement in the Shopping News....

"It is clear that in the absence of special circumstances an ordinary newspaper advertisement is not an offer, but is an offer to negotiate, an offer to receive offers or, as it is sometimes called, an offer to chaffer." Restatement of the Law of Contracts, Par. 25, Page 31.

Under the above paragraph the following illustration is given, "'A', a clothing merchant, advertises overcoats of a certain kind for sale at $50. This is not an offer but an invitation to the public to come and purchase."

"Thus, if goods are advertised for sale at a certain price, it is not an offer and no contract is formed by the statement of an intending purchaser that he will take a specified quantity of the goods at that price. The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer. So a published price list is not an offer to sell the goods listed at the published price." Williston on Contracts, Revised Edition, Vol. 1, Par. 27, Page 54.

"The commonest example of offers meant to open negotiations and to call forth offers in the technical sense are advertisements, circulars and trade letters sent out by business houses. While it is possible that the offers made by such means may be in such form as to become contracts, they are often merely expressions of a willingness to negotiate." Page on the Law of Contracts, 2d Ed., Vol. 1, Page 112, Par. 84.

"Business advertisements published in newspapers and circulars sent out by mail or distributed by hand stating that the advertiser has a certain quantity or quality of goods which he wants to dispose of at certain prices, are not offers which become contracts as soon as any person to whose notice they may come signifies his acceptance by notifying the other that he will take a certain quantity of them. They are merely invitations to all persons who may read them that the advertiser is ready to receive offers for the goods at the price stated." Corpus Juris 289, Par. 97....

We are constrained to the view that the trial court committed no prejudicial error in dismissing plaintiff's petition.

The judgment of the trial court will be affirmed and costs adjudged against the plaintiff-appellant.

NOTES

(1) *Advertisements as Offers.* If advertisements such as that in the *Craft* case were held to be offers, what would be the position of the store if the demand were to exceed its supply? Would it arise if "first come, first served" were read into every advertisement? This last approach appears to be that of French law, under which "the great majority of authorities consider such a proposal to be an offer, even if it can be accepted only by one of those to whom it is addressed. But such an offer is subject to the condition, as to each offeree, that it has not already been accepted by a quicker-acting offeree." 1 R. Schlesinger (ed.), Formation of Contracts: A Study of the Common Core of Legal Systems 359 (1968). Can you see any difficulties that might arise under this approach? What if the personal qualities (e.g., integrity) of the other party will play an important role under the contract?

(2) *Consumer Protection.* In Geismar v. Abraham & Strauss, 439 N.Y.S.2d 1005 (Dist.Ct.1981), a disappointed shopper sued a department store that had advertised in a newspaper a set of china dishes regularly priced at $280 for only $39.95, but had refused to sell them at that price. The court held that since the advertisement was not an offer, there was no breach of contract. But it went on to hold that she could recover $50 under a New York statute providing that any person "injured" by advertising "which is misleading in a material respect" is entitled to recover actual damages or $50, whichever is greater.

Many other states also have laws dealing with false advertising. Ohio, where the Craft case was decided, now has the Uniform Deceptive Trade Practices Act. Ohio Rev.Code Ann. ch. 4165. In addition to state laws, Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) declares "unfair or deceptive acts or practices" to be unlawful, and the Commission may promulgate rules to this end. The Commission's rule on misleading advertising by grocery stores is in 16 C.F.R. 424.1.

LEFKOWITZ v. GREAT MINNEAPOLIS SURPLUS STORE
86 N.W.2d 689 Minn. 1957.

[The Great Minneapolis Surplus Store published the following advertisement in a Minneapolis newspaper:

SATURDAY 9 A.M.
2 BRAND NEW PASTEL
MINK 3–SKIN SCARFS
Selling for $89.50
Out they go
SATURDAY, EACH $1.00

1 BLACK LAPIN STOLE ...
Beautiful,
worth $139.50 ..... $1.00
FIRST COME
FIRST SERVED [a]

Lefkowitz was the first to present himself on Saturday and demanded the Lapin stole for one dollar. The store refused to sell to him because of a "house rule" that the offer was intended for women only. Lefkowitz sued the store and was awarded $138.50 as damages. The store appealed.]

MURPHY, JUSTICE.... The defendant relies principally on Craft v. Elder & Johnston Co.... On the facts before us we are concerned with whether the advertisement constituted an offer, and, if so, whether the plaintiff's conduct constituted an acceptance. There are numerous authorities which hold that a particular advertisement in a newspaper or circular letter relating to a sale of articles may be construed by the court as constituting an offer, acceptance of which would complete a contract.... The test of whether a binding obligation may originate in advertisements addressed to the general public is "whether the facts show that some performance was promised in positive terms in return for something requested." 1 Williston, Contracts (rev. ed.) § 27. The authorities above cited emphasize that, where the offer is clear, definite and explicit, and leaves nothing open for negotiation, it constitutes an offer, acceptance of which will complete the contract.... Whether in any individual instance a newspaper advertisement is an offer rather than an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances.... We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation.... The defendant contends that the offer was modified by a "house rule" to the effect that only women were qualified to receive the bargains advertised. The advertisement contained no such restriction. This objection may be disposed of briefly by stating that, while an advertiser has the right at any time before acceptance to modify his offer, he does not have the right, after acceptance, to impose new or arbitrary conditions not contained in the published offer....

Affirmed.[b]

a. (The text of the ad appeared as one of a number of boxed items in a full-page ad featuring widely varying type sizes. A snippet from the page, somewhat reduced in size, is reproduced here):

b. The advertisement set out above was actually the second one by the Store to which Lefkowitz had responded. The first, published a week earlier, was: "3 Brand New Fur Coats Worth to $100.00/First Come First Served/$1 Each." To Lefkowitz's claim based on that ad the court answered that the ad was not an offer because the word "to" made the value of the coats "speculative and uncertain." This ruling is criticized in Ayres & Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L.J. 87, 105B106 (1989).

On the first occasion the Store had also refused to sell to Lefkowitz, saying that by a "house rule" the offer was intended for women only; sales would not be made to men. Considering this additional fact, do you agree with the court's decision that he could recover under the second advertisement?

NOTES

(1) *Rationale.* On what grounds might the *Craft* and *Lefkowitz* cases be distinguished? The decision in *Craft,* it is said, might have been based on the ground that the advertised price was an obvious misprint. 1 Corbin rev. 117. Was there an obvious misprint? (As to errors in offers see Note 3, p. 178 below.)

Is there another way to distinguish the cases? In what respect was the advertisement in *Lefkowitz* more "clear, definite and explicit" than that in *Craft?* Were the words "First Come First Served" significant?

(2) *Problem.* Is the following notice, appearing in a newspaper, an offer? If so, how might it be accepted?

"$50,000 REWARD. Tiffany & Co. offer a reward of up to $50,000 for information leading to the recovery of jewelry and watches stolen from Tiffany on the night of September 4th, 1994. Payment will be made solely at the discretion of the insurers of Tiffany & Co., subject to recovery, arrest and conviction of the criminals."[1]

(3) *Competitive Bidding.* A contracting party may fix the contract price, leave it to private negotiation, or determine it by competitive bidding. A party who chooses to determine it by competitive bidding may invite open bids at an auction, as is often done in the sale of goods or land, or may invite sealed bids, as is common in the letting of building contracts.

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1. Excerpted from The New York Times, Sept. 9, 1994, p. B2.

If a party invites competitive bids, is this an offer to be accepted by the highest bidder when the bid is made? Or is it merely an invitation for offers by bids that can then be accepted or rejected by the one who has invited them? The law has taken the latter view, that it is the bidder who makes the offer. Can you see why?

This is the general rule stated in UCC 2-328 with respect to the sale of goods by auction. Under that section the auctioneer may, however, make an offer by advertising the sale to be "without reserve." Note that if the sale is "without reserve," the auctioneer is bound not to withdraw after a bid is made, but the bidder is not similarly bound. Local statutes may also govern auction sales.

The rather elaborate provisions of UCC 2-328 are, of course, expressly applicable only to the sale of goods. UCC 2-102. Might they be extended by analogy to the sale of land? Comment 1 to UCC 1-102 speaks of the possibility of reasoning from the Code by analogy: "[Courts] have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act.... They have done the same where reason and policy so required, even where the subject-matter had been intentionally excluded from the act in general.... Nothing in this Act stands in the way of the continuance of such action by the courts." See Chevalier v. Town of Sanford, 475 A.2d 1148 (Me.1984), a land auction case in which the court reasoned by analogy to UCC 2-328.

(4) *The Case of the Winner's Complaint.* A firm providing business news by electronic means (FNN) filed a bankruptcy petition as part of its performance of a contract to dispose of the firm's media assets. On the morning set for opening bids, the bankruptcy court received rival offers from two firms, one of them being Consumer News (CN). It appeared initially that the rival bid was slightly more attractive than CN's. CN attempted to improve its prospects by "clarifying" its bid. The court objected that CN was attempting to "change a closed bid." But on the following day the court accepted a revised offer from each bidder. CN having offered additional consideration of more than $5 million, it was declared the winner. From an order to that effect CN appealed, seeking a "rebate" of the additional amount. The appeal was unsuccessful. In re Financial News Network Inc., 980 F.2d 165 (2d Cir.1992).

What consideration, other than desiring a speedy resolution, might have persuaded the bankruptcy court to refuse to reopen the bidding?

KEELER V. SUPERIOR COURT OF AMADOR COUNTY
Supreme Court of California, In Bank, 1970.
2 Cal.3d 619, 87 Cal.Rptr. 481, 470 P.2d 617.

■ MOSK, JUSTICE. In this proceeding for writ of prohibition we are called upon to decide whether an unborn but viable fetus is a "human being" within the meaning of the California statute defining murder (Pen.Code, § 187). We conclude that the Legislature did not intend such a meaning, and that for us to construe the statute to the contrary and apply it to this petitioner would exceed our judicial power and deny petitioner due process of law.

The evidence received at the preliminary examination may be summarized as follows: Petitioner and Teresa Keeler obtained an interlocutory decree of divorce on September 27, 1968. They had been married for 16 years. Unknown to petitioner, Mrs. Keeler was then pregnant by one Ernest Vogt, whom she had met earlier that summer. She subsequently began living with Vogt in Stockton, but concealed the fact from petitioner. Petitioner was given custody of their two daughters, aged 12 and 13 years, and under the decree Mrs. Keeler had the right to take the girls on alternate weekends.

On February 23, 1969, Mrs. Keeler was driving on a narrow mountain road in Amador County after delivering the girls to their home. She met petitioner driving in the opposite direction; he blocked the road with his car, and she pulled over to the side. He walked to her vehicle and began speaking to her. He seemed calm, and she rolled down her window to hear him. He said, "I hear you're pregnant. If you are you had better stay away from the girls and from here." She did not reply, and he opened the car door; as she later testified, "He assisted me out of the car. . . . [I]t wasn't roughly at this time." Petitioner then looked at her abdomen and became "extremely upset." He said, "You sure are. I'm going to stomp it out of you." He pushed her against the car, shoved his knee into her abdomen, and struck her in the face with several blows. She fainted, and when she regained consciousness petitioner had departed.

Mrs. Keeler drove back to Stockton, and the police and medical assistance were summoned. She had suffered substantial facial injuries, as well as extensive bruising of the abdominal wall. A Caesarian section was performed and the fetus was examined *in utero*. Its head was found to be severely fractured, and it was delivered stillborn. The pathologist gave as his opinion that the cause of death was skull fracture with consequent cerebral hemorrhaging, that death would have been immediate, and that the injury could have been the result of force applied to the mother's abdomen. There was no air in the fetus' lungs, and the umbilical cord was intact.

Upon delivery the fetus weighed five pounds and was 18 inches in length. Both Mrs. Keeler and her obstetrician testified that fetal movements had been observed prior to February 23, 1969. The evidence was in conflict as to the estimated age of the fetus;[13] the expert testimony on the point, however, concluded "with reasonable medical certainty" that the fetus had developed to the stage of viability, i.e., that in the event of premature birth on the date in question it would have

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13. Mrs. Keeler testified, in effect, that she had no sexual intercourse with Vogt prior to August 1968, which would have made the fetus some 28 weeks old. She stated that the pregnancy had reached the end of the seventh month and the projected delivery date was April 25, 1969. The obstetrician, however, first estimated she was at least 31 ½ weeks pregnant, then raised the figure to 35 weeks in the light of the autopsy report of the size and weight of the fetus. Finally, on similar evidence an attending pediatrician estimated the gestation period to have been between 34 ½ and 36 weeks. The average full-term pregnancy is 40 weeks.

had a 75 percent to 96 percent chance of survival.

An information was filed charging petitioner, in Count I, with committing the crime of murder (Pen.Code, § 187) in that he did "unlawfully kill a human being, to wit Baby Girl VOGT, with malice aforethought." In Count II petitioner was charged with wilful infliction of traumatic injury upon his wife (Pen.Code, § 273d), and in Count III, with assault on Mrs. Keeler by means of force likely to produce great bodily injury (Pen.Code, § 245). His motion to set aside the information for lack of probable cause (Pen.Code, § 995) was denied, and he now seeks a writ of prohibition; as will appear, only the murder count is actually in issue. Pending our disposition of the matter, petitioner is free on bail.

I

Penal Code section 187 provides: "Murder is the unlawful killing of a human being, with malice aforethought." The dispositive question is whether the fetus which petitioner is accused of killing was, on February 23, 1969, a "human being" within the meaning of this statute. If it was not, petitioner cannot be charged with its "murder" and prohibition will lie.

Section 187 was enacted as part of the Penal Code of 1872. Inasmuch as the provision has not been amended since that date, we must determine the intent of the Legislature at the time of its enactment. But section 187 was, in turn, taken verbatim from the first California statute defining murder, part of the Crimes and Punishments Act of 1850. (Stats.1850, ch. 99, § 19, p. 231.)[14] Penal Code section 5 (also enacted in 1872) declares: "The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments." We begin, accordingly, by inquiring into the intent of the Legislature in 1850 when it first defined murder as the unlawful and malicious killing of a "human being."

It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form. (Baker v. Baker (1859) 13 Cal. 87, 95–96; Morris v. Oney (1963) 217 Cal.App.2d 864, 870, 32 Cal.Rptr. 88.) This is particularly appropriate in considering the work of the first session of our Legislature: its precedents were necessarily drawn from the common law, as modified in certain respects by the Constitution and by legislation of our sister states.

We therefore undertake a brief review of the origins and development of the common law of abortional homicide. (For a more detailed treatment, see Means, The Law of New York concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (1968) 14 N.Y.L.F. 411 [hereinafter cited as Means]; Stern, Abortion: Reform and the Law (1968) 59 J.Crim.L., C. & P.S. 84; Quay, Justifiable Abortion—Medical and Legal Foundations II (1961) 49 Geo.L.J. 395.) From that inquiry it appears that by the year 1850—the date with which we are concerned—an infant could not be the subject of homicide at common law

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14. "Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." The revisers of 1872 did no more than transpose the "express or implied malice" language of this provision to the following section (§ 188), and delete the second sentence as surplusage. (Code Commissioners' Note, Pen.Code of Cal. (1st ed. 1872), p. 80.)

unless it had been born alive. Perhaps the most influential statement of the "born alive" rule is that of Coke, in mid–17th century: "If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is a great misprision [i.e., misdemeanor], and no murder; but if the child be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura,* when it is born alive." (3 Coke, Institutes *58 (1648).) In short, "By Coke's time, the common law regarded abortion as murder only if the foetus is (1) quickened, (2) born alive, (3) lives for a brief interval, and (4) then dies." (Means, at p. 420.) Whatever intrinsic defects there may have been in Coke's work (see 3 Stephen, A History of the Criminal Law of England (1883) pp. 52–60), the common law accepted his views as authoritative. In the 18th century, for example, Coke's requirement that an infant be born alive in order to be the subject of homicide was reiterated and expanded by both Blackstone and Hale. . . .

We conclude that in declaring murder to be the unlawful and malicious killing of a "human being" the Legislature of 1850 intended that term to have the settled common law meaning of a person who had been born alive, and did not intend the act of feticide—as distinguished from abortion—to be an offense under the laws of California. . . .

Properly understood, the often cited case of People v. Chavez (1947) 77 Cal.App.2d 621, 176 P.2d 92, does not derogate from this rule. There the defendant was charged with the murder of her newborn child, and convicted of manslaughter. She testified that the baby dropped from her womb into the toilet bowl; that she picked it up two or three minutes later, and cut but did not tie the umbilical cord; that the baby was limp and made no cry; and that after 15 minutes she wrapped it in a newspaper and concealed it, where it was found dead the next day. The autopsy surgeon testified that the baby was a full-term, nine-month child, weighing six and one-half pounds and appearing normal in every respect; that the body had very little blood in it, indicating the child had bled to death through the untied umbilical cord; that such a process would have taken about an hour; and that in his opinion "the child was born alive, based on conditions he found and the fact that the lungs contained air and the blood was extravasated or pushed back into the tissues, indicating heart action." (Id. at p. 624, 176 P.2d at p. 93.)

On appeal, the defendant emphasized that a doctor called by the defense had suggested other tests which the autopsy surgeon could have performed to determine the matter of live birth; on this basis, it was contended that the question of whether the infant was born alive "rests entirely on pure speculation." (Id. at p. 624, 176 P.2d 92.) The Court of Appeal found only an insignificant conflict in that regard (id. at p. 627, 176 P.2d 92), and focused its attention instead on testimony of the autopsy surgeon admitting the possibility that the evidence of heart and lung action could have resulted from the child's breathing "after presentation of the head but before the birth was completed" (id. at p. 624, 176 P.2d at p. 93).

The court cited the mid–19th century English infanticide cases mentioned hereinabove, and noted that the decisions had not reached uniformity on whether breathing, heart action, severance of the umbilical cord, or some combination of these or other factors established the status of "human being" for purposes of the law of homicide. (Id. at pp. 624–625, 176 P.2d 92.) The court then adverted to the state of modern medical knowledge, discussed the phenomenon of viability, and held that "a viable child *in the process of being born* is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events *a*

birth which is already started would naturally be successfully completed." (Italics added.) (Id. at p. 626, 176 P.2d at p. 94.) Since the testimony of the autopsy surgeon left no doubt in that case that a live birth had at least begun, the court found "the evidence is sufficient here to support the implied finding of the jury that this child *was born alive and became a human being within the meaning of the homicide statutes.*" (Italics added.) (Id. at p. 627, 176 P.2d at p. 95.)[15]

Chavez thus stands for the proposition—to which we adhere—that a viable fetus "in the process of being born" is a human being within the meaning of the homicide statutes. But it stands for no more; in particular it does not hold that a fetus, however viable, which is *not* "in the process of being born" is nevertheless a "human being in the law of homicide." On the contrary, the opinion is replete with references to the common law requirement that the child be "born alive," however that term is defined, and must accordingly be deemed to reaffirm that requirement as part of the law of California.[16] . . . And the text writers of the same period are no less unanimous on the point. (Perkins on Criminal Law, supra, pp. 29–30; Clark & Marshall, Crimes (6th ed. 1958) § 10.00, pp. 534–536; 1 Wharton, Criminal Law and Procedure (Anderson ed. 1957) § 189; 2 Burdick, Law of Crime (1946) § 445; 40 Am.Jur.2d, Homicide, §§ 9, 434; 40 C.J.S. Homicide § 2b.)

We conclude that the judicial enlargement of section 187 now urged upon us by the People would not have been foreseeable to this petitioner, and hence that its adoption at this time would deny him due process of law.

Let a peremptory writ of prohibition issue restraining respondent court from taking any further proceedings on Count I of the information, charging petitioner with the crime of murder.[17]

■ MCCOMB, PETERS, and TOBRINER, JJ., and PEEK, J. pro tem.,[18] concur.

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15. Penal Code section 192, which the defendant in *Chavez* was convicted of violating, defines manslaughter as "the unlawful killing of a human being without malice."

16. In People v. Belous (1969) 71 Cal.2d 954, 968, 80 Cal.Rptr. 354, 458 P.2d 194, a majority of this court recognized "there are major and decisive areas where the embryo and fetus are not treated as equivalent to the born child. . . . The intentional destruction of the born child is murder or manslaughter. The intentional destruction of the embryo or fetus is never treated as murder, and only rarely as manslaughter but rather as the lesser offense of abortion." While the case was decided after the occurrence of the acts with which petitioner is charged, it nonetheless indicates that *Chavez* did not change California law on this point. Indeed, in footnote 13 we proceeded to distinguish *Chavez* as a case holding that "for purposes of the manslaughter and murder statutes, human life may exist where childbirth has commenced but has not been fully completed." (Accord, Perkins on Criminal Law (2d ed. 1969), p. 30.) In the case at bar, of course, the record is devoid of evidence that "childbirth" had commenced at the time of the acts charged.

17. [Added by the Compiler.] Aftermath, Cal.Pen.Code § 187. "Murder is the unlawful killing of a human being, *or a fetus,* with malice aforethought. . . ." The words in italics were added by amendment in 1970, "triggered" by *Keeler.* Legal abortions are excluded from the current California statute. See People v. Smith, 188 Cal.App.3d 1495, 234 Cal.Rptr. 142 (1987).

18. Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council.

ERRINGTON AND OTHERS' CASE
Newcastle Assizes, 1838.
2 Lewin C.C. 217, 168 Eng.Rep. 1133.

The case against the prisoners was a very serious one. It appeared, that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest: and that while he was there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly; the consequence of which was, that the straw ignited, and he was burnt to death.

There was no evidence in the case of express malice; but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with anything short of design.

■ PATTESON, J., cited from the text books the law applicable to the case, and pointed the attention of the jury to the distinctions which characterise murder and manslaughter. He then adverted to the fact of there being no evidence of express malice; but told them, that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter.

The jury took a merciful view of the case, and returned a verdict of manslaughter only.[19]

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19. "Murder is when a man . . . unlawfully killeth . . . any reasonable creature . . . with malice forethought, either expressed by the party, or implied by law, so as the party . . . die . . . within a year and a day after the same." Coke, 3 Institutes 47.

"Following the common law trend, this court has recognized that malice aforethought . . . 'denotes four types of murder, each accompanied by distinct mental states.' . . .

First, . . . where the perpetrator acts with the specific intent to kill. . . . Second, . . . where the perpetrator has the specific intent to inflict serious bodily harm. . . . Third, . . . disregard of an unreasonable human risk. . . . [Fourth] . . . in the course of the intentional commission of a felony." Comber v United States, 584 A.2d 26, 38-39 (D.C.App.1990).

See Wechsler and Michael, A Rationale of the Law of Homicide I & II, 37 Col.L.Rev. 701, 1261 (1937).

Malice may consist of the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. People v. Woods, 416 Mich. 581, 331 N.W.2d 707 (1982).

Parties:

Plaintiff

Defendant

Appellant

Appellee

Moving Party

Trier of fact (fact finder)

Bench trial

Decisions:

Guilty

Not guilty

Innocent

Reversed

Remanded

Found (judgment) for the defendant (plaintiff)

Demurrer

Sustained

Overruled

Legal maxims:
n. a collection of legal truisms which are used as "rules of thumb" by both judges and lawyers. They are listed in the codified statutes of most states, and include:

"When the reason of a rule ceases, so should the rule itself"

"He who consents to an act is not wronged by it"

"No one can take advantage of his own wrong"

"No one should suffer by the act of another"

"He who takes the benefit must bear the burden"

"For every wrong there is a remedy"

"Between rights otherwise equal, the earliest is preferred"

"No man is responsible for that which no man can control"

"The law helps the vigilant, before those who sleep on their rights"

"The law respects form less than substance"

"The law never requires impossibilities"

"The law neither does nor requires idle acts"

"The law disregards trifles"

"Particular expressions qualify those which are general"

"That is certain which can be made certain"

"Time does not confirm a void act"

"An interpretation which gives effect is preferred to one which makes void"

"Interpretation must be reasonable"

"Things happen according to the ordinary course of nature and the ordinary habits of life"