

dence, I submit that the proof has not established the proposition.

The indictment contains two counts. On its face, want of knowledge of who killed Gordon is manifest. Without knowledge it is framed to meet contingencies. In the first count it is charged that Worrell killed him—killed him with a pistol—and that Bruff was by, aiding and abetting only. No sooner has the pleader drawn the charge than he reverses the accusation, and declares in a second count, that it was not Worrell who killed Gordon—that he was only present at the deed, and the killing was the act of another party. The indictment shows ignorance of the slayer of Gordon; and this ignorance is not dispelled, except by the statement of the defendant, which the State has made evidence.

1. My first proposition of law and fact is, that Worrell did not kill the deceased, as charged in the first count. The proof is to the contrary.

2. The second proposition is, that the second count is not proved. If Bruff killed the deceased, as charged, it is not proved that the defendant had knowledge of his design before the act, and agreed to aid and abet its perpetration; and that is essential to make him responsible for the act of another. There is no proof that he incited to the deed, so as to make him responsible as accessory before the fact; nor is it established that he was accessory at the fact.

3. If the evidence can be regarded as affecting the defendant with the homicide, the crime of murder in the first degree is not established against him.

This brings me to the distinction between murder in the first degree and in the second degree. The line is difficult to draw. It has not been drawn by any clean survey in our statute, and judicial construction has clouded the boundary. Our statute has not marked the division, nor run the line, as it was run in Pennsylvania, Tennessee and New Jersey; it makes the division at quite another part of the territory of crime; and yet our judges have been trying to follow the Pennsylvania, Tennessee and New Jersey surveys. What is murder in the second degree, in those states, may or may not