VARIAN'S VAGARIES.

Full Text of His Beaver Argument,

IN WHICH, AS A PROSECUTING OFFICER, HE DEFENDS THE PRISONER.

Says Thompson was Justified in What He Did,

AND THAT IT IS THE DUTY OF EVERY ACCUSED MAN TO GIVE HIMSELF UP.

[Reported Stenographically for the NEWS.]

ARGUMENT TO THE COURT.

May it please the court, there is a question of law which arrests our attention upon the very threshold of this inquiry, directed to the prosecuting officers as well as the court, which must be considered and determined. So far as I am advised, this is the first time in the history of the Territory, when the question involved here has been presented for determination by the court. That question is briefly stated whether or not, under any circumstances, a marshal of the United States, armed with a process of the Federal court, goes out to arrest an alleged offender against the laws of the United States, is authorized to use force to apprehend the offender; if so, to what extent, and whether he may use it to the extent of taking life or not. The matter I may say, so far as this trial is concerned, appears to have become something of a public question and interests all classes of the community, and upon which opinions may have been divided. In my judgment the time has come for a

SETTLEMENT OF THAT QUESTION

so far as it may now be settled. In that view, when it was understood that I was to come to Beaver, and take charge of this prosecution, I gave the matter all the study, examination and reflection, that I was able to—in the midst of other professional duties, and, speaking for the prosecution, will say that I have reached certain conclusions which it is my duty to make known to the court, and to present the argument with the authorities by which it seems to me I have fortified myself.

The facts in this present case disclose that the defendant was a duly appointed, qualified and acting deputy marshal of the United States, and under the law as such was authorized to serve the processes of the court. That the deceased was charged by an indictment of the grand jury of this court and district with a criminal offense against the laws of the United States, designated as the offense of unlawful cohabitation. By the express terms of the statutes, creating and defining the offense, it is classed as a misdemeanor; and the question now, as it seems to me, is, whether it is of that high order of crime, or the class of crimes which authorizes the officer, armed with a warrant to

TAKE HUMAN LIFE

if necessary to arrest the offender. This question involves, perhaps, the construction of the federal law as it is exemplified in the statutes as well as the construction of the territorial law in relation to kindred matters. I prefer in my discussion to consider the matter solely now in the light of the federal law. As your honor is aware there is no common law—criminal common law—known to the jurisprudence of the United States. There are no common law offenses. Our ancestors did not bring with them that portion of the body of the common law. Offenses against the common law are those which are defined by the Federal Congress in the statutes. In matters of procedure and of evidence and of construction of terms used by Congress in the statutes taken from the body of the common law, as it was known at common law, the courts are authorized to look to, and they do look to the common law as the mother of jurisprudence of the country. For the purpose of ascertaining whether a crime exists or not, the Federal Court is not authorized to look beyond the statute. At common law the crimes were divided into classes known as

FELONIES AND MISDEMEANORS.

Each had their particular signification. Felonies embraced all the degrees of crimes known as infamous, including capital crimes; and the punishment which attended the commission of the crime known as a felony was something more than the punishment that attended the commission of any crime in the United States at the present day. A felon was deprived very generally of his life, and also his blood was corrupted. He forfeited his lands, goods and chattels, and by the laws of England the sins of the parent were made to affect, in a very practical and substantial way, the descendants of his children. A misdemeanor, on the other hand, carried with it none of these forms of punishment. The penalty was simply imprisonment for short periods of time. Blackstone says, I believe, one or two years was denominated the limit, although there was no particular line of demarcation between the different durations of punishment. At the common law an officer was authorized to take the life of the felon, provided it was necessary to take his life, or to suffer him to escape. Armed with a proper process, or in some cases even upon a well grounded reason of suspicion of the felon, the peace officer was authorized to pursue the alleged felon

TO THE DEATH.

This was not a rule, however, in cases of misdemeanor; and the question is whether or not that rule is applicable here; and if so, to what extent, how and when may it be applied. The first proposition that occurs to one's mind in considering the question naturally is, that the power to make effective the processes of any court in any government ought to exist somewhere. Without that it would become impossible to carry into effect the decrees and lawful judgments of the courts; so that when we come to consider the question in the light of the Federal statutes, it is proper to assume, and I think that Congress in legislating on this subject intended to make it effective and to bring to justice the offenders of the law that it enacted; and to bring to justice the offenders against these laws; but in the Federal legislation we find that the distinction between felonies and misdemeanors has been entirely obliterated. It no longer exists. Corruption of the blood, forfeiture of his goods and lands, does not attend as a consequence of crime. In this country no man's blood can be corrupted. His goods and chattels are not forfeited to the State for the offense he may commit. In the legislation of Congress, contained as it is in a large volume—the penal code—a greater number, a larger majority of the offenses their defined are either designated as misdemeanors or are not, or are not designated by name at all, as belonging to any particular class of crime. The elements which shall go to make up and

CONSTITUTE A CRIME

are stated with accuracy and precision. The act which was entered into to form the crime was likewise stated with accuracy and precision. In some few instances the term felony is attached to the definition of the crime, but in a large majority of cases the word felony is not used. Again, punishment for crime in this country—I am speaking now of the United States as a federal government—is by fine and imprisonment, of course with the death penalty in certain instances. In only two instances that I now recollect, do other consequences attend or follow the violation of the Federal law. The man who attempts to bribe a Federal judge, if convicted, is to be punished by fine and imprisonment, and is disfranchised; that is to say that he is prohibited from again ever holding office or position of honor or trust under the Federal law. The man who commits the crime of perjury in a court of justice is also punished by fine and imprisonment and he is forever disqualified from giving testimony as a witness in a court of the United States. There may be some other crimes which I have overlooked to which similar consequences attach. These offences, however, are sufficient for illustration. They are both misdemeanors under the rules which I shall hereafter attempt to make clear. Offenses involving imprisonment for a long term of years, 10, 15 or 20, are under the classification of cases I have given, simply misdemeanors, offences created by Congress. On the other hand there are offences designated by Congress

AS FELONIES

that are followed by short terms of imprisonment and lighter penalties. Therefore it is apparent in reviewing the legislation upon this subject that the distinctive features known to common law as felonies, characterize them as such, the distinction from misdemeanors no longer existing in this country, in every State of this Union, in every Territory of this Union, there the distinction no longer exists. In every Territory and in every State, so far as I am advised, the designation of the class of crimes known as felonies is an arbitrary one, made by the legislature, and depends upon the punishment that follows, and not upon the character of the offence. Every offence that is followed by imprisonment in the State prison. The punishment in every State or in every Territory, is classified as a felony; every other offence is classified as a misdemeanor. Misdemeanors are punished in this Territory and through the States and Territories, by imprisonment in the county jails. Neither is the duration of the punishment, the period of time for which an offender may be committed to prison, to determine the question. I find upon examination of the statutes in this Territory, that there are some forty offences, statutory offences, punishable by imprisonment in the penitentiary, wherein the maximum terms of imprisonment have been fixed by the Legislature; so that each of them may be followed by imprisonment for only one day; still they are offenses under the

TERRITORIAL LAWS.

The courts of the United States, sitting upon circuits, have been greatly perplexed with this and similar questions growing out of the failure of Congress to make any distinguishing classification of crimes, and the question arose a few years ago upon the Tennessee circuit upon the application of a prisoner charged with counterfeiting, which was a felony at the common law, to exercise the right given him by this 819th section of the revised statutes of the United States, to challenge ten jurors instead of three. The state provided in cases of felony the prisoner should be allowed to exercise ten peremptory challenges; in cases of misdemeanor, only three. It was insisted there that counterfeiting, being a capital felony at the common law, must be treated as a felony under the law of the United States, because it was substantially the same crime as that known at the common law. Hammond, the Circuit Judge, reviewing the question at some length, came to the conclusion that there was no practical distinction between felonies and misdemeanors under the laws of the United States; and that the only consequence that followed, from the fact that a certain crime was designated as felony, was to give the prisoner a better and

GREATER ADVANTAGE

than he had before, giving him seven more challenges than he would have had if his offense had been designated as a misdemeanor.

I read from the Albany Law Journal, Volume 22, page 44. It is the case of the United States vs. Coppersmith, sitting in the Circuit Court in the West District of Tennessee, January 31, 1883. The Judge giving his opinion quotes from several of the courts.

I find by examination of the Revised Statutes that the following offenses are either by express declaration or impliedly, as suggested by Mr. Justice Hammond, felonies, under the laws of the United States: First—Murder, because it used the term of murder, without defining what murder is; breaking or entering a vessel, etc., running off with a vessel, stealing processes or procuring false bills, forging or counterfeiting, using forged certificates, aiding in the violation of the preceding section, falsely assuming to be a revenue officer, robbery or larceny; but in all cases under the definition of the Circuit Court, they say the common law word *rob*, which occurs, has no definition. The statutory word burglary or opening of sealed packages, under the revenue laws relating to distilleries; omitting to deface stamps of liquor; fixing false stamps; removing or failing to remove stamps of cigars from places where they are required to be kept. You will observe that this classification includes offenses of different classes:

IT INCLUDES MURDER;

it includes robbery; it includes two or three series of offenses at the common law which were punished as such, most of them at common law. On the other hand, it includes statutory offenses which are made for the protection of the revenue; and perhaps it may be said that each carried with it no particular degradation, except in so far, as they are in violation of the statutory prohibition. On the contrary, I find that that which was not a felony at the common law is a felony under the statutes. Mayhem, which was a felony is not a felony. Polygamy which was a felony, a capital crime in Sweden at one time, is not a felony under our law. Larceny is not a felony, only a special statutory larceny with reference to some particular portion of government, such as receiving stolen goods, plundering vessels, etc.

I will go back and give your honor an idea of the different maximum punishments that are imposed upon those misdemeanors. Mayhem is punished by imprisonment at hard labor for six years; polygamy, five years; larceny, one; receiving stolen goods, three; plundering vessels, 10 years; mutiny was a capital crime or 10 years; attacking vessels, imprisonment at hard labor, 10 years; robbery at sea or land, death. It may be doubtful whether that offense, under the definition given by Judge Hammond, ought not to be classed as a felony, although it is not defined as such. Arson, which was a felony at common law, is

NOT A FELONY;

but it is punishable by death under the United States Statute.

I will call your honor's attention now more particularly to the distinction that is made by the court. In the cases of arson, the statute is as follows: "Every person who, within any fort, dockyard, navy yard, arsenal, armory or magazine, the site whereof is under the jurisdiction of the United States, or on the site of any lighthouse or other needful building of the United States, the site whereof is under their jurisdiction, wilfully and maliciously burns any dwelling-house, or mansion-house, or any store, barn, stable or other building, parcel of any dwelling or mansion-house, shall suffer death." Now, if the legislature had simply said, after describing the places, that any person who shall commit arson within this Territorial jurisdiction shall suffer death, that is the rule laid down; but in the case of counterfeiting, they undertake to define the crime itself, and they say wilfully and maliciously burning any dwelling, etc., the consequence is we have a capital crime here which is not a felony under the laws of the United States. Perjury is punishable by hard labor for five years, and the convicted perjurer may not thereafter testify in any court in the United States. Taking a false oath in naturalization is punishable by five years. The crime of rescue is not defined as a felony. "Every person who, by force, sets at liberty or rescues any person found guilty of any capital crime while going to execution or during execution, shall suffer death." That is not defined

AS A FELONY.

Whether or not under the rule of Judge Hammond it would be deemed a felony under the laws of the United States, whether it was a felony at common law, or whether the legislature had defined it in apt language, it is not a felony at all events.

"Any officer permitting an escape of a prisoner, shall be fined not more than two thousand dollars, or imprisoned for a term of not more than two years, or both." Now, as to forging and counterfeiting: "Every person who falsely forges or alters any obligation or security of the United Sates shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years," both of which are capital yet are punished by hard labor for a term of years.

Forging certificates shall be punished by a fine of not more than ten thousand dollars and by imprisonment at hard labor not more than three years. Using plates, printing notes without authority, that is, government notes or bonds, which of course is a high crime against the Government, was a capital offense under the common law, but is a misdemeanor at common law and is punishable by imprisonment for a term of fifteen years

UNDER OUR STATUTE.

Passing, selling, and concealing forged obligations has the same penalty attached. Bribing a judge may be imprisoned at discretion for life, and forever disqualifying for holding office; yet the offender is not a felon under the United States laws. The offense is simply a misdemeanor. Counterfeiting is punishable by 10 years. Accessory before the fact in murder, robbery or piracy, punishable by death, is not a felony in the language of the statutes.

"Every person who knowingly aids, abets, causes, procures, commands or counsels another to commit any murder, robbery or act of piracy upon the seas, is an accessory before the fact to such piracies, and every such person being thereof convicted shall suffer death." Additional provisions are, that no conviction shall work corruption of blood or any forfeiture of his goods or lands to the benefit of the clergy.

ENOUGH HAS BEEN SAID,

apprehend, to make clear this proposition: that in the penal code of the United States the old distinctions between felonies and misdemeanors no longer exist. It never was the intention of Congress in the enactment of this statute to punish offenders against the Government or that this class of cases should be carried into these statutes. It is not suitable to the genius of our institutions and the civilization of the age. We have grown out and beyond it. The feelings of the people bear testimony to this in every State and Territory as well as in the federal legislation. We have laws of a similar character. While the word remains the distinction is gone. The word felony now simply indicates a punishment, not the duration of it, but its character. If the commission of the offense be followed by the punishment of imprisonment in the penitentiary where the moral degradation spoken of by the Supreme Court of the United States attaches it is a felony, and that is the only distinction. The only kind of punishment known is imprisonment, fine or imprisonment, or both, or death. Further, we find that Congress has never had that distinction in mind. The old common law distinction that crimes designated as misdemeanors—crimes that are misdemeanors because no designation has been given them. Then other offenses which Congress has in terms designated as felonies; and so I conclude that that

IS NOT THE TEST.

That is to say, that the question whether an offense is in terms designated a felony or a misdemeanor, is not the test by which this question is to be solved. In the very last volume of the reports of the United States, Mr. Justice Matthews, on the subject says in a case of *habeas corpus*: "A crime punishable with imprisonment in the penitentiary with or without hard labor is an infamous crime and carrying with it all the degradation attendant as known to the people of the land; and as such, under the Constitution of the United States it must be prosecuted by indictment and not by information."

In the case referred to by Justice Hammond, decided as long ago as 1850, Justice Nelson, speaking to the court, 8 Howard, page 44, says, the question there being whether the indictment punishing the defendant stating the fact was defective, in that it failed to allege that the acts charged against him were committed feloniously, that is to say with a felonious intent:

"In respect to the first question certified, the general rule is that the charge must be laid in the indictment, so as to bring the case within the description of the offense as given in the statute, alleging distinctly all the essential requisites that constitute it. Nothing is to be left to implication or intendment. Generally speaking, it is sufficient to pursue the words of the act; but if, in pursuing them, there should be any ambiguity or uncertainty in charging the offense, the pleader should regard the

SUBSTANCE AND LEGAL EFFECT

of the enactment. And when words or terms of art are used in the description that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.

"In all cases of felonies at common law, and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictments will be defective even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime.

"Sir William Blackstone observes, that the term felony originally denoted the penal consequences of the crime, namely, the forfeiture of the lands and goods; but that, by long use, it came, at last, to signify the actual crime committed.

"He further remarks, that the idea of felony is so generally connected with that of capital punishment that it is difficult to separate them, and that the interpretation of the law conforms to that usage; and therefore, if the statute makes any new offense felony, the law implies that it shall be punished with death, that is, by hanging as well as by forfeiture, unless the offender prays the benefit of the clergy." (4 Blackstone's Com., 96, Wend, Ed.)

"This view accounts for the necessity of the averment of a felonious intent in all indictments for

FELONY AT COMMON LAW;

and, also in many cases when made so by statute; because, if it is used, in the sense of the law, to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients inconstituting these several offenses

"But, in cases where this felonious intent constitutes no part of the crime, that being complete, under the statute, without it, and depending upon another and different criminal intent, the rule can have no application in reason, however it may be upon authority.

"The statute upon which the indictment in question is founded describes the several acts which make up the offense; and then declares the person to be guilty of felony punishable by fine and imprisonment. The transmission or presentation of any deed or other writing to any office or officer of the government, in support of, or *in relation* to, any account or claim, with the intent to defraud the United States, knowing the same to be *false*, are the only essential ingredients. The felonious intent is no part of the description, as the offense is complete without it. Felony is the conclusion of law from the acts done with the intent described and makes part of the punishment, as, in the eye of the common law, the prisoner thereby

BECOMES INFAMOUS

and disfranchised. These consequences may not follow, legally speaking, in a government where the common law does not prevail; but the moral degradation attaches to the punishment actually inflicted."

The question recurs then, if the distinction between felonies and misdemeanors in the sense of the common law no longer exists, what application is to be made of the rule which at common law authorizes the officer armed with the proper process to take human life, in certain cases? At common law, he was authorized to apprehend the offender and if necessary to arrest him, take his life. In cases of felony, that is to say in cases of that high order of crime which was attended with serious consequences followed by death or imprisonment and by the corruption of blood, there was a forfeiture of the estate and the loss of dower to his family. There was a large number of those kinds; they were innumerable. Only the lesser class or grade of crimes, small offenses, petty offenses, all embraced under the general classification of misdemeanors, was exempt from the operation of this rule; and we can readily understand why it is that the government which enacts the law, which defines the grades of crime and sets up its court to determine the question of the guilt or innocence of the offender, why it is that that government assumes to exercise its authority to bring him before the bar in order that he may be tried; if it were not so, the operations of the government would cease, if it were not so it might

CLOSE THE DOORS

of its courts, dismiss its prosecuting officers and marshals and discharge its judges from the further prosecution of criminal cases. If the power did not exist somewhere, if it was not allowed in some official to enable him to bring within the law a man charged with a crime against the law, it would be impossible to enforce the law. And so it was that at the common law, in by far the larger number of offenders all being classed as felons, it is laid down from Blackstone's time down, that the officer armed with a proper process against a man charged with that grade of crime, must bring him, and if it was necessary to kill him to take him, he was justified in doing so.

Now the conditions have changed, since the common law reached its ma-