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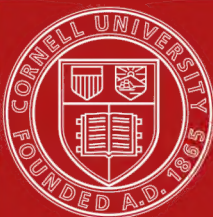
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**Commentaries on the criminal law /**



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COMMENTARIES,  
ON  
THE CRIMINAL LAW.

BY  
JOEL PRENTISS BISHOP.

SEVENTH EDITION,  
REVISED AND ENLARGED.

VOL. I.

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## PREFACE

### TO THE SEVENTH EDITION.

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THE time is so short since this work received its great and special improvements for the large sixth edition now exhausted, that no such extensive alterations are required for the seventh. A chapter on the Authorities and their Weight is added. To the brief discussion, in the latter part of it, of the rule of *stare decisis* in criminal cases, particular attention is invited, because of the great importance of the subject. I have rewritten the chapters on Ex post Facto Laws, Ignorance and Mistake of Law and Fact, Protection to the Lower Animals, the Domestic Relations, Relations other than Domestic, Battery, and Disturbing Meetings, and the greater part of the one on the Want of Mental Capacity. Parts, also, of other chapters are rewritten ; as, on Attempt, Homicide, Receiving Stolen Goods, and some others. For the rest, I have examined all the cases published since the sixth edition was prepared ; cited, with due explanations, such as have varied or questioned any doctrine, enunciated any new one, or confirmed an old one not before well settled ; and, beyond this, cited more or less of the cases merely reaffirming what was before established, not deeming it necessary to include this class entire.

In these various ways, the body of the work, exclusive of the indexes and prefatory parts, is enlarged just fifty pages. The number of added cases is 902 ; making in all, in these two volumes, 10,416.

The plan of distinguishing, in the Index to Cited Cases, those cited also by some other English or American author, from the ones appearing in text law only in the present work (as in the sixth edition, explained in the preface next following), is found on trial to render this index much less convenient of consultation. And, on balancing the reasons, the advantage to the reader is deemed not sufficient to compensate for the additional labor required of author and printers. So the present Index to Cases is printed in the usual way. But I have caused such comparisons to be made with the now last editions of the other books as to be able to say, that the proportions of the two classes of cases, for these two volumes of "Criminal Law," remain substantially the same as stated in the Preface to the Sixth edition; namely, a few more than half of them are cited in some book on the law, the practice, the pleading, or the evidence in criminal causes, by some other English or American author, while the rest are in my volumes alone reduced to text law. The proportion of those that appear only in this series of books is larger in "Criminal Procedure," and still larger in "Statutory Crimes."

| My plan, as elsewhere explained, has been uniformly to *examine all the cases* which the methods pointed out in the introduction to the third edition of "Criminal Procedure" could bring to me, but not necessarily in every instance to cite all. Therefore I have doubtless rejected some which another, writing on the same plan, would retain; and certainly some to which one would cling who professed to give all, while gathering them by means which could reach only the more easily found minor part. So I examined a second time, in the original books of reports, such of my discarded cases as had been cited in other works; finding, to my surprise, my first judgment confirmed in nearly every instance, and thus reclaiming too few to be worthy of mention. I do not profess that my double judgment

herein is infallible ; but, such as it is, the reader has the benefit of it, while the toil has been mine.

The value of a book cannot be said properly to depend on the number of cases cited, or even on the judgment with which selections of cases are made. Yet, on the other hand, all reflecting lawyers will admit that these are elements in the question. The highest element, without which any production is worthless, is accuracy of doctrine. Upon this, an author is almost forbidden to speak, and I shall here pass it by. But it is in place to say, what the reader cannot avoid perceiving, that, in these five volumes, is collected an immense quantity of legal doctrine not elsewhere to be found in the form of text law.

The reader's attention is invited to a series of introductions, — the first, originally inserted in the third edition of "Criminal Procedure ;" the second, in the sixth edition of "Marriage and Divorce ;" and the third, consisting of a rewriting and enlargement of a former one, in the present edition of this book, — wherein, while explaining the purposes and internal structure of these works, I endeavor to contribute something toward the general improvement of our legal literature and jurisprudence. Space would not permit me to draw the practical conclusions. So let me here suggest, without the reasons, yet as the result of years of reflection, the following : —

First. Most of all is needed a disposition in the profession, not to take things on trust, but for every man to *look and see for himself*. Without it, no solid improvement in our law or its literature is possible. Added to this should be —

Secondly. The establishment, by the National Bar Association, or some other association or individual able and willing to bear the expense, of a bureau to investigate, by the help of trained experts, every book relating to the law, and especially every new one, and report in writing to the profession, simply and only as to its *bona fides*. If



it is a reprint of a foreign work, is it correctly done, with name of author, dates, and the like, true to the fact? If it professes to be original, how far is it so? Are due credits given? Are the rules of our written language concerning quotation marks followed? Are there concealed piracies? Did the writer alter from other books any part of what he put forth as his own? Was the work done personally by the ostensible author? If a book of reported cases, did the judges, in their opinions, deal fairly with counsel, text-writers, and one another? And let all other questions, pertinent to the main inquiry, be answered.

Thirdly. The copyright laws need amendment and extension. Among the rest, we should have more stringent rules against piracy as a civil wrong. And it should be made a crime for an author to appropriate knowingly, *animo furandi*, and with the omission of credit, either the thoughts or the words of another as his own. The copyright protection should be made to avail no one who wilfully, in his book, puts forward a claim to originality beyond the truth. And there should be established a governmental bureau, in a degree similar to the private one suggested, to make due examinations, by experts, of all books for which copyrights are taken out. Resulting therefrom, in proper cases, the formal copyright should be withdrawn.

These suggestions, imperfect, and in outline incomplete, will suffice for this place. "Where there is a will there is a way." If the profession is satisfied with things as they now are, no one man can change them. If it *wants* a real reform, it lacks neither the understanding nor the energy to supply all deficiencies, and put it through to the very daylight.

J. P. B.

## PREFACE

### TO THE SIXTH EDITION.

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THIS sixth edition does not differ from the fifth in its general arrangement, in the order and numbering of the sections, or materially in legal doctrine. Nor does it omit the substance of any thing important in the fifth. But, in other respects, it is essentially new. Nearly all of it is either rewritten or otherwise compressed into briefer forms of expression, every case has been compared anew with the original report to see that it is correctly cited, the notes are augmented more than a third in the number of cases cited, the text is enlarged by what those added cases represent, it is by various devices made clearer, each topic is more easily found, and the entire work is brought down to the time of publication. Let me explain.

To a mass of material, embracing the substance of several thousand adjudged cases, which lay by me neither used nor definitively rejected after preparing the last editions of my books on the criminal law, I added the fruits of fresh searchings through the reports for cases which I might have overlooked or too hastily rejected, together with the adjudged law subsequently made public. With this material before me, I went through the entire work; compressing, changing, and adding, as already stated. Not a section, unless a quoted one, stands, if I mistake not, in this edition exactly as it did in the last.

In dealing with the cases, my aim has continued to be, what it was at first, to read all; and, upon questions which

divide judicial opinion, to cite all, especially to omit from my notes no case contrary to what I set down as the better law. To find the cases, I have personally handled every volume of the reports, and consulted all the auxiliary helps known to the profession; and, to have them before me while writing, I have employed the most successful devices hitherto invented. Moreover, in the production of my series of books on the criminal law, I have spent, in undivided labor, more than half the working years of an average lifetime. Yet I do not claim to have omitted nothing which ought to be set down, or to have mistaken nothing.

While, on questions which divide opinions, and on some others not well settled, I have aimed to cite all the cases, such has not been my purpose throughout. It has been to render the utmost practical help to the reader; and often I could see that I should serve him best by excluding what would be with him mere lumber. Great numbers of cases have been on this principle rejected.

Yet a pretty full citation of authorities has seemed desirable. They are not, as is sometimes assumed, introduced to support the text, which, as a general rule, and as viewed by a competent reader, ought to support itself. But they furnish, to the practitioner and the courts, the means of making a wider and more minute investigation of any topic or proposition than the limits which an author prescribes to himself will permit. Thus the text-book, while it serves its primary purpose, becomes also the most convenient index to the cases. Other men may possess abilities which I do not; but, for myself, I could not, by any form of digest, furnish the profession with so helpful a guide to the cases as I have done in this work, which still is not a digest but a commentary, or treatise.

Every sentence in this work, which is set down on the authority of the courts, was produced by me, not to any degree from examinations of other authors, whether Eng-



lish or American, old or new ; but wholly from my personal examinations, in the original books of reports, of the cases cited, and others not cited. It has occurred to me, therefore, that the reader might occasionally desire to see how other authors have dealt with the same cases. To satisfy this inquiry, he has only to find my cases in the tables of the other text-books, and thus be referred to the particular passages. But to enable him first to learn whether any other author has a particular case, I have caused such as are cited in any other current text-book, English or American, to be printed in my "Index to the Cases cited," at the end of this first volume, in *Italics*. And see the note at the head of that index. Again, if I lay down a proposition contrary to what is said by another author, this division of my cases into Roman and Italic will indicate with substantial though not absolute accuracy, whether or not the other author had before him the authorities from which my text was produced.

In the fifth edition of this work, 7,016 cases were cited. In this sixth edition there are 9,514 ; being an increase of 2,498, considerably more than a third. The English cases, including the Irish and a few Scotch and Canadian, number 3,321 ; the American, therefore, 6,193. Of the English, 2,494 are cited in one or more of the eight volumes, by other authors, of current English and American text law, and 827 are not cited in any of them. Of the American cases, 2,560 are cited in some one or more of those eight volumes, and 3,633 are not in any of them. Of the 9,514 cases, being the entire number cited in these two volumes, 5,054 are cited also by some one or more of the other English and American authors, and 4,460 are not cited by any of them ; but, in these volumes, are for the first time, it is believed, reduced to text-law.<sup>1</sup>

<sup>1</sup> Those who count the cases in my "Index to the Cases cited" will find them to number more than is thus set down. The reason is, that, where more reporters than one have a case, they occasionally differ in spelling the names ; and, in this "Index," each diverse spelling stands as a separate case.

The labor of preparing this edition has been quite beyond what was originally supposed. After allowing myself what appeared to be ample time for a thorough revision, I arranged to bring out this edition six months ago. Yet the present has proved to be the earliest moment possible. Though the book has been lying out of print and constantly called for, I deemed it for the interest of my readers to take the needful time, and carry to the end what I had undertaken. My hope is, that neither they nor I may see occasion to regret the delay.

J. P. B.

CAMBRIDGE, Feb. 1, 1877.

## PREFACE

### TO THE FIFTH EDITION.

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THOSE who have examined the second edition of my work on the law of Criminal Procedure, published a few months ago, will see that I have done for this work what I did for that. I have rearranged the matter throughout, added some new topics, improved many of the old discussions by presenting the doctrines in new lights and new relations, cited the latest cases, pruned away what could be spared of the old to give place to what is better and fresh, and prefixed in a peculiar type headings to the sections to enable the practitioner rapidly to get at the contents of the book.

In an Introduction following this Preface, the reader will find an explanation of the series of books of which the present work is one, and of the plan on which they are executed.

When I refer from one book to another of this series, the form of the reference is, for example, "Crim. Proced. II. § 54," or "Stat. Crimes, § 25." This is done to avoid the frequent writing of my own name. When I refer to one of my other books, I do it in the usual way. These references have their uses ; but I never, except for some very brief thing, repeat in one book what is said in another.

To preserve the balance of these volumes in size, and avoid the necessity of transferring to the first volume any of the matter now inserted in the second, I have had the "Index to the cases cited in both volumes" printed at

the end of the first. And for the same reason, some of the topics which, as respects the procedure, are treated of in the second volume of "Criminal Procedure," are, as respects the law, treated of in the first volume of this work.

The old English statutes are printed from the edition known as Ruffhead's. This explains why the words of these statutes occasionally differ slightly from those found in English text-books. I believe there is no higher authority than Ruffhead, on a question of the true wording, in English, of an old statute.

Where the same case is in several reports, I often refer to more reports than one, even though the precise point is set down in only one. The double or treble reference helps as much in these instances as in any other.

J. P. B.

CAMBRIDGE, August, 1872.

## GENERAL INTRODUCTION

TO THE BOOKS OF THIS CRIMINAL-LAW SERIES AND  
THE OTHER RELATED WORKS.

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It seemed due equally to myself and the public, that, after spending some thirty years in the exclusive and undivided labors of writing law books which, while constantly in the hands of law students, legal practitioners, and the courts, remain, by reason of being in some respects different from the majority of the text-books in common use, not at all understood by some and only imperfectly by others, I should make such explanations as will leave it certainly not my fault if those who care for them do not in the future comprehend their methods and structure. To this end, I prefixed to the third edition of my "Criminal Procedure" an "Introduction explaining how and why the Books of this Series are written;" and, to the sixth edition of "Marriage and Divorce," an "Introduction explaining the Plan of Writing Law by Looking and Seeing." The present Introduction consists of a rewriting and extending of the one in the sixth edition of this work.

The two volumes here presented are a part of a series of five, covering the field of Criminal Law, Criminal Pleading, the Practice in Criminal Cases, and Criminal Evidence, both at the common law and under the statutes of our States. The series is arranged as one work, so that what is set down in one of the books is not repeated in another. These two volumes of "Criminal Law" are limited to the law of the subject, not extending into the procedure. Their sphere is the unwritten law, yet not simple and pure, but as augmented and qualified by the statutes. Treating, for example, of common-law larceny, they exhibit the statutory modifications and enlargements of it; and include the

statutory larceny called embezzlement. And this illustration will serve for all. But each purely statutory offence — such, for instance, as the prohibited selling of intoxicating liquors — is reserved for “Statutory Crimes.” In “Criminal Procedure,” consisting of two volumes, are embraced the three several subjects, by some deemed suitable for distinct works, of Criminal Evidence, Criminal Pleading, and Criminal Practice. It seemed to me that they could be more conveniently for the reader, and in less space, presented in one work. The single volume of “Statutory Crimes” gives the leading doctrines of the interpretation of statutes, and the discussions of the unmixed statutory offences. In it, for convenience, the law and the procedure are blended.

The sole purpose of these and the other works, not speaking of the motives for writing as explained in the Introduction to “Criminal Procedure,” is practical instruction in the law. Nothing merely theoretical is admitted. Nothing tending directly to this object, and possible within the space limited, is intentionally excluded. In determining what to insert and what to reject, I look to real needs, not inquiring what misapprehensions of needs may prevail among persons who have not observed or reasoned on the question. To particularize : —

The student, the practitioner, and the judge have severally occasion for the same learning. There is not one sort of law for the first, another for the second, and still another for the third. Nor is the student a person of immature mind to be fed on pap. Like the practitioner and the judge, he has acquired a liberal education and grown to the stature of a man. Therefore these works are constructed to be equally adapted to all. Any one may choose, for a purpose, to read or consult an epitomization of a subject, or an ampler elucidation ; but a student, it is believed, should not be restricted to a brief statement of legal doctrine, a practitioner permitted a fuller, and a judge overwhelmed with the fullest. No one can fully examine every thing. But, of all classes, the student should not be kept exclusively to what, from its brevity, is practically to him inaccurate. If he cannot read every page of a book, he can turn over unread pages, and thus learn that there remains something which he does not know, — the lesson of highest importance, hardest of acquisition, and never attained by a large part of those who enter upon the law.

What, then, is the exact thing to be taught and acquired? It is not primarily what has been adjudged to be the law, in cases which are past and the identical facts of which will never again occur, but what should and will be held under the new and ever-varying developments of the present and future, assuming the questions to be laid properly before a competent tribunal. If yesterday was simply being repeated in to-day, and only the former cases were recurring, the practice of the law would be plain and easy; requiring indeed some industry, but no capacity. Yet every practitioner knows, that of the questions of law put to him by clients, nine-tenths were never in exact form drawn into litigation in any reported cases. And still, if he is qualified for his calling, he answers them in most instances correctly. This he could not do if the law was what many in our profession say it is, a conglomeration of judicial decisions, and no science. The natural reason of man, informed and educated and shaped by the course of the courts in the past, is able to discern what should be held, though under changed facts, in the future. It discovers the science of the law, and applies it to the future cases. Were this not so, there would be no law, but every judge would be the mere arbitrary dispenser of weal or woe to the parties appearing before him.

Now, the science of the law consists of what are termed legal principles, and the rules whereby they operate together to work out the law's results in new cases. For though, in common speech, not all the cases arising from day to day are called new, in exact language all are, no one having its precise counterpart in the past. And those called new are the difficult ones, which every lawyer is compelled to be able to answer or pronounce himself incompetent. He, therefore, who through the making of a law book would render practical instruction, has the double task of ascertaining and stating the principles, and of showing how they are applied to the constantly changing facts. Other forms of book may be useful, but this alone is practical. Other forms may be consulted for particular purposes, but this alone is indispensable to the student, the practitioner, and the judge. Such, to repeat, is the author's task; how to perform it, is the question to which we next arrive.

The things to be ascertained and stated, then, are the principles, and the rules for their application. Except as modified

by statutes and written constitutions, they constitute what is termed the unwritten law. The judicial reports, the chief fountain whence to draw them, do not yield them in the abstract form required for a legal treatise. True, there are lawyers who in words deny this proposition; but every successful lawyer practises upon it, whether consciously to himself or not. The office of a court is, not to formulate abstract principles of law, or abstract rules for the applications of principles, but to *decide cases*. If an issue as to such mere principle or rule were made up in pleadings between parties, no judge would either try it himself or submit it to a jury. What is termed an issue of law consists of admitted facts, where the court is to say what are the rights of the parties growing out of them. And in instructions to juries the course is not really different. Though the judge lays down doctrines, they are not the abstract ones which legal treatises embody, but the special forms of doctrine applicable to *such facts in issue as the evidence tends to prove*. In particular instances, these may coincide with the abstract forms required in the legal treatise; but they do not always so, or necessarily. And such is the bound of the judicial jurisdiction. A court has no authority to go beyond this bound, and, *as legal decision*, say more. If it says more, as commonly for the gratification of litigants and for public instruction it very properly does, its words, however just, are extra-jurisdictional, and, while they may furnish valuable evidence of the law, do not constitute it. Moreover, should we undertake to formulate them all and indiscriminately as law, the result would be to leave us no law, by reason of their contradiction and confusion. For every one who has examined the subject knows, that our books of reports are plethoric with irreconcilable *dicta* from the bench. In this view, *dictum* would devour *dictum* and be in turn devoured, till nothing would remain.

The business of our courts, therefore, is to decide cases. Such is the bound of their jurisdiction, and they have none beyond. They can deal only with facts in litigation. A judge, speaking to other facts, or laying down general doctrine, travels outside of his jurisdiction, and his words are no more the law than those of any other person of equal learning. He can no more create legal doctrine, independently of the facts in issue, than create a statute.



And still legal doctrine exists. And the judges do and should recognize it, speak of it, define it when they can, and follow it in their decisions. It is not a thing to be handled, like a saw; manufactured, like a packing-box; weighed and stamped, like a letter; or consumed by fire, like a block of wood. It is of substance immaterial and immortal, like the breath of God whence it sprang, or the mind of man wherein, shaped to his uses, it reposes. If, like the sunbeam, it cannot be measured, it can be seen, at least in its effects.

The work of discovering and defining legal doctrine began with the law and it is ever progressing. Judges, especially of the abler sort, have done much of this work; lawyers practising before them, much; writers on the law, much; and undoubtedly much, how much no man can know in advance, remains undone.

The space limited for this introduction will not permit explanations of every thing. So I shall pass over the methods by which discoveries of principles are made, and the rules to test their accuracy.

It is vain for a writer to assume to describe what he has not seen. Nor would any American who had never crossed the Atlantic undertake to delineate, for the information of mankind, the scenery and life of London or Paris. Lawyers alone do the equivalent of this for the instruction and applause of lawyers. Not universally, but to an extent the limit of which I have no occasion to ascertain, men of our profession, who never travelled through any considerable proportion of the adjudged cases on a subject, plan a book upon it without so much as knowing where its difficulties are, therefore without being able even to attempt an arrangement whose very order will argue a path through them, begin the writing without understanding more of the topic than do the average of their readers, steal right and left from other authors, introduce material collected from the reports by boys employed to assist them, adopt what any judge says without ascertaining whether it is correct or not, and thus progress to the end; and the profession applauds, pays for, and is misled by the result. Such, in part, is the wisdom of the law in these closing years of the nineteenth century!

How well or poorly I have written, as compared with this class of authors, is a question not possible to arise. To pronounce my works the better, or theirs the better, is equally absurd. Legal

gentlemen properly have their preferences; some are attracted to the one class, others to the other; but it is simply ridiculous to say, that a certain book of the one class is better or poorer than a certain one of the other. In the main, all forms of law books are, with us, products of the decided cases. So equally a coat and a jug of whiskey may be products of the maize. If corn is fed to a sheep, then the fleece is sheared from it, then certain steps are taken with the fleece, the corn comes out a coat. If fed to a still, its result is whiskey. But most people do not compare the merits of a coat and a jug of whiskey, disputing whether or not the one is better or abler, more scientific or more practical, or a more exact reproduction of the original corn, than the other. And still it is true that some men's affections are more drawn to the product which warms without, and others to the one which warms within.

In whatever pertains to the law, there are two ways of doing things. The one is to look and see. The other is, in the language of the juveniles, to "shut your eyes, open your mouth, and swallow." The distinction is of the highest importance. It extends through our legal literature, legal study, legal practice, and the administration of the law from the bench. And only by a consideration of this distinction can we arrive at the difference between the two classes of the legal treatise, to the one of which my books distinctively belong, and with the other they have no affinity. The purpose of this writing being simply to unfold my own plan, I see I can best accomplish it by the historical method, showing how the plan came to me. I do not profess that it is original; but it was such with me; so I shall speak of it as though it were such absolutely.

In the place where I studied and practised law, I was a stranger who drifted there, without friends, money, or even a relative in the State. Worse than all, I had not the native ability to acquire, by the ordinary methods, the desired professional education, or conduct the successful practice to which I aspired. So it occurred to me to adopt a way of my own; which was, before taking a step or deciding any thing, to *look and see*. Therefore, on being admitted as a student into a law office, the plan was to keep the eyes open and the thinking part at work. In this way, before the lapse of a week, I was able to make myself useful; and before three months had passed, I had fully

committed to me the entire small-court business of the office, including the consultations with clients and the trial of the causes in court. Of course, by looking and seeing, I was able correctly to decide when to act, and when to refrain, and to take each step properly. Clients, therefore, were satisfied, and seldom was a case lost. The gentlemen under whom I studied were relieved of much drudgery, in return for which they looked upon it as a duty to devote to me all the time and render all the instruction desired. Thus, by the simple process of looking and seeing, I acquired, without cost, more than the advantages of a law school with its moot courts, and more of those special to office study than are commonly afforded.

So well had this plan served me during the period of preparation, that I determined to take it into professional practice. And I have never ceased to wonder, that, in the crowds of our profession, whence agonized aspirations are constantly going up unsatisfied, so few are willing to recognize their lack of ability to succeed by the ordinary methods, and supply defects by a plan so simple. Not many days had my office been open, when a man came in with a case which, he said, he had taken to Mr. So-and-So, the most prominent lawyer in the city among those who would accept small causes, and he had declined. My course, therefore, was, not to act upon the opinion of Mr. So-and-So, though fully aware of his great superiority in every respect, but to *look and see*. The party complained of was known by reputation, where not personally, to the entire city, as being very litigious, never beaten, yet able to respond to any judgment obtainable. The complaint was for assault and battery. My client was earnestly of the opinion that he ought to have five dollars, but was willing to settle for three. Should we fail of getting the three in compromise, he wanted the delinquent sued in the small-cause court, the jurisdiction whereof was limited to twenty dollars. It did not require a great deal of looking and seeing to determine, that, if the client was right, the lawyer who had declined his cause was right also. But may not a client, contrary to the common course, underestimate his case? This required looking and seeing. The result was, that I brought a suit in the higher court before a jury, laid the damages at five hundred dollars, and recovered a verdict for three hundred. My estimate of the injury was just one hundred dollars to one of the

client's, and the jury gave him just one hundred dollars to one of the sum which he was anxious to receive in compromise. In the trial, I was opposed by one of the most popular and best-known jury lawyers in the city. The defendant, on finding himself beaten and, as he deemed, outrageously so, raved like a madman — abused the jury — was brought before the court on a *capias* and fined for the contempt — moved for a new trial — changed his lawyer for another conspicuous one — and thus continued to the end of his rope. Every time the case was before the court the proceedings were published in all the papers, my name appeared in each several instance as the winning counsel, and thus I became thoroughly advertised. From that time onward, during my practice, I had never a moment when something was not pressing to be done. Yet as the method was the comparatively slow one of looking and seeing, and I had much to learn, I could accomplish less than if it had been by simply opening and swallowing. A considerable part of the business brought me consisted of causes which my superiors at the bar, not looking and seeing, had pronounced impossible. And there was never an instance of failure in a case of this class.

When, therefore, not in "intervals of leisure" from practice, as writers sometimes tell, but in time otherwise brought under command, I undertook the writing of a law book, I had learned that it is possible for a legal practitioner, however experienced, wise, and crowned with years, to overlook something. Could a judge? So well had the plan of looking and seeing served me in study and practice, that I could not help asking this question. Was it really true, as many deemed, that the man who yesterday as practitioner was not infallible, became to-day as judge like the Omniscient? I did not then know, what has since been told by some, that this is a question not permitted to an author, and that, whatever others do, he is required to bandage his eyes and "go it blind." So, as I said, I looked. If by chance I might see what had escaped the notice of my superior as practitioner, might I not, if I could, discern what he did not as judge? I saw, in the opinions of the courts, a vast amount of wisdom, beautiful and true. I saw likewise curious things, marvellous in cunning devices, and dark spots blended with the light. For example, a court would argue in a certain way to a given result. Another court would attack "*the* argument" — not pausing to

see whether there might not be some other course to the same end — and, having demolished “*the* argument,” leap, without looking, to the opposite conclusion. Indeed, in nearly every instance, when a legal argument had found its way into the reports, judges and counsel alike would accept it as “*the* argument” for its side of the question; it not occurring to them, that reasoning and conclusion are distinguishable, and either one may be wrong and the other right. In other cases, the most obvious elementary principles would be overlooked. Or some every-day rule for applying the principles, certainly changing the result had the court thought of it, would be ignored. And, on the whole, it became obvious that, in nearly or quite every instance of doubt or dispute, the judges would have concurred in results clear and harmonious, leaving behind them no difficulties or uncertainties, if the minds of all had been directed to what did not occur to any of them.

This thought was in the preface to the first edition of “*Marriage and Divorce*” expressed as follows: “In dealing with these questions [of conflict and doubt], I have not always followed the path of argument pursued by either side to the controversy. Indeed it has happened, that, in most of these instances, the truth has seemed to me to lie in a somewhat untrodden way. . . . And if I have succeeded in elucidating any questions of difficulty, it has been in consequence of this method. Truth, alone and unadorned, with no shadow of contiguous error upon its visage, is usually recognized alike by all men; and the principal reason why differences arise is because it has never thus been distinctly and accurately seen.”

That this view was correct the courts subsequently, as the questions arose, affirmed. For on every question they adopted both my arguments and their conclusions, so that now uniformity and distinctness of doctrine prevail in place of the former discord and doubt. If there is so much as one exception to this fact it does not occur to me, and certainly there are no such exceptions as to vary the general truth.

Still there is a class of questions, not those most disputed or most important, yet not to be overlooked, on which no considerate writer would even attempt to produce uniformity. They are such as lie on border lines between the dominions of conflicting principles, or where the controlling principle shades off and be-

comes thin. Readers who do not look and see demand of their author the same positive assertion on these questions as on the others. And if he leaves a question of this sort in doubt, then exposes some palpable blunder of an honored court, they are rampant with indignation. They are sure he has some personal pique to the judge who is represented to have erred, while he lacked the sense to be equally distinct at the other place.

Moreover, there are doctrines, wrong in principle, yet so firmly established by decision, that no judicious writer of practical books on the plan of looking and seeing would attempt their overthrow; either because they ought not to be overturned otherwise than by legislation, or because judicial action would require a higher judicial discernment than is at present attained by the average of our tribunals. A practical writer does not undertake impracticable things. Therefore, in these works, criticisms on what has been decided, do not ordinarily extend beyond what can be made practically available, by any competent lawyer who will take pains to understand and explain them, before any court, however short-sighted or prejudiced. Still, as they are meant for use in all the States, it sometimes occurs that an incorrect doctrine is established past overthrow in a particular State, yet not in others; then, for the benefit of practitioners and judges in the other States, its blemishes are pointed out.

Where criticism is practically available, the plan is perhaps a little peculiar. While certainly I am not the only author who ever produced a legal treatise by looking and seeing, I do not claim to be, for I do not know, the only one to proceed fully as I am now to describe. This is the part of the plan least — possibly I should say not at all — understood. My previous efforts to make it known have not been quite successful, doubtless from my lack of lucidity of statement, rather than from any difficulties adhering in the subject. Arriving, in the course of the writing, at a particular topic, I have before me all the cases, personally examined before the writing began, as explained in the introduction to “Criminal Procedure.” I now re-examine, simply as far as may seem necessary, the cases to this topic. I consider and compare all the views which have been taken of it by the courts and by every writer whose work is deemed worth looking into; then, in connection with this, I pass under mental review whatever else, on both or all sides, the question admits of in argu-

mentation. I give the vision a range equally wide and minute, so as, if possible, to omit nothing. The result of the examination is, as of course, to disclose some plain, simple, and conclusive line of legal reasoning, leading absolutely to a particular end and excluding doubt; for, should this not be so, the question is of another class, not that of which I am now speaking. In the writing, it would be useless to set down all that the mind beheld, or even any considerable proportion of it. Commonly the want of space compels me to say less than I should desire; but, if there is room, I select such a single thread of argument as, drawn to the conclusion without encountering doubts, admits of no reply. *And there never is a reply.* Not a single instance of one, by any gentleman on or off the bench, who took pains to *understand* the reasoning, has come to my notice. There is nothing remarkable in this. The doing simply requires an amount of labor — of course, as in every thing else, and no more than in other things, with due aptitude in the original structure of the mind — alien to the other methods. And the consolation of an author writing on this plan is, that, daylight beaming in all places where he sets his feet, he knows himself absolutely secure from overthrow or even intelligent attack. Of course, where he is thus required to depart from lines of argument previously drawn by others, or to dissent from their conclusions, those who will not look and see have their little day to jeer, but so always does Darkness make faces in retiring from advancing light.<sup>1</sup>

<sup>1</sup> I will gratify a little vanity here. In the third and fourth editions of this work, I took occasion to consider the question of the number of States required to ratify a constitutional amendment proposed by Congress, at a time when a part of the States were regarded by the General Government as possessing no legislatures, — the Constitution providing that the amendment "shall be valid to all intents and purposes *when ratified by the legislatures of three-fourths of the several States.*" The Executive Department at Washington, and the majority of the senators, not duly looking into the question, were of the opinion, that, in counting the "legislatures," those which did not exist must be reckoned the same as those which did, — contrary to the rule prevailing both in legal and governmental

affairs in all other cases of the like sort. One day this question came up in the senate (see Congressional Globe for 1868, p. 878); and, after a speech had been made stating the majority doctrine, Mr. Sumner presented in a few words the opposite, and added: "I introduce here the authority of the best living text writer on the jurisprudence of our country, who has treated this very point in a manner which leaves *no opportunity for reply.* I refer to the book of Mr. Bishop on Criminal Law. . . . I send to the chair the work of Mr. Bishop, and I ask the secretary to be good enough to read what I have marked." Here was a distinct challenge for a reply, made under the assertion, from a competent source, that the legal argumentation in the passage admitted of none. But no reply was at-

In the writing, it is not always or even generally practicable to occupy so much space with a question as the method thus detailed might seem to demand. The book must find purchasers. It must, therefore, be made acceptable to the profession. Disquisitions in it unread can do no good. Nor, if it is read, need it, to accomplish its object, be made altogether so formally exhaustive. Therefore I do not attempt to set down every thing so conclusively that a practitioner or judge who merely consults the one place, however thoughtfully and circumspectly, will, as of course, be convinced. To do so would require impossible space. I must assume, on one page, that the reader understands what is said on another. If, looking at the one thing, and shutting his eyes to the rest, he fails to be instructed, the fault is not mine. As a court has its jurisdiction, so also has an author his. And it is not his to compel men to read, or to provide them with the disposition to think. I endeavor to make the arrangement, in general and in detail, argue, — so to illumine one page that its rays will be reflected on another, — to unfold one question in a

tempted; and the issue presented by the senator, which was therefore not met, was parried in the following manner: "Mr. [Reverdy] Johnson. . . . The senator is aware that there are *on this floor* and outside of Congress a great many men who, perhaps, are as able as Mr. Bishop to write a book upon that subject, who entertain a very different opinion." So it was gravely put forth, in this august body, that the weight of an argument lies in the mental *avoids* of the arguer! The next lunge of the senatorial logic was in the direction of an apology for those who, ever since my writings have been in the course of publication, have been in the practice of pirating the original views which they contained, and giving them out as their own. The proposition was, that, for aught the speaker knew to the contrary, I might have stolen what I had set down as original; and, while the mind is in doubt, it is proper to withhold the credit which honesty would otherwise demand. Says the judge of this class, while his light fingers write as his own what another's brain has wrought out: "Doubtless the fellow stole this chicken; for there are, *on this bench*, men as capable of raising chickens as he, who

never raised one. Therefore, to preserve the dignity of my station, and show that the administration of the laws is in proper hands, it becomes my duty to steal the chicken also." Said Mr. Johnson: "I do not know when that particular edition was published; but I am [not] sure that Mr. Bishop has not been convinced by the argument of the honorable member from Massachusetts, and that he may not be considered as merely indorsing the doctrine of the member from Massachusetts. With the knowledge I now have, with the lights which are now afforded me, I would rather — and I say it with no purpose of disparaging Mr. Bishop, for that cannot be done by such comparison — much rather yield, if I am to yield to authority, to the authority of the honorable member than to the author of that book." Here was the end-all wriggle and twist. This very able senator and the rest of the majority had been challenged, not to yield to authority, but to answer an argument. And the challenge was such that the failure to meet it, by men present of the ability described by him, was tantamount to yielding the point. So the senate dropped the question and proceeded to other business.



manner to solve another one, — and in a thousand ways do indirectly what the limited space will not suffer to be done directly.

The idea, prevailing to some extent in our profession, that the law is whatever the court which happens first to decide a question holds it to be, and that there is no absolute standard for measuring the decision, is, as to some classes of questions, and as things go, practically correct. But of other and more important classes it is the reverse of true. Not even in mathematics are results more certain than in portions of the law. For example, it is certain in the law that the whole of a thing is the sum of its parts ; and, as flowing from this, that the part of a series of acts cannot be criminal and the completed series innocent. So that, descending to a single particular, an attempt, which is an unfinished transaction, cannot be punished where the transaction if completed could not be. No holdings of courts, however eminent, or however often the holdings were repeated, could establish as law such a contradiction. This is like the other simple proposition, not to be overturned by judicial decision, that the sum of two and two is four. Equally certain in mathematics are the more complicated propositions whereby an eclipse is calculated ; so likewise are the more complicated ones, *of corresponding natures*, in the law. Thus is shown the feasibility of the method of writing which I have just explained. The illustration of the attempt and the completed crime does not stand for every form of this legal truth. The forms are numerous ; some of them very complicated, others little so. And as complications multiply, the danger of blundering by the courts increases. A judge has, commonly, not the means of seeing what an author whose method is by looking and seeing discerns. To sit as a court of appeal from all decisions, and to correct all errors, is, in abstract theory, the special province of a legal writer on the plan of looking and seeing. But where his books, like mine, are simply for practical use, prudence will not permit him to occupy his entire jurisdiction ; even were he competent, which certainly I do not claim to be. Should he disclose errors which no court would look into, much less correct, he would, by such impracticable matter, impair his success in the practicable, besides wasting pages which might be usefully filled.

Such, in general terms, not to be minute in every thing, is the plan of these works. I deem the plan to be good. If I have

not well executed it, the fault is personal with me. My aim in these expositions is, more than any other, to induce abler writers than myself to take it up and produce better books.

I was helped forward to this method, and encouraged in it, by some things which came to my attention while preparing "Marriage and Divorce." "With regard to the decided cases," said Lord Stowell, in delivering one of the most admired of a series of masterly judgments on subjects then within the range of my investigations, "I must observe generally, that very few are to be found in any administration of law, in any country, upon acknowledged and settled rules. Such rules are not controverted by litigation; they are, therefore, not evidenced by direct decisions; *they are found in the maxims and rules of books of text law*. It would be difficult, for instance, to find an English case in which it was directly decided that the heir takes the real, and the executor the personal estate; yet, though nothing can be more certain, it is only incidentally and *obiter* that such a matter can force itself upon any recorded observation of a court. Equally difficult would it be to find a litigated case in the canon law establishing the doctrine that a contract *per verba de præsenti* is a present marriage, though none is more deeply radicated in that law."<sup>1</sup> Here, indeed, is the whole of it, from a master whose superior never presided in any court in any country. The text-book gathers the rules of law from the decisions, and from such other sources as are available, not by servile copyings while ignoring quotation marks, not by perverting the words of judges spoken to special facts into general doctrine, not by omissions of doctrines which the judges had no occasion to formulate, not by piracies from other text-books, not by the lying which every writer is guilty of who publishes without marks of quotation or varied type the words of another with his own, or in altered words another's thoughts without acknowledgment; but by descending into the depths of the law, and bringing thence, not what merely appears to the casual eye, but what in fact is, — the true wisdom of the past for the guidance of the future.

The relations of my books to others on the same subjects is matter on which, I see, there is a determination abroad that the professional public shall not be enlightened. I am equally determined it shall be.

<sup>1</sup> Dalrymple v. Dalrymple, 2 Hag. Con. 54, 93.

When I had fully resolved to devote my life to the writing of legal treatises, I stated in a preface that the books would not interfere with any others on the same subjects; because, being entirely different from the others, they would be indispensable to those who liked them, and the others would be indispensable to those who did not like them, and prudent lawyers, whatever their preferences, would not confine their researches to a single author. Though I have required pay for my work, it has not, in the true sense, been done for money. I have no shrewdness in pecuniary affairs, yet, looking at the money returns, I was never so demented as to reject the emoluments of practice for the comparative poverty which any success in law writing would entail. Or, if I had looked solely at getting gold in authorship, the plan would not have been to write by looking and seeing, but by shutting the eyes and stealing. If honor had been the thing sought, I could have won, at least, as much by the latter kind of writing as by any other, and vastly more in the way of practice than in any line of authorship; if ease, hard as a full practice is, it is less severe than writing law by looking and seeing; if a pleasant occupation, no man ever breathed who loved the practice better than I. But I had other objects, and it was essential to their attainment that my books should be *used by the side of those written on the other plans*. So far, then, from presenting mine as rivals, the success of the others was, for my purposes, second in importance only to that of my own.

And the result has shown, that, in proportion to the number and assumed consequence of the other works on any subject on which I have written, have been the sales of mine. For example, of the books of the present series, "Statutory Crimes" has sold less rapidly than either "Criminal Law" or "Criminal Procedure." Yet, though a few of its topics have been treated of by other writers, substantially there is no other work, English or American, covering the same ground. It is the part of the general subject on which, in proportion to the space occupied with it, the cases are the most numerous; on which the profession oftenest needs help; and to which, if want and supply were duly understood, they would oftenest go. But as one of our most eminent judges and professors of the law, specially versed in the criminal department, wrote me, voicing the general idea of the profession when this book appeared, "I was not fully

sensible of the great necessity of such a work until I found how much difficulty it cleared away." If there had been a dozen books, rivals of one another, covering the same subject after the manner of the other criminal-law works, mine, on this different plan, would have had a larger sale than either of the others of my series. The books by the other authors, on the other plans, would not have been in the slightest degree in the way;<sup>1</sup> because

<sup>1</sup> This plain fact, in the highest degree probable *a priori*, seems not to have been seen without looking, even where there was no lack of the disposition to see. Not long ago, a writer in one of our periodicals, urging the importance of international copyright, illustrated as follows: "In this connection, we would call attention to the fact that no American lawyer has yet been able to make the writing of law books remunerative as a distinct and single occupation. Kent, Story, Greenleaf, Parsons, Cooley, Dillon, — all of them, while writing the great works which bear their names, had an independent living, in salaries derived from professorships in colleges, or in seats on the judicial bench. Mr. Bishop is the only law-writer of age and eminence who, without any of these collateral aids, has steadily pursued this profession for many years. And we happen to know that this great man, while rich in all the qualities that strengthen and adorn human character, while honored and admired by sound lawyers wherever law-books written in the English language are read, is poor in the possession of this world's goods. Even the degree of LL.D., which the best American colleges have scattered about in a manner that cries shame, has not yet descended upon him. The chief reason why his books, though widely circulated, have paid so little for the labor of writing them, is that he has been obliged to compete with American editions of English works on the same subjects, on which the English authors are paid no royalty." 5 South. Law Rev. n. s. 875. Now, the publishers of my law books could demonstrate, to any one having an interest to know, that this "chief reason" is a myth. I should be proud if the rest of this too complimentary language did not approach too near the mythical also. The English books

referred to have been at times out of print in this country, and at times in fresh editions with American notes. Publishers keep exact, monthly records of their sales. And there never was an instance of the sale of any one of my books being made less by the presence on the market of any English reprint, or greater by its absence. Surely no lawyer, dwelling so far back in the dark ages as to purchase such reprint, however loaded with American notes, *instead* of a respectable American work (though at a reduced price, and urged thereto by publishers or their agents), would under any circumstances buy a book written on the plan of looking and seeing. I should not have quoted the other myths but for their intimate connection with this one, without which it would not clearly appear. If I have taken even a step toward greatness, which, I think, few will admit, it has been from want of capacity, and failure in the execution of my plan. Could I have fully done what I meant, every doctrine would have been stated so simply and clearly, that most readers would have deemed its very enunciation superfluous, and all young men and nine-tenths of the old ones would have felt sure that their execution of the work, had they undertaken it, would have been vastly superior. A "great man" is the product of great dust, which he raises, where nothing is distinctly seen. Whatever want of success I have encountered has come from the various forms of stealing. When mechanical improvement stood as far back in the darkness of the past as legal literature does now, one who proposed anything beneficial in this department was obliged to dwell under a cloud until his claim was established by trial. Then came the reward in the reversal of the public judgment, and commonly in money also. The cloud is equally a reality

no one who has used a book on his subject written by looking and seeing will go on without it, whatever other works he may have before him, and however high their merits. The idea was in part expressed by a very eminent judge, who, speaking of the present series of books, said: "On a close or difficult point in criminal law, we never feel satisfied until we have seen how it is regarded by" them.<sup>1</sup> So that, for mere money's sake, the prosperity of the other books on the same subjects has had a special interest for me.

On the other side, there have been those who, almost from the beginning, have taken a very different view of this question. Shortly after my book on the Criminal Law was announced as in preparation, I was notified off the ground by a gentleman who spoke in the plural "we," and told me that its failure had been decreed by "we;" and, from the day of its publication to this, if, for example, a seeming quotation has anywhere appeared from any work of mine of this series, no one could know whether it was meant to be real or a forgery, except by examination. A book appeared before mine, in which special pains was taken to inform the profession that nothing more on the subject was wanted. Finally came a new edition of a prior work, wherein it was among other things specially said in the preface, "that there

now in the law. He who sees what another did not discern, is, by the mass who will not look, put under the like cloud. But, when the question arises where it cannot be dodged, another pirates the solution and claims it as his own. The men who would not look and see accept the claim. They remember the real author of the solution only as a half-addlehead, who put forth something foolish on the subject. His triumph in fact has brought him nothing. His second effort will command no more in the market than the first, and so of the third, and fourth, to the end. *Here we have the real obstacle, and the whole of it, to the success of writing law by looking and seeing.* I could fill a volume with facts on this subject, but I forbear. As to the "LL.D.," if I had been a candidate thereof, I could never have obtained it, for the just reason that it was not my due. Properly, it is the reward of "learning," which, highly as it should be prized, is a sort of

"moral piracy;" looking and seeing do not constitute learning. Practically, it is for two classes: it illustrates the one class, and the other class illustrates it. From the head and shoulders of the one it glides down, and we see it no more. To the other it sticks. A man of the latter class never writes his name without the *doctor*; we dare not write it without, for fear of giving offence; we speak of and to him as *doctor*; even in the family circle, he is no longer "my dear husband," but "the *doctor*." For example: There were three men known to all the American people, named Webster. Was Daniel Webster an LL.D.? No one can tell. Was Noah Webster? This is a thing understood only by the readers of the title-page of the big dictionary. "*Doctor Webster*" signifies, to every understanding, the Webster who was hung. I never stood high enough to be of the former class, or low enough to be of the latter.

<sup>1</sup> Dillon, J., 4 Cent. Law Jour. 326.

is not a citation in my former texts which has not, for this edition, been verified; and that, as far as I know, *there is not a single intermediate reported English and American criminal decision which I have not scrutinized and introduced*," — an obvious thing to say in a preface if true, or if so far approximating the fact as to convey any sort of useful idea to the reader. But if one chooses to take into his hands any volume of the "intermediate" criminal-law reports, or any other, and see how large, or more properly how small, a part of the decisions in it this author did "scrutinize and introduce," he will seek for some other line of usefulness for this passage than actual instruction to the readers of his book. Then it came to be proclaimed, in various ways over the country, in substance, that here was a book which contained every thing needful for any practitioner, and no other book did. So my vocation was gone!

I might add a great deal more to show, not that there was now occasion for explaining any thing to lawyers who look and see, but that to leave the other class absolutely in the dark would be alike unjust to them and to me. There was still room for my books. Those who look and see knew what it was. The rest, for whose swallowing the above statements had been given out, under the assumption of their having still capacity enough of their own to understand the importance of being referred to the cases, might like to know, that, notwithstanding all, my books contained references to pretty respectable numbers of cases not cited in other works; enough, indeed, to constitute alone, without the rest, a complete body of criminal jurisprudence.<sup>1</sup> At my suggestion, therefore, and on the necessary examinations and counts being made, my publishers inserted in their advertisements some facts on this subject. And for a like reason, among others, I stated something under this head in prefaces to subsequent

<sup>1</sup> For example, my "Criminal Procedure," as the books stand at the date of this publication, January, 1882, contains, among its 16,000 cases, 9,000 (speaking in round numbers) not referred to in the four volume series from a preface in an earlier edition of which the above extract is taken. And they are selected cases, made on an examination of all I could find in the reports, including all in that series. I now open the book known as Fisher's Criminal Law Digest, and

read in the Preface: "This volume is a full reprint, from Mr. Fisher's Common Law Digest, of the titles Criminal Law and Criminal Information, and will be found a complete compendium of the English law of crimes and punishments, upon which our American criminal law is founded." Yet the cases in this work number less than 3,000, not quite a third as many as, of the class exclusively mine, are reduced to text law in two volumes of my five.

editions. I have been informed that there are persons who, discerning nothing amiss in those utterances the very name whereof it would not be pleasant to search out and write down, look upon the telling of the truth, which followed, as very foolish and horribly wicked.

For breaking the effect of this carrying forward of that beginning, it was a happy thing to have it go abroad that here was a rivalry of authors! The details of what has been written and said on this subject need not be mentioned. What any reader does not know of it, is not worth learning. To those whose surprise was awakened at seeing, in an unexpected place, the statement that in "Marriage and Divorce" my "work" is "*at its best*;" then that in the criminal law I have a "learned rival," that "the *profession gain* directly and indirectly by this rivalry; directly by the quality of the work done by these gentlemen themselves, and indirectly by their wholesome example [!] upon other writers," — I am glad to be able to explain that this stuff proceeded from no one in any manner, directly or indirectly, connected with my books or their publication. It was the high conception of a well-known sympathizer with — if the reader would learn with whom, let him see whose works are thrust into the list as published within a twelvemonth, when in truth they were not. Even the fact alone of the greater fulness of my works, if there were no difference in the structure, excludes the idea of rivalry.<sup>1</sup>

<sup>1</sup> After proceeding thus far, I paused to consider whether or not the above explanations are adequate. On reading them over, it seemed to me that the positive statements concerning my plan are reasonably full, but that there is a lack of what may be called negative averment. If they show what it is that these works attempt, they do not make plain what they avoid. How can the latter object be accomplished? After a good deal of deliberation, and fully examining the ground, I became convinced that the only practicable method is to compare my plan with some others to which it stands in contrast, and explain the difference. To do this by merely presenting extracts from other books and my own, ranged side by side, would be tedious, and probably would be deemed by some

offensive. And the other plans are not generally explained by those who pursue them; they are learned only from examinations of their works. But there are some explanations, not very exact, yet to a moderate extent practically available for this purpose; and I propose to present them to the reader, pointing out as we go on the divergence of methods. I shall avoid comment, further than the showing of the difference renders imperative. Should there be those who, attached to my plan, will not like the others, I trust they will bear in mind that this is a case of conflicting professional judgments, such as we encounter every day with no abatement of mutual regard and confidence. And I bespeak from those who deem us in the wrong, the same charitable consideration. It is con-

The foregoing expositions are deemed sufficient for the present purpose. They were written, like the body of the book itself, with reference to the actual needs of the profession without inquiring whether or not they will be approved by all, or

fidently expected of all who so far look and see as to verify the accuracy of the following statements, that they will withdraw the charge of "rivalry."

A personal explanation will best introduce the reader to the other plan first to be stated. In a review of an American reprint of an English book (5 South. Law Rev. n. s. 882), the reviewer said, that, while it was in the course of publication in England, in the periodical "Law Times," an American one on the same subject appeared; whereupon the editor "boldly accused" the American author "of appropriating matter contained in this work, without credit." The reviewer then goes on to say, that "this brought Mr. Bishop to the front in a letter to the 'Law Times,' in which he made, in substance, the same accusation against" the American author "touching the manner in which he had made use of the writings of other authors." "The American public," continues the reviewer, "naturally and perhaps justly assumed that" the American author "had been wronged." The fact concerning what is thus called my "accusation," was simply this: I had known, since my earliest law readings, as every lawyer knows who has perused our legal literature with any care, that there are two ways of pirating English books, — the one, to publish them bodily with their English authors' names; the other, to appropriate them, commonly in parts and patches, and more or less changed, mixed with American matter, as the American author's own. The latter appropriation is sometimes, and sometimes not, accompanied by a general acknowledgment, which amounts to nothing. Sometimes there are shrewd devices for concealing and covering up the English origin. While the former method does honor to the English author's ability and labors, enhances his fame, and thus indirectly benefits him even pecuniarily, the latter takes from him money and fame alike. I have always deemed it an outrage on the English author, —

needless, corrupting to those who resort to it, and a disgrace to the American profession who sustain it, — protection from which is demanded by common justice. But never an opportunity to give vent to the pent-up fires occurred till now. I wrote to the "Law Times" stating how the English lawyers can protect their authors in this regard if they choose. I brought no accusation against the particular American author. I simply mentioned him casually, and in the kindest terms. My letter is reprinted in this country; it was written for the good I hoped it might do, and I should be glad to have the reader of this note peruse it. *Law Times* of June 9, 1877, Vol. 63, p. 106; 5 Cent. Law Jour. 191.

The next number of the American periodical (6 South. Law Rev. n. s. 119), contained, extracted from the "Law Times" (the place is not given, but it is Sept. 8, 1877, Vol. 63, p. 322), the American author's reply, introduced by a letter from his publishers in which they say that they deem it due to him "that it should appear in your next number, and we trust you will agree with us." Mingled with explanations thus called out, and constituting of them a part, are some concerning his methods. These alone are relevant here.

Regarding the arrangement of a book, his course is "to prepare an analysis and then leisurely work in the details." Mine is the direct reverse; namely, to examine first the details, then, having discovered what there is to arrange, and what are the difficulties of the discussion, devise an order which, to the extent possible, shall overcome the difficulties by its own force, without any seeming effort of authorship. And one who never tried it will be amazed at seeing how far this can be done. It brings no fame to the author; and, in the estimation of those who decide *a priori* how an arrangement should be, it detracts from his merits. But it helps the reader immensely. And the plan of these works is to give the utmost



whether or not they are adapted to enhance the public estimation of works which, for good or ill, have already a wide and constantly-increasing circulation. If I may be instrumental in promoting the much-needed reform indicated by this Introduction

practical help, and let fame take care of itself.

To bring out some other points, I must mention one of the specifications made by the English editor; namely, that the author copied from the English work "the *best part of two pages*" of the American, "without any difference in the type, without any inverted commas, and without any acknowledgment." *Law Times* for April 14, 1877, Vol. 62, p. 423. The reply states the case thus: "Your remaining specification is, that I took from your columns, without acknowledgment, *ten lines* containing," &c. Here we have, not a defining in terms of the author's plan, but rather an illustration of it, on a question whereon nothing more distinct is given. It requires the reader to make steeper jumps with his reasoning powers, and to accept more on the mere authority of the author, than does mine. On any plan, the rule of pleading is, that whatever of allegation is not denied in the plea or answer is admitted. There is nothing in any part of this letter as to the number of lines which the American book in question contains per page. The charge is "the best part of two pages." The answer covers "ten lines;" which, of course, is as broad as the charge. "The best part of two pages" must be, at least, one line more than one page. Hence the book in question contains only nine lines or less per page. Most persons would estimate it at six lines; so that one full page and four lines would constitute "the best part of two pages." Now, the plan of my books is to lead the reader up, to a conclusion unusual, by gentle steps. As never before was a legal treatise printed with so few lines per page, I should introduce this matter with an explanation why, in this so exceptional instance, the lines were printed with such enormous spaces between.

The author does not deny the allegation, but explains as follows: "When preparing my work . . . I examined, in connection with other standards, your

journal, marking in it, for the use of a copyist, all passages, whether in reports, or editorial articles, or communications, which I thought I might afterwards desire to cite as exhibiting English law." The result was "an immense mass of manuscript." He does not remember how the omission to cite the "*Law Times*" occurred, but surmises: "It may have been that the reference to your journal was inadvertently dropped by the copyist; or it may have been that, coming to me, as the copy did, simply as the report of a case with your name and that of the *Law Reports* attached, I may have assumed that the reports in your journal and in the *Law Reports* were substantially the same, and for the sake of brevity, as I was compelled to do in some other cases where I found my notes were overrunning, I may have stricken out the reference to you, leaving that to the *Law Reports* as the authority most accessible in the United States." Though, for the sake of apparent as well as real fairness, I have copied this surmise, it is of no consequence here, where we are simply inquiring after the plan. The allegation material here is the admitted one, that he transcribed into his book "the best part of two pages . . . without any difference in the type, without any inverted commas," while yet there was at the end a reference to a single authority. To add another would simply leave the acknowledgment less distinct. By the ordinary rules of our written language, even one reference at the end of every "best part of two pages," "without any difference in the type, without any inverted commas," does not indicate that the pages were taken bodily from the place referred to, much less would two references. As to which the author explains his plan as follows: "The originality of the passage itself is disclaimed by the very nature of the extract, as well as by the reference to the *Law Reports*. No writer of any experience can be presumed to be ignorant of the fact that the value of extra-territorial decisions de-

and the other two, I am quite willing that then, should necessity command, whatever light is in or from me shall be drowned by the superior floods of the future.

Yet there is probably no reader who thinks me so destitute of

pend, not on the originality of the reproducer, but on the fidelity of his reproduction." This, as I read the letter, is the common course of its writer. He does not say what would be the inaccuracy which marks of quotation would create in these specially important passages, requiring extraordinary "fidelity." He proceeds: "That I was influenced by any desire to withhold due acknowledgment to your own authoritative journal is negatived by my innumerable citations from your columns, and from the conspicuous insertion I have given, with due acknowledgment, to an extract from one of the very articles which it is now alleged I ignore." For this part of the plan, the writer might have evoked judicial authority; though, I submit, the "weight of authority" is overwhelmingly the other way. For those who have observed have noticed, that, in occasional instances, the course of a judicial opinion is to "negative" "any desire to withhold due acknowledgment to" a text-book, by referring to it for something of little value, then, as in the case of this writer, to leave the "nature of the extract," or the importance of the adopted views, or considerations of "fidelity," to explain omissions. An exceptional form of this, yet not unknown, is to cite the book for some erroneous doctrine, then to present the author's argument in refutation of it as the judicial product; the "nature of the extract," and the high importance of "fidelity," explaining the rest.

The plan, therefore, which I am now seeking to lay before the reader, is, except as thus "negatived," for the author to set a copyist at work, thereby collecting "an immense mass of material;" then it is properly enough, and necessarily when special "fidelity" is required, introduced into his book, even in its very words, without marks of quotation or distinction of type.

To this plan I am not objecting. I only introduce it to explain, by the contrast, my own. Mine is to write, as

nearly as I can (for I am conscious of short-comings), in the English language according to the standards of the present day and generation. Should I undertake a composition in Latin, Greek, German, French, Italian, or Spanish, I should say in the preface what language it was in, unless confident of being able to write the language with sufficient accuracy to enable gentlemen acquainted with it to see for themselves. One rule of modern English is known by all who read it to be, that what is transcribed by the author from another's book is distinguished either by the type or by inverted commas. And I can discover no reason why English readers should not have their books in English. If I believed, as this writer seems to, that there is but one way of stating a legal decision, and that this one way is never original, I should deem myself to be strengthening a statement by introducing and closing it, when I truthfully could, with marks of quotation. And I should think myself doing a service to the reader in thus cautioning him against being misled in passages standing without the marks. In this method of writing, there can be little use for the sort of copying above described. Should books from other authors require consultation, the easy way would be to look into the printed page itself. If the preservation of a passage was thereupon found desirable, or if it was foreseen to be so before the writing began, it could be copied; and, whenever done, it would stand when printed between marks of quotation.

The results of processes thus diverse can, in the nature of things, bear no similitudes, and they cannot be the subjects of "rivalry." It is immaterial—returning, for a moment, to the figure a little way back in the text—which is deemed the whiskey and which the coat,—two warmth-producing articles obtained by diverse processes from corn. The dram-shop and the tailor's shop are not rivals. I mean no disrespect, and request those who prefer the tailor's shop to call

judgment as not to perceive, that this Introduction will not awaken universal delight. But are there those who, taking pains to understand its views, will, with an honest purpose, present and expose fairly their errors to the profession, and point out,

mine the dram-shop, and those who prefer the dram-shop to call mine the tailor's shop. They cannot be rivals. On the contrary, the advocate of temperance will deem his cause best promoted by exhibiting a man full to overflowing with whiskey, and the advocate of the dram will most rejoice when the whiskey-drinker comes into the scene fully clothed. Nor, in reason, as I explained in the text in respect of the different classes of books, should a man leave unvisited the whiskey-jug because he has a coat, or go without a coat because he is drunk. Or, to drop the figure, prudent lawyers will, as I said at the beginning, consult the books of both classes. And if the advocates of the one class believe in it, why object to the other being used by its side? The proof of all things is trial. And assuming a book to be of a 'quality not to instruct the practitioner himself, still, if his court will follow it to a conclusion, wrong in law yet favorable to his client, he will bear it before him to victory, unless restrained by his oath of office. The remedy for the other side is to seek instruction and help from a book of the other class. In this way, what is useful becomes known, and what cannot stand the trial goes, as it should, to the wall. Here, again, we are helped by the illustration of the whiskey and the coat. If, finally, either goes to the wall and the other prevails, — as, if no more whiskey is drunk, but every man has a coat, or all is whiskey and no drinker of it has a coat to his back, — they will no more than now be regarded as rivals, but dissimilar products from one substance to accomplish a common end. Such, therefore, is, not the rivalry, but the contrast, even were the differences in books no more than is above pointed out.

But in the present instance, the differences in the parts which by all opinions are properly original are still wider. They can, in the nature of the subject, be explained only by illustration. I should be glad to have the illustrative

matter selected by some friend of the plan to which mine is in contrast. This cannot be done in form, yet it has already been done in substance and effect. In a single instance, in the preparation of this seventh edition, I had occasion to dissent from views which a learned and excellent court adopted from a book written on the plan in contemplation. Vol. I. § 768 *d*; *Cox v. People*, 82 Ill. 191. This being the only instance, I bear no part in the selection. It was wholly made, the reader perceives, by a bench of learned judges, under their oath of office. On this occasion, they were the friends of the plan I am comparing with mine; though, as my book seems not to have been before them, there was evidently no partisanship of any sort. The question itself is stated at the place in this first volume just referred to. The doctrine adopted from the book, having, as is there seen, never before been entertained by any court or text-writer, is special to its plan; so that no question arises as to whether the "nature of the extract" required, or not, the omission of quotation marks. The passage I am to present is certainly original. This is not the place to inquire into the soundness of respective doctrines, but only into methods of elucidating and enforcing doctrines. My plan, in presenting a view of the law which originated with me, is, unless in very exceptional circumstances, to do it in a form and by arguments not admitting of reply. A view not of this sort is not ordinarily, however my own mind may entertain it, presented to the reader. The rare exceptions have no relevancy to this discussion. The present case is not within any of them. To maintain the distinction that, though solicitations are indictable attempts when the endeavor is to procure a breach of the peace, or some interference with justice in the courts or in public office, they are not such when the enticement is to an offence of any other class, — the reasoning, upon the plan after which we are inquiring, is as follows:

for the benefit of all travellers hereafter, the open ways of truth? I shall not predict. If any thing of this sort is attempted, even by a single individual, the experience of thirty years will be reversed. Whoever undertakes a good thing, for the public ser-

"For we would be forced to admit, if we adopt the affirmative view, that the professors and teachers of all novel and experimental ethical theories are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed." This is not the whole of the reasoning, but it is best to explain, as we go along. Before employing this reasoning, I should inquire whether, assuming its soundness in the abstract, it tends to sustain, on the one hand, or weaken, on the other, the particular distinction or doctrine to be supported. Thus, I should say, admitting (1), that "the professors and teachers of all novel and experimental ethical theories" are entitled to have the law so shaped as not to interfere with their proceedings; hence (2), that, if a theory of this sort consisted of urging A to steal B's goods instead of buying them, the enticer would not be indictable; some of my readers might, in spite of all I could formulate, deem it not certainly indictable for (3) the professor of the theory to urge a man to get up a row in the streets, or refuse attendance in court as a witness. In other words, the *distinction* would not, to me, appear sufficiently conclusive on the face of the reasoning. So, on the plan I am recommending, a form of argumentation thus doubtful in its effect would not be employed to establish a "novel and experimental" distinction in legal doctrine. Still, if this objection were overcome, I should next ask, whether it is really true that "all novel and experimental ethical theories" consist of importuning men to commit crimes. An absolutely accurate answer to this question might require an extended investigation; and I should deem that practically many words would be needed to bring the entire body of my readers to the affirmative belief of such fact, so I should pass this matter by without inserting it in the book. To proceed: "It would be hard, we must agree, if we maintain such general responsibility, to defend, in prose-

cutions for soliciting crime, the publishers of Byron's 'Don Juan,' of Rousseau's 'Emile,' or of Goethe's 'Elective Affinities.' Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery." My plan would reject also this matter. The reasons are numerous. One is, that it would not harmonize with the distinction I was attempting to support. Another is, that, in the case, for example, of Chesterfield, I should not regard the success of an English lord in escaping punishment as establishing the non-indictability of his act. And a conclusive reason is, that, adultery not being indictable in England, it is not there, *a fortiori*, punishable to solicit one to commit it. Other reasons might be added, but I should stop with one so absolutely conclusive. Let us go on: "Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances or as libels. But to make them indictable as attempts to lead particular individuals into crime, not only unduly and perilously extends the scope of penal adjudication, but forces on the courts psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land." My plan would omit this also. The reasons already appear in part. Moreover, desiring my argument to be sound, I could not see why, if the law had made "psychological questions" a portion of itself, the courts should dodge the decision of them. Finally, I should fear being unable to open the understandings of my readers to see, that, for the courts to hold indictable the soliciting of an individual to steal a neighbor's goods, or poison his well, or burn his house, or commit forgery, or adultery or incest where it is felony, "would make them despots of every intellect in the land."

vice, whether it relates to law-books or to any other interest, is reasonably safe against this kind of obstruction; while, on the other hand, he is aided forward by quite different means. As, to illustrate, it may be said in this instance, that I am seeking to

My plan, therefore, looking at practical results, would be to omit this argument, however sound in itself I might deem it to be. Again: "What human judge can determine that there is such a necessary connection between one man's advice [I suppose "solicitation" is the word meant; if anything less, the argument is wholly irrelevant] and another man's action, as to make the former the cause of the latter?" Now, passing over the inquiry whether such matter is for the judge or the jury, my plan would exclude it from the discussion. And the reason is, that, by fundamental doctrine, acknowledged from age to age, and never drawn into doubt, our law, under all circumstances, holds indictable the man who solicits another to commit a crime, where the other commits it. By the common-law rules, he is an accessory before the fact if it is felony, or principal if it is misdemeanor. Where it is not committed, and so the solicitation fails, the same principle brings such unsuccessful enticement into the rank of indictable attempts. My plan excludes arguments in contravention of those established doctrines which no court would permit to be questioned in its presence. The reasoning, on the other plan, concludes, in this instance, as follows: "An *attempt*, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by causes outside of the party's will, in the commission of a deliberate crime. But this cannot be affirmed of advice ["solicitation," for the reason shown in brackets above] given to another, which advice such other person is at full liberty to accept or reject. Following such reasoning, several eminent European jurists have declined to regard any attempts or solicitations as indictable, when there is interposed between the attempt or solicitation, on the one hand, and the proposed illegal act, on the other, the resisting will of another person, which other person refuses assent and co-oper-

tion." This extract closes the argument. With the others above given, it comprehends the whole. I should reject it, with the rest. Some of the reasons are, that this remaining part, even more obviously than the others quoted, has no tendency to support the *distinction* which the writer is endeavoring to maintain. If effective, the effect is too broad. If not effective, it is useless. Again, my plan is, not to lay down *a priori* a definition, then reject a view of the law found not to be within it. On the contrary, the law is first ascertained, then the definition epitomizes it as nearly as in few words it may. This difference in plans is wide and important. Moreover, mine does not lead to inquiries, however interesting, into views of European jurists antagonistic to the fundamental principles of our own jurisprudence. I should deem them relevant to some forms of useful book, but not to a mere practical one.

The foregoing illustrations disclose why it is that I wish, not to destroy the books on other plans, but to have them used in the courts by the side of those written on the plan I am recommending, and let trial and time determine between the *plans*. It is the *plan* of my books, greatly more than the books themselves, that I am anxious to perpetuate. I have written with such ability as God gave me. I could do no more. My remaining hope is to persuade abler men to write on the *like plan*. Other books have been changed from time to time in outward form, so as nearly to resemble mine; it is the *inner structure* for which I am now seeking imitators.

I must not omit to bring into contrast in this note one more plan. An honored book, bearing on its title-page the name of a well-known author, contains a preface written apparently after the work was completed, not only not acknowledging any help therein, but in terms which would convey to most readers the idea that all was the product of his personal labor. By and by a complaint is made

show off egotism, that I have become scared for the future of my books, that I am envious and malicious, that I am — well, any sort of contemptible being (for so has a part of the world always spoken of every one who has endeavored in any way to benefit it); and all this, and as much more as anybody chooses to add, will, for the sake of the argument, be admitted. That there are those who will believe it all is admitted also. And still they will see these works having sufficient success to give force to the following suggestion; namely, “If a creature like this can do so much, what, on the like plan of labor, might not be accomplished by *me!*” Thus the plan will be recommended, and the workers thereon increased. For the questions I am presenting resolve themselves into the single and sole one, whether the *plan* is good or ill. I am content to be called by any name which anybody may choose to apply, to have my efforts and purposes falsified, to be personally defamed, to have any thing said or done which any individual may desire relating to myself, if the object in view will thereby be promoted. But such sayings and doings will not meet the question in issue. It is, whether our legal literature shall remain among the shadows of the dark ages, or advance forward to the light of the present, and stand civilized in the habiliments of to-day. That question is to be answered, not by me, not by gentlemen who may desire to obstruct my labors, not from considerations of individual in-

to his publishers of violations of another person's copyright. They refer it to the author. In answer to which he writes them a letter apparently meant to be transmitted to the complaining person; at least, it was so transmitted. That letter, in its original, lies before me. This author therein discloses his plan, not directly, but by distinct implication; thus, — “I have called the attention of the writer of the [specifying the matter complained of] to [the complaining person's] claim. He denies,” &c. “My instructions to the writer not to infringe upon any copyright were most positive and complete. And to avoid the use of any but original materials, I purchased” certain reports specified, for a sum named. “Having thus done all I could to avoid injury to others, . . . since I have not intended any wrong to any person or his

rights,” this author goes on to say, he rejects the claim, while possessing no personal knowledge of the matter. “There seems to be,” he concludes, “nothing further for me to say upon the subject.” This plan of authorship, consisting of, first, getting a reputation; secondly, employing journeymen and apprentices to continue the work; thirdly, cautioning them to run clear of copyright violations; fourthly, abstaining from overlooking them even so much as to know whether or not the caution is heeded; fifthly, appealing to the public to buy the book because it is the apparent author's personal production; sixthly, excusing himself for alleged violations of copyright because the work was not his own; and, seventhly, falling back on good intentions, — is, however just, not the plan which this Introduction is written to recommend.

terests, but by the legal profession of the country, looking to their own interests and those of the law. For me, my position is fixed, and no mortal has the power to change it. I am now to be bold, and tell what it is. It is precisely what is recorded in the yet unopened rolls of the future, wherein no man can write for another.

On the whole, thus far in these labors of authorship, I have received as ample encouragement and as few buffetings as commonly fall to the lot of men who deviate, however slightly, from the thronged highway. While clouds which do not now appear overhung my path, there were constantly being sent me appreciative words of cheer and hope, not to speak of what every man is entitled to carry within his own breast. I need not parade them to the reader. One letter, inserted in previous editions, I retain, in remembrance of a great lawyer and good man, whose name long before he passed behind the golden sunset was, as it is now, a household word in every land where jurisprudence has a habitation, and who never failed in condescension and kindness to his juniors and inferiors, even when personally unknown and dwelling in foreign lands, — the late Professor Mittermaier, of Heidelberg, Germany.<sup>1</sup>

<sup>1</sup> He wrote to me in English, as, I believe, he did to all his correspondents in countries where it is the spoken language. I think he learned it at a comparatively late period of life; nor, as the reader will see, did he write it with idiomatic purity. I give this specimen letter — for there were others — precisely *in hæc verba*, that the reader may see in it an exact photograph of the writer's mind when turned, so to speak, *English-ward*.

“HEIDELBERG, 8 Aug., '60.

“MY DEAR SIR:

“I have received your kind letter (of 10 July) with a great conflict of feelings. I felt the highest pleasure receiving a letter from you, and knowing that you have received the work of M. Nypels on Criminal Law, forwarded by me. On the other side, I was much afflicted by your letter which informed me that my letter addressed to you in the last work did not reach your hands. This letter contained the expression of my gratitude for so many enterprises, — works which

your kindness forwarded to me. I felt the duty to express to you, in my letter, my admiration, and the acknowledgment of the excellent qualities in waiting on your works, — an abundance of materials, with the profound scientific researches, and a very fine practical sense. Your work is duly appreciated as the best about the matter. Every lawyer must acknowledge that he is much indebted to you for many explanations, important equally for the legislator and the lawyer of every country, in your excellent work on Criminal Law. This is a very scientific and practical work. I have the pleasure to see that my articles published in the Journals on your works have produced the attention and the study of these important works by German lawyers. I have forwarded yesterday a copy of the first number of the second volume of the work of Nypels (the first volume you have received) to Trübner, bookseller, in London, with the order to forward the book to you. You shall receive equally the other volumes.

In the introduction which this one supersedes, I had some explanations of the methods in which books written on their plan are properly to be used. They were too brief to afford much practical help, and to extend them duly here would make the Introduction too long.

I think you will find that this work is a very useful comparison of the French criminal law with the legislation in Germany and Italy. I regret that you have not received my letter, in which I have explained the present state of the criminal law in Germany. The science of the criminal law has surely made great progress in Germany: but there are great defects in our science. The greatest number of our lawyers neglect the study of the human nature, and the duty of every legislator to adapt the criminal law to this nature, and to the exigency of the social state, of the conscience of the people. The legislator should be guided by well ascertained principles. But in Germany, very dangerous princi-

ples, namely, that of intimidation, or retaliation, or imitation of the divine justice, have a bad influence. If you wish to have my opinion on this matter, I shall be ready to explain it in my next letter. I am highly desirous to receive your work on the Criminal Procedure, and am sure that this work will furnish me with excellent information.

"Pray present my best compliments to Mr. ———. I shall be much obliged to him if he will procure me new publications of your country.

"Believe me to be,

"With highest esteem,

"Your faithful

"MITTERMAIER."



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# CRIMINAL LAW.

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## BOOK I.

### OUTLINES AND INTRODUCTORY VIEWS.

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#### CHAPTER I.

##### THE NATURE AND SOURCES OF JURIDICAL LAW.

§ 1. **Law, in Broadest Sense.** — Law, in the broadest meaning of the word, is the order which pervades and controls all existence.<sup>1</sup> In the nature of things, there can be nothing without order; from the Infinite down through all space, among all forms of creation material and immaterial, each particular thing must have its order of being, and order must constrain the whole, else the thing destitute of it would cease to be. The name which we give to this order is law. Another name, more poetical in sound, yet less apt and full in meaning, is harmony. All happiness flows from harmony, — in other words, from obedience to law. And from disobedience comes all misery. So it is of every thing, material and immaterial, of which we have cognizance; and doubtless order, or law, binds alike the Creator and created throughout the entire universe.

§ 2. **Narrower Meanings of Law.** — When we descend to narrower meanings, we find the word “law” still to require the same form of definition, limited by the particular subject to which it is applied. Thus, the law of our material world is the order which pervades and controls it. To one part of this order has been given the name of gravitation; and, in like manner, we have named and we shall name other parts as discovered. So the law which governs the associations of men together is the

<sup>1</sup> Bishop First Book, § 36.

order which pervades and controls those associations. And the parts of this law bear their respective names; as, the law of nature, the law of nations, the law of politeness and good society, the municipal law of the particular country, the law (as in England) of the unwritten constitution, the law (as in this country) of the written constitution, and so through other specifications not necessary here to mention.

§ 3. **Municipal Laws, &c.** — Therefore the municipal, constitutional, and other like laws which govern nations and communities are, in their origin and intrinsic force, rules of being given to man by God. But, though man received them from his Maker, he took them as he did the air, the streams, the soil, and their productions, to use, and in a limited degree to form and transform at his pleasure. Practically, therefore, the laws, in the sense in which a legal author employs the term, are a blending of the perfect and imperfect, — in part the work of God, and in part the work of man. It cannot be otherwise than that the stream of the Primary Wisdom should sometimes become mingled with impurities while flowing through earthly channels; and the Divine rule itself provides for human modifications of the abstract, adapting it to particular circumstances, views, and wants. And whether the modifications accord with the original right or not, they are alike permitted as laws; being in the one case acts of well-doing, in the other of evil-doing.

§ 4. **What for the Legal Author — (Abstract Justice as Authority).** — The legal author is not to trace, in full, the original right through the windings of human affairs; but to state the conclusions of right, and the technical and arbitrary rules, established by legislatures and courts to guide the people. Yet he cannot drop from his own consideration, and should not withhold from his readers, the fact, that, besides the rules already shaped by man into the forms of law, there are others, derivable from Nature herself, waiting around to fill any vacuum discovered in what had been before adopted and approved. In the beginning of our jurisprudence, the courts of necessity decided causes to a greater extent than now by what was supposed to be original justice; but, even now, while precedents are numerous, the voice of God, uttering the abstract right, is listened to by every good judge, and by the legislature.

§ 5. **Law a Necessity.** — To repeat, in part: No two human

beings can exist together without rules of association, termed law. For example, it must be a rule, that neither shall occupy the space occupied for the moment by the other: a violation of this rule would end the physical lives of both. And, for the same reason, neither shall attempt to take the other's life: this rule cannot be violated and the association continue. So, if they would not only exist together, but be happy in the relation, they must obey laws tending to promote this object; as, that neither shall assault the other, or use language wounding the feelings of the other. And the further they carry this class of rules, the more full will be their enjoyment, which will be complete only when, following the injunction of Holy Writ, each loves the other as himself.

§ 6. **Penalty essential to Law.** — By law, as the word is here used, is meant, not merely the precept, but the penalty also. Indeed, law, without punishment for its violation, is in the nature of things impossible. It is as though we were to speak of an earth without matter, an atmosphere without air, an existence without existence. If, as just said, no two human beings can exist together without rules of association, so neither can they without the penal sanction practically enforcing those rules, whether themselves cognizant of the fact or not. No instance ever was or can be in which this is not so.

§ 7. **Why Law must always exist.** — There are those who look for a condition of society to come, in which human laws, as they term rules binding associated men by penal sanctions, shall cease. But this can never be within His dominions who governs all things well; because, as admitted, in the infancy of any creature, it must have rules of being, and penalties for their violation, and a nature originally given is not changed by growth and development. Man, indeed, may learn to avoid the punishment; but the law, which includes the punishment, abides.

§ 8. **Further of Rule and Penalty combined.** — If we should imagine any existence, mental or physical, to be without law, it could not be made palpable to our reason; because all of which we can take cognizance concerning any thing is the action of its laws of being. A particle of matter presents to our cognizance a variety of laws; as the law of extension, the law of gravity, and the like; but nothing whereof we can take notice except the action of these laws. And the soul of a man, like the par-

ticle of matter, has its laws, by whose action alone we understand that it exists. And when men come together in communities of many souls, we only know the fact of their association from perceiving the effects of the laws of their combined being. Now, if the laws which bind them together, or the laws under which one soul lives, or the laws of a particle of matter, are violated, there is a disturbance of what was before, in all the thing to which the violation relates; and this disturbance is the penal sanction of the laws. Consequently a law, the violation of which was not attended by the disturbance, would be no law.

§ 9. **Law anterior to Government — and how enforced.** — We therefore see, that law, with its punishment, is anterior to organized government. It is then enforced by the party more immediately aggrieved pursuing the wrong-doer, or by a company of individuals spontaneously uniting to enforce it, or by various other means such as a rude state of society brings into action.

**Law the Parent of Government.** — But all irregular and mere private modes of administering justice are uncertain, inadequate, and perilous to the peace of the community. Therefore, as civilization advances, some one takes into his exclusive hands the enforcement of the laws, and the power, under the name of king, or chief, or patriarch of his tribe, to modify or change them as circumstances require; or sometimes, as in the United States, the people establish a government for themselves. Yet this is rather a philosophical view than one historically accurate; for historically the methods blend; as, for instance, the laws are partly enforced by a feeble and vicious government, and partly by the arm of private revenge. But —

**Effect of Government on Law.** — The establishment of the government neither obliterates the law which before existed, nor changes it; being modified only by the act of governmental organization, or by decree or statute of the government itself.

§ 10. **Limit of Governmental Cognizance of Law.** — The government does not take cognizance of all the law of human association in the community. For example, —

**Etiquette — Honor.** — The law, in the larger meaning of the word, provides, that a person civilly spoken to shall return a civil answer; but no court will entertain a suit to enforce this provision. The party aggrieved may inflict a mild punishment for its violation, such as to decline speaking to the offending person;

but, if he goes beyond certain limits, the legal tribunals will interfere. A case of such interference occurs, when, for an affront not cognizable by the courts, but a real breach of the law of honor,<sup>1</sup> the injured one meets the aggressor in a duel. The penalty of death is beyond the jurisdiction of the individual to inflict; and, if it ensues, he is guilty of murder.<sup>2</sup>

§ 11. **Further of Jurisdiction to enforce Law.** — Therefore the student of our jurisprudence has to inquire, alike, what is the law which existed anterior to the establishment of any government, how it has been modified and changed by subsequent custom, and by legislation under preceding governments and under the present one, and when the courts assume and when decline jurisdiction to enforce it. Cases in which the jurisdiction is declined are not alone those wherein the offence is too trifling, or not adapted to legal investigation, but they are of many other classes also. Thus, —

**Judicial Jurisdiction declined — (Clean Hands — Caveat Emptor).** — Though the courts entertain suits for the violation of contracts; yet, if he who brings a suit has no interest in the question,<sup>3</sup> or if the contract is illegal or immoral, and he is *particeps criminis* in it, so that he does not appear before the tribunal with clean hands,<sup>4</sup> he will be dismissed; not because the thing in controversy is too small or otherwise improper for judicial investigation, or because the defendant is in the right, but because the plaintiff has no proper status to complain. So the wrong may be of sufficient magnitude, and the plaintiff meritorious; but, for some other reason, it may be against good policy to sustain the action. An example of this is seen in the maxim *caveat emptor*,<sup>5</sup> as applied in the common law.<sup>6</sup> The meaning of which maxim with us is

<sup>1</sup> Blackstone says, honor is "a point of a nature so nice and delicate that its wrongs and injuries escape the notice of the common law, and yet are fit to be redressed somewhere." Therefore, in England, the Court of Chivalry, now abolished, used to take cognizance of it. 3 Bl. Com. 104. Grotius observes: "Honor is an opinion of one's own excellence; and he who bears such an injury shows himself excellently patient, and so increases his honor rather than diminishes. Nor does it make any difference if some corrupt judgment turn this virtue into a disgrace by artificial names; for those

perverse judgments neither change the fact nor its value. And not only the ancient Christians said this, but also the philosophers, who said it was the part of a little mind not to be able to bear contumely." Grotius de Jure Belli et Pacis, II. 1, 10, 2 Whewell's ed. vol. i. p. 215.

<sup>2</sup> Vol. II. § 811.

<sup>3</sup> *Actio non datur non damnificato*. An action is not given to him who has received no damage. Jenk. Cent. 69. See also *Nichols v. Valentine*, 36 Maine, 322.

<sup>4</sup> 2 Bishop Mar. & Div. § 75.

<sup>5</sup> Broom Leg. Max. 2d ed. 506-538.

<sup>6</sup> The common law is the unwritten

in substance, that, if, without fraud or warranty, one purchases of another an article or estate open to inspection, he cannot ordinarily recover any thing of the seller by reason of failure in the title, if it is real estate, or defect in the quality, whether the estate is real or personal; though he had in fact made the purchase confiding in the seller's erroneous representations, and so parted with his money without receiving the return mutually contemplated; the reason being, according to the better opinion, not that the vendor has acquired any just right to retain the money, but that a denial of the other's demand to recover it would promote the public good, by educating men to be sharp and cautious in trade. In the civil law, this policy seems not to prevail; therefore it permits the buyer to get back what, according to both systems of jurisprudence, truly belongs to him, and not to the seller.<sup>1</sup>

§ 12. **Discussing Justice of Laws.** — Whether the civil or the common law embodies the purer wisdom, in its application of this maxim, is a question of a class not necessarily for discussion in a book treating of either system of laws as actually administered. Therefore, in unfolding our common law as received in our courts, we shall not often indulge in discussions of this nature. And though, in searchings after light on a question not illumined by the decisions, we may sometimes look toward the Original Rays, the author does not deem it his duty, in general, while explaining doctrines which only legislation can properly change, to point out any departure from abstract right discernible in them.

§ 13. **Technical Limitations of Original Right.** — In all countries, the laws take cognizance of the original right; in all, they recognize the necessity of conventional limitations and definings of it; while in nothing do men differ less than in their understandings of what are the original rules. Therefore the technical limitations of rules constitute the chief differences in the varying systems of cultivated jurisprudence. Even Religion herself wears a becoming uniformity in her doctrines concerning the primary truth and duty; while her earthly part divides itself into as many sects as ingenuity can invent.

law of England and this country; the civil law, of continental Europe generally.

<sup>1</sup> See *Seixas v. Woods*, 2 Caines, 48;

2 Kent Com. 478 et seq.; Rawle Cov. Title, 1st ed. 458 et seq.; 1 Smith Lead. Cas. 77, and the American notes.

§ 14. **Law further distinguished from Government.** — In the foregoing outline, we have supposed fewer steps in the progress of mankind than have in fact been taken. We cannot absolutely trace the course of any community back to a time when it was without any thing which might in some sense be termed a government; yet we see something of this, even at the present day, in rude and barbarous nations. But the principle, that law, like the atmosphere, pervades human society always, without leaving for a moment any vacuum, be there a government or not, is illustrated in daily examples before us. Thus, —

**California.** — In the sudden settlement of California, before a governmental organization was made, law was there recognized, and enforced under the severest penalties. And —

**Law of Nations.** — In the law of nations we have an illustration in point: international law is everywhere acknowledged; but nations have no common civil tribunal to expound and enforce it,<sup>1</sup> therefore they interpret it among themselves according to the lights which reason gives them, and execute the decree by a resort to arms. So, —

**Laws not change with Government.** — When a country is conquered, or ceded to another country, there being already in it a system of laws, these are not overturned by the mere change of government; but they remain in force as before, liable only to be superseded by new laws should the new power elect.<sup>2</sup> It is the same when a new organization of government follows a political revolution.<sup>3</sup> Even if there is a rebellion, proceeding to the extent of practically ousting the government for the time, and establishing a new *de-facto* government, the laws enacted under this new order of things, not in aid of the rebellion, remain after it is suppressed.<sup>4</sup>

<sup>1</sup> 1 Kent Com. 2.

<sup>2</sup> *United States v. Power*, 11 How. U. S. 570; *McMullen v. Hodge*, 5 Texas, 34; *Cass v. Dillon*, 2 Ohio State, 607; *Chew v. Calvert*, Walk. Missis. 54. Therefore, when the United States acquired the territory of New Mexico, the former laws were by our courts held still to prevail, "except so far as they were, in their nature and character, found to be in conflict with the Constitution and laws of the United States, or with the regulations which the conquering and

occupying authority should ordain." *Leitensdorfer v. Webb*, 20 How. U. S. 176, 177. See also *Fowler v. Smith*, 2 Cal. 39.

<sup>3</sup> *Shaw, C. J.*, in *Commonwealth v. Chapman*, 18 Met. 68, 71; *The State v. Cawood*, 2 Stew. 360, 362. When a State of the American Union changes its Constitution, the change does not abrogate prior laws not repugnant to the new Constitution. *Cass v. Dillon*, 2 Ohio State, 607.

<sup>4</sup> *Luter v. Hunter*, 30 Texas, 688;

**Emigrants carry Laws, but not Government.** — On the same principle, emigrants to an uninhabited country carry with them their own laws to fill the vacuum there; they go with them step by step from the mother country, and constitute the rule of action and dealing as well before a government and courts are established for their enforcement as afterward.<sup>1</sup>

§ 15. **Nature of Law viewed separate from Government.** — The law which precedes government is not the pure and unmixed primary right, as provided by God for human use; but, foreshadowing the cultivated jurisprudence, it is more or less mingled with human devices, and restrained in its operation by technical rule. And so it should be. The same reason which casts upon man the labor of cultivating the soil, and tending the growth of its fruits and its grains, and preparing them by art for the table, demands of him also the labor of fitting the primary right into laws, before it constitutes, even in a rude age, the accepted guide for his conduct. The laws need not, to perform their functions, be written, or passed upon by vote, or even in any way be ordained in words; for a tacit recognition and assent are, in essence, the same.

§ 16. **Primary and Technical Rules blend variously.** — One of the chief labors of legal science is to ascertain the distinction already mentioned, between the law which the courts enforce and the law which they decline enforcing.<sup>2</sup> The rules concerning this distinction vary with the time and the country in which the court sits. And, in other respects, the manner and degree in which the technical rules established by man and the primary right furnished by God blend, differ with the age, the country, the circumstances of the people, and their enlightenment. But —

**Will be enforced.** — The truth remains, through all changes and in all countries, that there must be law pervading all human affairs; and that, if the tribunals and the legislature have failed

Canfield v. Hunter, 30 Texas, 712; Culbreath v. Hunter, 30 Texas, 713; Levison v. Krohne, 30 Texas, 714; Arce-neaux v. Benoit, 21 La. An. 673; Watson v. Stone, 40 Ala. 451; Michael v. The State, 40 Ala. 361; Central Railroad v. Collins, 40 Ga. 582; Reynolds v. Taylor, 43 Ala. 420; Ray v. Thompson, 43 Ala. 434; Winter v. Dickerson, 42 Ala. 92; The State v. McGinty, 41 Missis.

435. See Hedges v. Price, 2 W. Va. 192; Thornburg v. Harris, 3 Coldw. 157; Leach v. Smith, 25 Ark. 246; Woodruff v. Tilly, 25 Ark. 309; Baily v. Milner, 35 Ga. 330; Scudder v. Thomas, 35 Ga. 364.

<sup>1</sup> 1 Bishop Mar. & Div. § 69. See, for a somewhat full discussion, Bishop First Book, § 43-59.

<sup>2</sup> See ante, § 10, 11.



to fill the entire space, still Nature fills it; and, if the judges will not listen to the voice of Nature, other powers will expound her laws and inflict her punishments.

§ 17. **Courts administer Natural Law.** — There is necessarily a diversity of opinion, in different ages and among different people, as to how much of the law of nature shall be administered in the courts. But, said a learned judge, “every nation must of necessity have its common law, let it be called by what name it may; and it will be simple or complicated in its details as society is simple or complicated in its relations.”<sup>1</sup> And, however men may deprecate what is sometimes termed arbitrary power in judges, who administer laws not written in the statute-books, such administration of justice is necessary among every people, whether calling themselves free or not. Great, indeed, would be the calamity, if the courts were to compel mob violence, by refusing justice in every case which the legislature had not foreseen.

§ 18. **Courts not manufacture Law.** — These views show the absurdity of the charge sometimes brought against our tribunals, that they manufacture law.

**Duty as to new Cases.** — A court may err, since judges are but human; yet no error is so monstrous as the denial of admitted right to a suitor who is simply unable to find his case laid down in the statute-book, or in a previous decision. And the tribunals of the present time commit many more errors by refusing to deal out to parties before them the justice which the general principles of our jurisprudence and the collective conscience of mankind confessedly demand — alleging, as a supposed justification for the refusal, the want of a statute or a precedent — than in all other ways combined. Not thus was it anciently, when the courts of our English ancestors decided controversies with but few statutes and precedents to aid them; deriving principles for their decisions from the known usages of the country, and from what they found written by God in the breasts of men.<sup>2</sup> And because it

<sup>1</sup> Turley, J., in *Jacob v. The State*, 3 Humph. 493, 514.

<sup>2</sup> In an old case, one of the counsel said, that he had searched the books, and “there is not one case,” &c.; to which Anderson, C. J., responded: “What of that? Shall not we give judgment because it is not adjudged in the books,

before? We will give judgment according to reason, and if there be no reason in the books I will not regard them.” Anonymous, Gouldsb. 96. It must be understood, however, that by “reason” here is meant “legal reason.” See Bishop First Book, § 80-82.

was not thus formerly, it should not be now ; for, by admitted doctrine, the judges should not decide according to their individual fancies, but according to the law as they find it ; and we see that the law, as the judges find it, commands them to go, in proper cases, outside the statutes and prior decisions, for principles on which to adjudicate the particular matter before them.

§ 19. **Further of New Cases — Precedents.** — These views will appear more important to the reader in proportion as he becomes truly acquainted with what has gone before in our jurisprudence, and contemplates the ceaseless variety of change in human affairs, presenting questions as new to-day as were those which came up for decision a thousand years ago. Therefore, though the courts properly adhere to precedents, yet it is as true now as it was in the earlier periods of our law, that precedents have not covered the entire ground. And how absurd it is, that a question between man and man, or between a man and the community, should depend, neither on the abstract right of the case, nor on the practical convenience or propriety of one decision of it or another, but solely on the accident, whether it arose in early times, received then an adjudication, and the adjudication found a reporter !<sup>1</sup>

§ 20. **Expansions of the Law.** — In the vast complications of affairs, requiring new applications of old principles continually to be made ; in the measureless range of thought, bringing new doctrines out of events new and old ; in the immense fields of human exploration, luminous with the light of every species of science, over which the race is always travelling ; in the unlimited expansibility of society, developing new aspects, new relations, new wants ; in the fact, that, although the reported decisions of the courts are numerically considerable, they embrace but comparatively few even of the questions which have arisen heretofore ; in the fact, also, that evermore the surges of time are driving the shores of human capability further toward the infinite, — we read the truth, pervading every system of jurisprudence, that, whenever a question comes before the courts, it is really a call for a new enunciation of legal doctrines ; and that from the past we gather merely a few rays to guide us in the future. We learn that both the old light and the new point to

<sup>1</sup> And see post, § 35-37.

the way of principle for the settlement of all new cases where particular precedents fail.

§ 21. **Sketch of Wider Field — Conclusion.** — These views of the nature and sources of jurisprudence comprehend what is here to be said on this branch of our subject. If space permitted, we could profitably enlarge them much. There remain regions into which we have not even looked. There are the rise and progress of the different systems of laws, — the origin of their respective rules, — the influence of morals, of manners, and of religion upon each system, — the scientific and the practical view of each, — the weight given to judicial decision in each; and unnumbered other things of the like general sort: but only as the common law, in conjunction with the written constitutional and statutory laws of our own country, presents itself to us in the following investigations, can we now examine these things. Nor, if we could, should we derive from the searching into other systems much useful assistance in the labor of learning our own law. In the adjudications of our common-law tribunals, we have the material from which more of science and of practical wisdom can be drawn than the mind of any one man has yet gathered in the entire juridical field of the world. And if, in the attempt to extract the sweet from this unsightly heap, the author might hope for any near approach to complete success, it, alone, would be an aspiring to what no single writer on any system of laws ever, in fact, accomplished.

## CHAPTER II.

## INTO WHAT CLASSES THE LAW ADMINISTERED BY OUR GOVERNMENTAL POWERS IS SEPARABLE.

§ 22. **The Law as a Unit.** — There is a sense in which the law of the land — meaning the law of human association as recognized among us and enforced by the governmental powers — is an entirety, without seam or division. The several parts of it, if we speak of parts, are alike authoritative over us all ; and, when the whole is rightly construed and carried into practical effect, there is no conflict between the parts.

§ 23. **The Laws as diverse.** — But in another sense there is a diversity. Our laws are derived from different immediate sources, and administered by different functionaries. This is, to a certain extent, so also in all other countries. But in this country we have one peculiarity not known elsewhere, exerting a decided influence, and presenting complications not always readily understood. It is —

**National and State.** — We who live in particular States, constituting the mass of our people, are under a double government and a double set of laws ; each of which governments is supreme and sovereign within its sphere, and the laws emanating from each of which are alike binding upon us. The government of the United States embraces a larger sphere than do the governments of the several States ; while, on the other hand, the State governments for the most part descend to minuter things.

§ 24. **Written Constitutions.** — In this country also, unlike most others, and particularly unlike England whence we derive our unwritten laws, we have written constitutions restraining the legislative power. There is a written Constitution of the United States, and each State has its written constitution. No State law can be valid if in conflict with the Constitution either of the State or of the United States. A law of the general government, to be of effect, must not be in conflict with the Constitution of

the United States. But no constitution, or statute, or local custom, or other law written or unwritten, of any State, can, under any circumstances, restrain or annul the action of the general government proceeding within its constitutional sphere.<sup>1</sup>

§ 25. **Judicial and Diplomatic Law.**— There exists, likewise, in our country, as in every other, the distinction between the law administered in judicial tribunals and the law acted upon in diplomatic and other like affairs between nation and nation. Again, —

**Military and Martial.**— We have the distinction between the law which controls the judicial tribunals in the decision of causes, and the law which guides the military power in times of war.

§ 26. **Unwritten and Statutory.**— Another distinction is between the common, or unwritten, law and the statutes.

§ 27. **The Tribunal or Administering Power.**— Still other distinctions grow out of considerations relating to the particular tribunal, or power, which administers the law.

§ 28. **Laws not of Judicial Cognizance.**— It is a popular idea, — not unfrequently favored by politicians, who, if more enlightened, still deem it desirable to nurse the public delusion, — that there is in this country no law except what is administered in the courts. But the law, for example, which a single branch of the legislature, either of a State or of the nation, enforces when it excludes a member because it deems him not to possess the qualifications required by the Constitution, is just as much a law of the land as is that whereby a man is ejected by judicial process from his estate. In the one instance, the administration of the law is exclusively with the legislative body by whom the exclusion is made; in the other, it is exclusively with the judicial tribunal; and neither the legislative body nor the judicial has any jurisdiction to interfere with what belongs thus exclusively to the other. So the law by which the President of the United States, as commander-in-chief of the armies, expels an invading force from our shores, is precisely as much a law as is either of the others mentioned. And a further branch of the proposition is, that martial law and military law are, within their spheres, as truly laws of the land as is the law by which a creditor collects an ordinary debt in court.

<sup>1</sup> Const. U. S. art. 6. And see Stat. Crimes, § 11-26.

**Administration of these Laws.** — The responsibilities which devolve on judicial tribunals, in the administration of the laws within their cognizance, are admitted. But a judge, sitting in court, is under no higher obligation to cast aside personal motives, and his likes and dislikes of the parties litigant, and to spurn the bribe if proffered, than are other official persons, acting under a jurisdiction to enforce laws not judicial. From the President, who has extensive powers of this sort, down through the members of the two houses of Congress, who have also great powers, to the lowest officer of the general government, and through the various grades of State officers, the duty is on all to administer the laws within their respective jurisdictions justly and impartially. If we would inform ourselves how this duty is sometimes performed, we have only to observe, for example, the votes of a legislative body in the case of a contested election, and see how absolutely each member is judicially convinced that the contestant of his own party is entitled to the seat claimed. Happy will be the day when public virtue exists otherwise than in name !

§ 29. **Conclusion — What for these Volumes.** — This sketch of the classes into which the law of the land is divisible is not to be all filled up in the present work. It is here presented that the reader may, at the outset, see more clearly what is the relation of the division of the law here to be unfolded, to the mass of the law which governs us. In general, it is the purpose of these volumes to treat only of the criminal law. Yet a few particulars which do not more intimately belong to a work on criminal jurisprudence than to one on civil will be brought to view in them ; because otherwise things vital to our subject could be shown only in an imperfect light.

## CHAPTER III.

## THE CRIMINAL LAW.

✱ § 30. **Law administered in Courts.** — That part of the law of the land which is administered in the judicial tribunals is by far the most extensive, and of supreme importance. This is the division to which the attention of those professional men who are termed lawyers is almost exclusively directed. Indeed, inconsiderate expressions have sometimes fallen from judicial lips, and from legal gentlemen not in office or politics, more or less in harmony with the utterances of politicians already mentioned,<sup>1</sup> indicating, in one form or another, the idea, that, contrary to what is written in all our constitutions and daily witnessed in the actual workings of governmental affairs, there is no law except the law of our judicial tribunals, and where these are silent, the voice of justice and the behests of the law are hushed and disregarded.

§ 31. **Law not administered in Courts.** — It is chiefly to the law administered in our courts of justice that these volumes are devoted. Yet it would be unwise to keep out of view in these discussions the fact that there are laws of another kind, equally binding upon us as are those which the courts administer. Therefore a glance will now and then be given to military and martial law, and laws of our national and State Constitutions administered by the legislative and executive powers. Yet we shall bear in mind also that —

**Criminal Law.** — We are not treating of the entire body even of our juridical law, but only of the part termed the Criminal Law.

§ 32. **Criminal Law, what.** — It may seem a little strange, yet such is the fact, that no definition distinguishing the criminal law from the other branches of our juridical system can be given, the

<sup>1</sup> Ante, § 28.

correctness of which will be universally acknowledged. Still the author ventures the following:—

**How defined.**—Criminal law treats of those wrongs which the government notices as injurious to the public, and punishes in what is called a criminal proceeding, in its own name.

**Views of the Definition.**—“A crime or misdemeanor” is defined by Blackstone to be “an act committed or omitted in violation of a public law either forbidding or commanding it.”<sup>1</sup> But this defining fails in precision; neither is the definition given above as apt as sometimes a writer is able to produce. In the present state of the authorities we may hesitate to say, that in no case is any thing deemed a crime unless pursuable in the name of the State, or, in England, of the sovereign; but this is the general, if not universal, rule in the United States. Thus, a sale of intoxicating liquor without license is a criminal offence when a statute prohibits it under a penalty recoverable by indictment; but otherwise when the proceeding is by action of debt,—a suit on a penal statute being deemed a civil cause.<sup>2</sup> Judges fre-

<sup>1</sup> 4 Bl. Com. 5. And see further, as to what is a criminal offence, *Rector v. The State*, 1 Eng. 187; *Durr v. Howard*, 1 Eng. 461; *People v. Ontario*, 4 Denio, 260.

<sup>2</sup> *Indianapolis v. Fairchild*, 1 Ind. 315, Smith, Ind. 122; *Woodward v. Squires*, 39 Iowa, 435; *Keith v. Tuttle*, 28 Maine, 326, 335; *People v. Hoffman*, 3 Mich. 248; *United States v. Brown, Deady*, 566. See, however, *Reed v. Cist*, 7 S. & R. 183; *Commonwealth v. Evans*, 13 S. & R. 426. In Iowa and Michigan, a proceeding against the place where liquors are sold has been deemed criminal. Part of *Lot v. The State*, 1 Iowa, 507; *Hibbard v. People*, 4 Mich. 125. And see, for further views on this general subject, *Graham v. The State*, 1 Pike, 79; *Matter of Attorney-General*, Mart. & Yerg. 285; *Jacob v. United States*, 1 Brock. 520; *Mahoney v. Crowley*, 36 Maine, 486; *Brown v. Mobile*, 23 Ala. 722; *Ketland v. The Cassius*, 2 Dall. 365; *The State v. Mace*, 5 Md. 337, 349; *Kimpton v. London and Northwestern Railway*, 25 Eng. L. & Eq. 657; *Matter of Eggington*, 2 Ellis & B. 717, 23 Law J. n. s. M. C. 41, 18 Jur. 224, 24 Eng. L. & Eq. 146;

*Leavensworth v. Tomlinson*, 1 Root, 436; *Beals v. Thurlow*, 63 Maine, 9. In *Belcher v. Johnson*, 1 Met. 148, it is held, that the proceeding to obtain judgment for a militia fine is civil and not criminal, because civil in form. See also *Buckwalter v. United States*, 11 S. & R. 193; *Ellmore v. Hoffman*, 2 Ashm. 159; *Rogers v. Alexander*, 2 Greene, Iowa, 443; *Dickinson v. Potter*, 4 Day, 340; *Houghton v. Havens*, 6 Conn. 305; *People v. Ontario*, 4 Denio, 260; *Eason v. The State*, 6 Eng. 481; *Attorney-General v. Radloff*, 10 Exch. 84, 26 Eng. L. & Eq. 413; *Dyer v. Hunnewell*, 12 Mass. 271; *Winslow v. Anderson*, 4 Mass. 376. In *The State v. Pate, Busbee*, 244, it is said, that the test is to inquire whether the proceeding is by indictment or action; if the former, the cause is criminal; if the latter, it is civil. That the action—*Webster v. People*, 14 Ill. 365—is in the name of the State does not make the cause criminal. See also J. F. Stephen *Crim. Law*, 5, and authorities cited by him. Likewise *Reg. v. Ferrall*, 1 Eng. L. & Eq. 675, 4 Cox C. C. 431, 15 Jur. 42; *Ward v. Bell*, 7 Jones, N. C. 79. A proceeding to compel sureties of the peace



quently, however, speak of things as belonging to the general department of criminal jurisprudence, though the form of the procedure is civil ;<sup>1</sup> but we should hardly treat of such things under the title Criminal Law. On the other hand, a mandamus is said to be a criminal process to enforce civil rights ;<sup>2</sup> yet we do not ordinarily regard it as belonging particularly to the criminal law. The words "criminal cases," in the Constitution of Georgia, are held not to apply to violations of the local by-laws and police regulations of town and city corporations ;<sup>3</sup> but it is otherwise in Illinois.<sup>4</sup> According to late English cases, a matter is not necessarily criminal merely because an indictment will lie ;<sup>5</sup> or civil, merely because the proceeding is at the suit of a private person.<sup>6</sup> That an action is in the name of the State, and its object is the recovery of a penalty, does not make it criminal.<sup>7</sup>

§ 33. **Criminal and Civil blend.**—Indeed, the criminal and civil departments of the law somewhat blend ; consequently the line dividing them is neither at all points distinct, nor drawn by the hand of an exact science. And where there is no doubt to which department a particular controversy belongs, it may still be so like something else of the other department as to be governed partly by its rules ; while yet it follows the rules of its own department in other respects.<sup>8</sup>

§ 34. **How these Discussions divided.**—In these two volumes on the "Criminal Law," we shall look first at those principles which

has been held to be criminal. *Deloohery v. The State*, 27 Ind. 521.

<sup>1</sup> See 2 Bishop Mar. & Div. § 233.

<sup>2</sup> *The State v. Bruce*, 1 Tread. 165, 174.

<sup>3</sup> *Williams v. Augusta*, 4 Ga. 509. See, however, *Slaughter v. People*, 2 Doug. Mich. 334, note ; *Mixer v. Manistee*, 26 Mich. 422.

<sup>4</sup> *Wiggins v. Chicago*, 68 Ill. 372.

<sup>5</sup> *Bancroft v. Mitchell*, Law Rep. 2 Q. B. 549. In *Reg. v. Paget*, 3 Fost. & F. 29, it was held, that an indictment for the obstruction of a highway intended to effect the removal of the nuisance, is in substance a civil, and not a criminal case. The reporter, in a note, says, that "the distinction taken in the most ancient and approved authorities is, not whether the Crown is a party (for so it is in *mandamus* and *quo warranto*), but

whether the real end or object of the proceeding is punishment or reparation. See *Mirror of Justice*, c. 11, sect. 3 ; 3 Inst., and 1 Reeve, Hist. Eng. Law, 32. The mere fact of a *fine* no more shows that an indictment is a criminal proceeding, than the ancient fine in trespass. *Vide Reg. v. Chorley*, 12 Q. B. 515 ; new trial allowed on such indictments. And see *Reg. v. Russell*, 3 E. & B. 942, where, *semble*, the *dictum* of Coleridge, J., is the better opinion." And see *Rex v. Cotesbatch*, 2 D. & R. 265.

<sup>6</sup> *Parker v. Green*, 9 Cox C. C. 169.

<sup>7</sup> *The State v. Hayden*, 32 Wis. 663 ; *United States v. Brown*, Deady, 566. And see *The State v. Leach*, 60 Maine, 58.

<sup>8</sup> See, for example, post, § 1074-1076, and the places there referred to.

pervade alike all its branches. Then we shall consider the specific offences. The former will furnish the chief topics for this first volume ; the latter, for the second.

**Criminal Procedure.**—The subject of “Criminal Procedure,” including what, in technical phrase, are termed Pleading, Practice, and Evidence, is treated of in a work of two volumes, essentially separate from this, while yet it constitutes with this and “Statutory Crimes” a connected series, so that what is discussed in one work is not repeated in another.

**Statutory Crimes.**—The leading and older statutory offences, partaking of the nature of common-law crimes, are treated of in the present work as to the law, and in “Criminal Procedure” as to the pleading, practice, and evidence. In a separate work in one volume entitled “Statutory Crimes,” the rules of statutory interpretation are considered, with the leading doctrines of procedure on statutes, views of all the statutory offences, and particular and full discussions of the modern and the minor and more purely statutory ones. This work embraces both law and procedure.

§ 35. **Common Law as to Crimes.**—It is plain, both on principle and authority, that the common law must extend as well to criminal things as to civil.<sup>1</sup>

**Exceptional States.**—In Ohio, the court “decided, that the common law, although in force in this State in all civil cases, could not be resorted to for the punishment of crimes and misdemeanors.”<sup>2</sup> And, in Indiana, by statute, “crimes and misdemeanors shall be defined, and the punishment thereof fixed, by statutes of this State, and not otherwise.”<sup>3</sup> So, in Florida and

<sup>1</sup> The State v. Danforth, 3 Conn. 112; The State v. Rollins, 8 N. H. 550; The State v. Council, Harper, 53; Commonwealth v. Newell, 7 Mass. 245; The State v. Bosse, 8 Rich. 276; Brockway v. People, 2 Hill, N. Y. 558, 562; The State v. Twogood, 7 Iowa, 252; Smith v. People, 25 Ill. 17; Barlow v. Lambert, 28 Ala. 704; The State v. Cawood, 2 Stew. 360; Ex parte Blanchard, 9 Nev. 101; Chandler v. The State, 2 Texas, 305, 309; Grinder v. The State, 2 Texas, 338; The State v. Odum, 11 Texas, 12. But in Texas it is so by statute. Hartley Dig. Laws, 120. The common law of crimes

has also been held, by the majority of the judges, to be in force in Minnesota. The State v. Pule, 12 Minn. 164.

<sup>2</sup> Key v. Vattier, 1 Ohio, 132; Vanvalkenburg v. The State, 11 Ohio, 404; Allen v. The State, 10 Ohio State, 287, 301; Smith v. The State, 12 Ohio State, 466. See Young v. The State, 6 Ohio, 435, 438; Bloom v. Richards, 2 Ohio State, 387. This Ohio doctrine seems to be partly, at least, adopted in Iowa. Estes v. Carter, 10 Iowa, 400.

<sup>3</sup> Ind. R. S. of 1852, p. 352; Hackney v. The State, 8 Ind. 494; McJunkins v. The State, 10 Ind. 140, 144; Malone v.

Missouri, there are legislative enactments less broad, yet still restricting, to a limited fine and imprisonment, the right to punish for common-law offences.<sup>1</sup>

§ 36. **How in Scotland.**—In Scotland, the doctrine that the common law of the country embraces the criminal as well as the civil department, is held in a very clear and just light. There the courts will not listen to the objection of a defendant, that the thing alleged against him is not laid down either in any statute or in any judicial decision as a crime.<sup>2</sup>

The State, 14 Ind. 219; *Beal v. The State*, 16 Ind. 378; *Marvin v. The State*, 19 Ind. 181; *Jennings v. The State*, 16 Ind. 335. **Indiana Interpretations.**—The last-cited case involves a doctrine which, if carried to its full consequences, must, unless legislation is extraordinarily circumspect, prove a serious embarrassment to the punishment of crime. A statute made punishable “notorious lewdness or other *public indecency*,” and the court held, that, as it did not “define” what it termed “public indecency,” it was in conflict with the statute quoted in our text, and therefore void. See also *Marvin v. The State*, 19 Ind. 181. We may add, that, as the statute does not “define” “notorious lewdness,” the same result would seem to follow under this clause also, thus interpreted. So, in most of our States, the majority of the statutes prohibiting offences do not “define” them, but leave their definitions to the common law, or to the civil law, or to any other system of law in which they were before known in the community, or to lexicography, or to the common understanding of mankind. See Stat. Crimes, § 242, 347. Assuming that these two Indiana statutes are in conflict, so that if the first were incorporated into the Constitution, the other would be void, still, as both are mere statutes, the first, it would seem in reason, should be construed as limited and qualified by the other; thus, in effect, both would stand. See Stat. Crimes, § 126. The words “public indecency” are well enough defined in the common law of crimes; so that the provision, in this view, becomes specific and direct. Since writing the above, I find, on looking down the re-

ports, that the Indiana court has already changed its course of adjudication, substantially in accordance with this reasoning. Thus, after the enactment of the statute quoted in my text, it was further enacted “that ‘every person who shall perpetrate an assault or assault and battery, with intent, &c., shall,’ &c.; and the court held that this statute was valid. Referring to the above cases, and some others of the like kind, Frazer, J., said: “Upon careful consideration, we are of opinion that these cases are not good law, as applicable to the question now in hand. That the legislature cannot, in such a matter, impose limits and restrictions upon its own future action, and that, when two statutes are inconsistent, the last enactment stands as the law, are very plain propositions, which, we presume, will not be controverted.” *Wall v. The State*, 23 Ind. 150, 153. And see Stat. Crimes, § 31.

<sup>1</sup> Thompson Dig. Fla. Laws, 21; *Missouri R. S. of 1845*, c. 100, § 2; *Ex parte Meyers*, 44 Misso. 279. In Florida it is also provided, that no person shall be “punished by the said common law when there is an existing provision by the statutes of the State on the subject.” Thompson Dig. ut supra.

<sup>2</sup> In one case, the Lord Justice-Clerk remarked: “It is of no consequence that the charge is now made for the first time. For there are numerous instances in which crimes which had never before been the subject of prosecution have been found cognizable by the common law of this country. On this point I refer particularly to the authority of Baron Hume (Vol. I. p. 12). It appears that that learned author had not been

§ 37. *How it should be.* — It is noticeable, that, while some States, wherein the common law originally prevailed, and still prevails in other things, have excluded from judicial cognizance all common-law crimes, punishing as criminal nothing except what is defined — or, at least, mentioned — by legislative enactment, Louisiana<sup>1</sup> and Texas,<sup>2</sup> not originally governed by the common law, have expressly introduced it as to crimes. That the latter is the wiser legislation, few who carefully study this subject will doubt.<sup>3</sup> No well-founded reason can be given, why, if we are to have a common law, it should not be applied to acts wrongfully committed against the entire community, as well as to those committed only in violation of individual rights.<sup>4</sup> If a distinction must be made, rather let the civil part be abrogated, but by all means preserve the criminal.

§ 38. *Extent of Common-law Sources.* — The common law which our forefathers brought to this country from England includes, not only the principles administered there in what are technically termed the courts of common law, but in all other judicial tribunals. Thus, though we have no ecclesiastical judicatories, yet

sufficiently aware of the power of the common law in England; for, after stating that 'it seems to be held in England that no court has power to take cognizance of any new offence, although highly pernicious, and approaching very nearly to others which have been prohibited, until some statute has declared it to be a crime, and assigned a punishment,' he continues, 'With us the maxim is directly the reverse; that our supreme criminal court have an inherent power, as such, competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature, though it be such which in time past has never been the subject of prosecution.'" And Lord Moncreiff added: "We are all agreed, that the present case is the first example of an offence of this nature having been made the subject of an indictment in this court. But that will go but a very little way to settle the question, unless we were also agreed, that that circumstance must be sufficient to render it incompetent for the public prosecutor so to proceed against it. Now it cannot, in my apprehension, be maintained that

nothing is an indictable offence, by the common law of Scotland, which has not been indicted before. Indeed, to hold this to be law seems to me to be impossible, without running the whole theory of the criminal system into absurdity. For the common law itself must have had a beginning." Greenhuff's Case, 2 Swinton, 236, 259, 264, 265.

<sup>1</sup> The State v. Mullen, 14 La. An. 570, 572; The State v. Davis, 22 La. An. 77.

<sup>2</sup> Ante, § 35, note.

<sup>3</sup> In Ohio, under the rule which excludes crimes not statutory from punishment, the court was compelled to hold that it was no offence for a man to attempt to have carnal knowledge of a girl under ten years of age when she consents. See Stat. Crimes, § 493. "Not without evident mortification the judge added: "In this respect our little ones are not so well protected from demoralizing influences as are the children of the country from which we, mainly, derive our laws." Smith v. The State, 12 Ohio State, 466, 474.

<sup>4</sup> And see Bishop First Book, § 59.

so much of the law administered in them as relates to the civil affairs of men,<sup>1</sup> and is applicable to our situation, has come to us as a part of our common law ; and, by legislative enactments, it is variously distributed among our courts.

**Criminal Law of Ecclesiastical Courts — (Fornication — Adultery).**

— Now, there are criminal offences cognizable, in England, by the ecclesiastical judges ; yet not criminal in precisely the sense of the general common law, but rather as injuring the souls of men. The punishment is ordinarily to pay the costs of prosecution,<sup>2</sup> and do penance ; the usual penance being to make confession in the vestry of the church,<sup>3</sup> unless the judge will consent to receive, in commutation, “an oblation of a sum of money for pious uses,”<sup>4</sup> or unless the penalty is remitted on account of his ill health, or for some other cause.<sup>5</sup> But obviously, in the absence both of ecclesiastical courts and an established religion, these offences and punishments do not exist in this country. Therefore, though fornication and adultery are in England cognizable criminally under the ecclesiastical law,<sup>6</sup> yet, in the absence of legislation, they are not punishable in our common-law tribunals, unless, indeed, they are open and notorious, amounting to a public nuisance.<sup>7</sup>

§ 39. **Ecclesiastical, continued.** — Still, though we have not, in form, the ecclesiastical crimes and punishments, perhaps, in principle, our courts ought to hold as punishable here some of the offences which in England are cognizable only in the ecclesiastical. Those tribunals sit under authority of law ; and, though their forms of procedure and punishments are not the same which prevail in the common-law courts, the latter might well decline to pursue light offences over which the former exercised a correcting power. This view leaves open the question concerning each particular offence which in England is cognizable only in the ecclesiastical courts ; the offence may, if this view is

<sup>1</sup> 1 Bishop Mar. & Div. § 66 et seq.

<sup>2</sup> *Palmer v. Tijou*, 2 Add. Ec. 196, 203 ; *Griffiths v. Reed*, 1 Hag. Ec. 195, 210 ; *Newbery v. Goodwin*, 1 Phillim. 282, 286.

<sup>3</sup> *Coote Ec. Pract.* 269, 272 ; *Courtail v. Homfray*, 2 Hag. Ec. 1 ; *Blackmore v. Brider*, 2 Phillim. 359, 362, note.

<sup>4</sup> 3 *Burn Ec. Law*, Phillim. ed., title Penance, 101 ; 2 *Inst.* 489.

<sup>5</sup> *Coote Ec. Pract.* 274 ; *Chick v. Ramsdale*, 1 Curt. Ec. 34, 37 ; *Woods v. Woods*, 2 Curt. Ec. 516, 529 ; *Burgess v. Burgess*, 1 Hag. Con. 384, 393.

<sup>6</sup> 2 *Burn Ec. Law*, Phillim. ed., title Lewdness, 401 ; *Wheatley v. Fowler*, 2 Lee, 376 ; *Coote Ec. Pract.* 145.

<sup>7</sup> *The State v. Moore*, 1 *Swan*, Tenn. 136 ; *The State v. Smith*, 32 *Texas*, 167 ; post, § 501 ; *Stat. Crimes*, § 625, 654, 655.

adopted, be indictable or not with us, according as it falls within or without the boundaries of crime drawn by our general criminal law.

§ 40. **Authorities in Criminal Law.** — The principal law authorities, therefore, which we shall have occasion to consult in the following pages, are our own judicial decisions, and, from England, the reports of decisions in criminal causes at common law, and some old text-books which have acquired a standard reputation.

§ 41. **Continued.** — Of course, our subject will now and then sweep a wider English field than is here indicated; while, in the United States, immense regions of legal wisdom lie before us, unknown to the English investigator.

**Foreign Laws.** — Occasionally, too, we shall look into the Scotch and other foreign laws, yet not often; for, as a Scotch judge once said, “In considering this question, I pay very little regard to what may be the law of other countries in similar cases. The laws of different nations, and especially the criminal laws, must always depend on the character and habits of the people, and other circumstances.”<sup>1</sup>

**The Civil Law.** — Especially, in this field, can no advantage be derived from comparisons of the civil law with ours. Though that was a cultivated jurisprudence, and it has left its impress in no slight degree upon the common law as to civil affairs, and though even the claim is not quite unfounded that some resemblance to the civil law may be seen in our criminal laws, still, happily for the cause of true liberty, and for the administration of criminal justice in those countries where the common law prevails, the civil law of crimes is in no proper sense the parent of ours, it has no authority in our criminal courts, and no wisdom to illumine the understanding superior to the rays of natural light which God has given.

§ 42. **Reason and Conscience.** — Besides these authorities, there is another, sometimes apparently disregarded, but never in fact, — derided, it may be, but as certainly bowed before as the forest tree bows before the whirlwind, — namely, the force of the combined reason and conscience of mankind. No judge ever did or could stand long in direct opposition to this power. Before it bend the precedents, the statutes, the judicial judgment, and even

<sup>1</sup> Lord Justice-General, in *Alston's Case*, 1 Swinton, 433, 473.

the private opinion of the incumbent of the bench. Therefore, in preparing a legal treatise, it is an author's duty to consider, step by step, what is the reason which really controls each decision and formula of doctrine, and whether it accords with fundamental principle, original justice, and natural right, — whether, in other words, the conscience of mankind will hereafter pronounce it just. For a law book is written, not for the past, but for the future, — not to impart mere historical knowledge, but to help practitioners advise their clients, and win their causes, in matters not yet transpired. Therefore it is — to make his books practically useful — that the author of these volumes continually directs attention to the reasons which underlie the decided points of the law. Moreover, the *legal* reason is the law;<sup>1</sup> and the adjudged points are always wrong — never law — when counter to the legal reason.

<sup>1</sup> Bishop First Book, § 80 et seq., and the accompanying chapters.

## CHAPTER IV.

## MILITARY AND MARTIAL LAW.

§ 43. **Why discussed here.** — Though the primary object of this work is to explain the criminal law as administered in our judicial tribunals, yet, to distinguish it from military and martial law, with which it is sometimes blended in the apprehensions of men, and for some other reasons of convenience and instruction, the present chapter becomes important.

§ 44. **Military Law, what and how administered.** — Military law is “a body of rules and ordinances prescribed by competent authority for the government of the military state, considered as a distinct community.”<sup>1</sup> It is deemed, in a certain sense, criminal law.<sup>2</sup> But it is not properly such, as the latter term is commonly understood in the legal profession. With us, it is chiefly statutory; but, to some extent, it has a common law derived from the mother country, being the law which was there anciently administered in the court of chivalry,<sup>3</sup> or of the constable and marshal. This tribunal, like the chancery and admiralty courts, proceeded after the manner of the civil law; which, as Hawkins observes, “is as much the law of the land in such cases wherein it has been always used, as the common law is in others.”<sup>4</sup> At present, both in England and the United States, the military law is administered chiefly in courts-martial.<sup>5</sup>

<sup>1</sup> O'Brien *Courts-Martial*, 26; *The State v. Davis*, 1 Southard, 311.

<sup>2</sup> 3 Greenl. Ev. § 469.

<sup>3</sup> 1 McArthur *Courts-Martial*, 3d ed. 13, 18, 20.

<sup>4</sup> 2 Hawk. P. C. 6th ed. b. 2, c. 4, § 7, 11.

<sup>5</sup> Concerning courts-martial, see Bell *v. Tooley*, 11 Ire. 605; *Brooks v. Adams*, 11 Pick. 441; *Mills v. Martin*, 19 Johns. 7; *Wise v. Withers*, 3 Cranch, 231; *Contested Election of Brigadier-General*, 1 Strob. 190; *Coffin v. Wilbour*, 7 Pick.

149; *Opinion of the Justices*, 3 Cush. 586; *White v. McBride*, 4 Bibb, 61; *Alden v. Fitts*, 25 Maine, 488; *Hall v. Howd*, 10 Conn. 514; *Wilkes v. Dinsman*, 7 How. U. S. 89, 123; *The State v. Davis*, 1 Southard, 311; 3 Greenl. Ev. § 470. **Military Jurisdiction—Courts.** — “Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but



§ 45. **Military Law distinguished from Martial.** — Military law is distinct from martial law, with which it has sometimes been inconsiderately blended.<sup>1</sup>

**Martial Law.** — O'Brien says: "Martial law, as Blackstone truly remarks, is in fact no law. It is an expedient, resorted to in times of public danger, similar, in its effect, to the appointment of a dictator. The general, or other authority charged with the defence of a country, proclaims martial law. By so doing he places himself above all law. He abrogates or suspends, at his pleasure, the operation of the law of the land. He resorts to all measures, however repugnant to ordinary law, which he deems best calculated to secure the safety of the State in the imminent peril to which it is exposed. Martial law, being thus vague and uncertain, and measured only by the danger to be guarded against, exists only in the breast of him who proclaims and executes it. It is contained in no written code. . . . Despotic in its character, and tyrannical in its application, it is only suited to those moments of extreme peril, when the safety, and even existence, of a nation depend on the prompt adoption and unhesitating execution of measures of the most energetic character. . . . The Constitution of the United States has wisely, and indeed necessarily, permitted the proclamation of martial law in certain specified cases of public danger, when no other alternative is left to preserve the State from foreign invasion or domestic insurrection."<sup>2</sup> Now, we have seen, that no community can exist without law.<sup>3</sup> Contrary, therefore, to some of the above observations, the effect of martial law, truly viewed, can only be to change the administration of the laws, to give them a rapid force, and make their penalties certain and effectual, not to abrogate what was the justice of the community before. The civil courts are suspended; but, in reason, the new summary tribunals should govern themselves in their pro-

military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country. In the armies of the United States, the first is exercised by courts-martial; while cases which do not come within

the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial, are tried by military commission." Lieber Instruct. pl. 13. And see *Ex parte Vallandigham*, 1 Wal. 243.

<sup>1</sup> 1 McArthur Courts-Martial, 3d ed. 32; 3 Greenl. Ev. § 468.

<sup>2</sup> O'Brien Courts-Martial, 26.

<sup>3</sup> Ante, § 5 et seq.

ceedings, as far as circumstances will admit, by established principles of justice, the same which had before been recognized in the courts.<sup>1</sup> In the extreme circumstances which justify martial law, it may be proclaimed by a military commander;<sup>2</sup> or, as in the Dorr rebellion in Rhode Island, by the legislature of a State.<sup>3</sup>

§ 46. **Military Law not subvert the Civil—How subordinate.**—Military law, in the United States and England, however the fact may be elsewhere, is in no way subversive of the other laws, but is in harmony with them. Says O'Brien, concerning the United States: "It is an accumulative law. The citizen, on becoming a soldier, does not merge his former character in the latter. . . . With regard to the civil powers and authorities, he stands in precisely the same position he formerly occupied. . . . He still remains subject to them, and is bound to assist and aid them, even in the apprehension of his military comrades. There is no principle more thoroughly incorporated in our military, as well as in our civil code, than that the soldier does not cease to be a citizen, and cannot throw off his obligations and responsibilities as such. The general law claims supreme and undisputed jurisdiction over all. The military law puts forth no such pretensions. It aims solely to enforce, on the soldier, the additional duties he has assumed. . . . These two systems of law can in no case come in collision. The military code commences where the other ends. It finds a body of men who, besides being citizens, are also soldiers."<sup>4</sup> So, in England, "the military law is subordinate to the civil and municipal laws of the kingdom, and does not in any way supersede those laws; but they materially aid and co-operate with each other, for the good order and discipline of the army in particular, and for the benefit of the community in general."<sup>5</sup>

§ 47. **Proceed by Rule.**—Of course, then, military law and its administration proceed by rule. So, we have seen,<sup>6</sup> even martial law ought to do. The doctrines of right, as established by the

<sup>1</sup> And see *Luther v. Borden*, 7 How. U. S. 1; *Commonwealth v. Blodgett*, 12 Met. 56; *Commonwealth v. Fox*, 7 Barr, 336; *People v. McLeod*, 1 Hill, N. Y. 377, 415, 435; 3 Greenl. Ev. § 469.

<sup>2</sup> 1 Bouv. Inst. 53; *Johnson v. Duncan*, 3 Mart. La. 530; 1 Kent Com. 341, note.

<sup>3</sup> *Luther v. Borden*, 7 How. U. S. 1,

45; *Commonwealth v. Blodgett*, 12 Met. 56. See post, § 48, 49. See also, on Martial Law, 1 McArthur Courts-Martial, 35.

<sup>4</sup> O'Brien Courts-Martial, 26, 27.

<sup>5</sup> 1 McArthur Courts-Martial, 3d ed. 33, and see on p. 34.

<sup>6</sup> Ante, § 45.

common consent of the people, and evidenced by the decisions of the courts, should in no emergency be violated, because no emergency can call for the commission of wrong. Emergencies may demand new methods and prompt movements in executing the right; but never the subversion of it, and the execution of the wrong.

§ 48. **States as to Martial Law.** — The Constitution of the United States declares, that “no State shall, without the consent of Congress, . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay;”<sup>1</sup> yet, as we have seen,<sup>2</sup> when, without the consent of Congress, the legislature of Rhode Island declared, for a temporary purpose, and under the pressure of an internal rebellion against the State authorities, martial law throughout the State, this was held to be constitutional. “Unquestionably,” said Taney, C. J., “a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government.” The military government, in this case, had been set up only to meet an emergency, and the learned judge added: “Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority.”<sup>3</sup>

§ 49. **United States and States as to the same.** — We have seen,<sup>4</sup> that the citizen of the United States, who is also a citizen of a State, owes a double allegiance: first, to the government of his own State; secondly, to the government of the United States. And if the State government can declare martial law over him, it is probable that the United States government can also. The difficulty, in the case of the State, was, whether, as by the United States Constitution the State has no war-making power without the consent of Congress, she, without such consent, can declare martial law, which is an act of war. The decision which holds that she can is perhaps justified on the ground, that high necessity may be permitted for the moment to override the express words even of the Constitution; or, per-

<sup>1</sup> Const. U. S. art. 1, § 10.

<sup>2</sup> Ante, § 45.

<sup>3</sup> *Luther v. Borden*, 7 How. U. S. 1, 45.

<sup>4</sup> Ante, § 23.

haps, by a very liberal interpretation, a State may be said to be "invaded" when she is beset by a domestic rebellion.<sup>1</sup> But, as we shall presently see, the right to declare martial law, as respects the United States, rests on a broader and firmer foundation.

§ 50. **Military and Martial distinguished under United States Constitution.** — The Constitution of the United States provides, that Congress shall have power, among other things, "to make rules for the government and regulation of the land and naval forces;"<sup>2</sup> also, that "the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States."<sup>3</sup> In pursuance of the former of these two powers —

**Written Military Law — Unwritten.** — Congress has, by legislative act, established what are termed Articles of War for the government of the armies; and, in pursuance of the latter, the War Department has caused to be drawn up and promulgated, under the sanction of the President, regulations for the army, and instructions for the government of the armies in the field; to which may be added orders issued from time to time by the various commanding officers. This is what may be termed the written military law of the country. There is also, in this de-

<sup>1</sup> If my opinion were of importance, as against that of the Supreme Court of the United States, dissented from by one judge only, I should deem the circumstances of the Rhode Island case itself to strengthen the doubt, whether the true object of the provision of the Constitution, cited in the last section, was not, among other things, to restrain the State authorities from entering into a war, without the concurrence of those of the United States, even to suppress a rebellion at home. In this Rhode Island case, there were two parties, each of which claimed to be the lawful government of the State; and, as the case decides, it devolved on the United States authorities to determine between the two. When, therefore, it became apparent that the question could not be settled at home without a conflict of arms, and the conflict was in ferment, the governor at the head of either party should apply to the authorities of the United States for help

under art. 4, § 4, of the Constitution, which provides that "the United States shall . . . protect each of them [the States] . . . on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." On such an application, it would be determined by competent authority which was the rightful government, and the conflict of arms would ordinarily be avoided. I cannot but think that this is the true meaning of the Constitution. This view would not prevent the State from using its military power to enforce the decrees of the civil tribunals, and to assist the civil officers in keeping order and the like. It goes only to the extent, that, when the question becomes one of overturning the civil power, and setting up in the place of it the law of war, the United States shall be called in.

<sup>2</sup> Const. U. S. art. 1, § 8.

<sup>3</sup> Const. U. S. art. 2, § 2.

partment of the law, as in all others, an unwritten, or common, law.<sup>1</sup> The written and unwritten constitute together the body of our law military. But this body of law contains more or less directions concerning martial law.

§ 51. **United States Martial Law** — (Compared with Military). — “Martial law,” says Lieber, in his Instructions for the Government of the Armies of the United States in the Field, sanctioned and promulgated by the President and the War Department, “is simply military authority exercised in accordance with the laws and usages of war.”<sup>2</sup> If we liken military law to the rules by which legislatures and courts are constituted and their internal machinery is moved, then martial law will correspond pretty nearly with the laws enacted by the legislature and enforced by the courts for the government of the community outside. Martial law is rather the law by which the military power governs others than that by which it regulates its own internal affairs and governs itself.

§ 52. **Martial Law elastic.** — Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the civil authority; or its touch may be light, scarcely felt, or not felt at all, by the mass of the people, while the courts go on in their ordinary course, and the business of the community flows in its accustomed channels.<sup>3</sup>

**Test whether it exists.** — The test by which to determine whether martial law prevails or not, in a particular place, is to consider whether, in a case of conflict between the civil and military authorities, the former bow to the latter, or the latter to the former. Thus, in New Orleans, when General Jackson, assuming with his army the control of the city, arrested one whom a judge thereupon attempted to discharge on a writ of *habeas corpus*, and upon this the general arrested the judge, and sent him outside of his lines and the city, martial law prevailed; but, when afterward

<sup>1</sup> Ante, § 45.

<sup>2</sup> Lieber Instruct. pl. 4.

<sup>3</sup> I cannot doubt that this statement is as near absolute legal truth as I am capable of making it; though it appears to me to stand at a great remove from truth, if we are to accept as sound in legal doctrine all the language of the learned judge who delivered the majority opinion in *Ex parte Milligan*, 4 Wal.

2. As I understand the opinion, the judge deemed martial law to be no law whatever, if indeed he deemed any thing to be law except what is enforced in the judicial tribunals. But a mere dictum from the bench carries no weight beyond that of its own inherent reasons. See further, as to this case, post, § 64, note.

the judge returned, and in his seat fined the general as for a contempt, and the latter paid the fine, the civil power prevailed. And if the judge had not, at the former time, attempted to resist the general, but had yielded as gracefully to the military power as the general afterward did to the civil, martial law would have prevailed the same; while, at the latter time, the civil power would have equally prevailed, though there had been neither arrest nor fine, because the military had withdrawn its hand.

**More or less Stringent.** — “Martial law,” say the Instructions by Lieber, approved by the military department of our government, “should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed — even in the commander’s own country — when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.”<sup>1</sup>

§ 53. **No Martial Law in Peace.** — It is a principle of acknowledged law, prevailing in our own country, in England, and very extensively in other civilized countries at the present day, that, in times of peace, and in the absence of any such domestic rebellion as calls into action the power of war, there can be no martial law; because, it is said, the military power must be subordinate to the civil.

**How in Time of War.** — To what extent this principle holds sway in a time of war is a question upon which opinions differ. The fine which the New Orleans judge imposed on General Jackson — the arrest of the judge was just before the close of our war of 1812, and the fine imposed on the general was just after its close — was not refunded to that officer until after the lapse of many years, when, at length, an act for this purpose passed both houses of Congress, and was approved by the President. And, even then, many senators and representatives who voted for the bill hesitated to say, that it was lawful and constitutional for a general to declare martial law over a city which in a time of war he was defending; while several, who also favored the proposed indemnity, took the ground that the act of declaring martial law

<sup>1</sup> Lieber Instruct. pl. 5.

was, on the one hand, unlawful ; and, on the other hand, necessary, and they deemed it commendable in a general to do a necessary unlawful act.

§ 54. *Necessity as justifying Martial Law.* — But we shall see, in the course of the present volume, that, whenever an act is necessary in the legal sense, it is, because thus necessary, lawful ; and the rule of necessity furnishes the rule of the law.<sup>1</sup> Plainly to commend an unlawful thing, on the ground that it is necessary, is to confound, not only all legal distinctions, but all moral ones also. It is to overturn into one lump obedience and disobedience, virtue and vice, heaven and hell. Nothing so absurd can pertain to any system of law or enlightened government.

§ 55. *Power under the National Constitution to declare Martial Law : —*

**Reasonably plain — Beneficial.** — The question of the power of official persons administering the national government to declare martial law is not, perhaps, quite so clear on the face of our Constitution as are some others. Yet it is believed that the only real difficulty in it lies in the arts of aspirants for office and their abettors, who, to win the votes of the unthinking, represent themselves to be the champions of the people against what they call the tyranny of martial law. The truth is, that martial law is the only kind of law adapted to those circumstances in which a reasonable military power will ask it to prevail ; and no people or portion of the people can exist even for a day without some kind of law governing them. If the civil tribunals, in the best of faith, endeavor to stretch their precedents and adapt their processes to the emergencies which call for martial law, they so change the law of their procedure, which must prevail afterward, as to render it unfitted for times of peace. And as martial law necessarily passes away with the emergency which called it into action, a wise people, fit for freedom, will bow thankfully before it, rejoicing that thus they preserve, uncorrupted by exceptional and temporary influences of a disturbing sort, the permanent jurisprudence of the civil tribunals.

§ 56. **Not a Judicial Power.** — The Constitution does not confer on the judges all governmental power, but simply the “judicial.” “The judicial power of the United States shall be vested in one

<sup>1</sup> Post, § 346-355, 824.

supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>1</sup> Now, here is no power of martial law, because it is not a thing pertaining to “judicial power.” The United States courts cannot establish it, on the one hand ; or, on the other hand, overthrow or interfere with it, if lawfully established by another department of the government. Their “power,” either for or against, does not extend to martial law.

§ 57. **Judicial distinguished from War Power.** — The Constitution provides rules for the guidance of “the judicial power.” In some of its clauses, express words mention the “judicial” as the power to be guided ; in others, the form of the language points to this power alone. Of the latter, let the fourth and fifth articles of the Amendments serve as samples. They are, consecutively, as follows : “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use without just compensation.” Perhaps the last clause is properly construed, as it is by the courts, to be a limitation upon the legislative as well as the judicial power ; and indeed the whole restrains the legislature from passing any act which shall command the courts to violate, in their proceedings, the provisions thus laid down. But these provisions have nothing to do with the martial power of war, or with the law which this power executes ; and that this is so, the form of the expression just as conclusively shows as if express words of limitation were used.

§ 58. **War Power distinct from Judicial.** — It is obvious that, if

<sup>1</sup> Const. U. S. art. 3, § 1.



no man could, by the war-arm of the government, be put to death, or be deprived of his liberty, until first he had been indicted by a grand jury and found guilty by a petit jury, we should make, as a nation, but a poor headway in martial affairs; and, in fact, the restriction would be tantamount to a prohibition of all war. Then, if, looking into other parts of the Constitution, we find war to be a thing provided for in it, we are to draw the conclusion that the particular provisions of the Constitution which do not point expressly or by clear intendment to war are meant to be regulations for the civil branches of the government in affairs of peace, and that they have no reference to war or to martial law.

§ 59. **Sources of War Power — How War made.** — We have already seen,<sup>1</sup> that, by the Constitution, Congress is to make rules and articles of war, and the President is to be commander-in-chief of the army and navy. So the Congress has power “to declare war,” “to raise and support armies,” “to provide and maintain a navy,” “to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;” and, among other things, “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”<sup>2</sup> Congress has made the laws, and they apply both to the suppression of insurrections at home, and to the repelling of invasions from abroad. Nor is it always imperative, to justify an exercise of war power, that there should be a declaration of war by Congress.<sup>3</sup>

§ 60. **The President, as to War.** — The President, having the power of war thus put into his hands, takes the oath to “preserve, protect, and defend the Constitution of the United States.”<sup>4</sup> In another clause, he is enjoined to “take care that the laws be faithfully executed.”<sup>5</sup>

**And Martial Law.** — It is obvious that the word “laws,” in this connection, has no restricted meaning; it is plural in its form, and, if it were singular, it would not be restrictive; it applies, not alone, perhaps not primarily, to the laws administered by the “judicial power,” because the judges, to whom they are expressly committed, are ordinarily competent to execute them. But it applies, in an especial manner, to the law-martial, which is exe-

<sup>1</sup> Ante, § 50.

<sup>2</sup> Const. U. S. art. 1, § 8.

<sup>3</sup> Prize Cases, 2 Black, 635.

<sup>4</sup> Const. U. S. art. 2, § 1.

<sup>5</sup> Const. U. S. art. 2, § 3.

cuted by the military forces whereof he is the commander-in-chief. If, by reason of insurrection or rebellion at home, or invasion from abroad, there comes a disturbance which the civil power cannot or will not suppress, he is bound to call into action this power of war, carrying with it the law-martial.

§ 61. **Who advise President — (Not the Judges).** — In circumstances like these, and in all others, the President, if he wishes for advice concerning his duty, or concerning the meaning of the Constitution or an act of Congress, or concerning any thing else, is to apply, not to the judges, but to the proper cabinet officer. "He may require," says the Constitution, "the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices."<sup>1</sup> It is not, therefore, for the judges to advise him of the time or the necessity for calling out the military force of the country to execute the law of war, or law-martial; but, as he is to act, and to be responsible for what he does or refrains from doing, the duty of judging devolves upon him;<sup>2</sup> and, if he wishes advice, he is to take it, not from them, but from his cabinet officer. Therefore, —

**Courts not limit Martial Law.** — It is impossible for the courts to limit the President as to the space over which, within the country, the martial law of the army and navy shall operate. Should any one wish to call in question his conduct in this respect, he must apply to the constitutional tribunal, namely, the two houses of Congress, in whose hands the power of impeachment lies.

§ 62. **Relations of President to Judiciary.** — Let not the doctrine be misunderstood. The President may violate law by proclaiming martial law, by extending the sphere of it too widely, or by causing the weight of it to fall too heavily; but, under our Constitution, the judicial power is not the one to exercise the restraint. The question is not in its nature "judicial;" and the courts have, under our Constitution, only "judicial power." If the judges should attempt it, they could not execute their decree without calling upon the military power; but it, by the Constitution and laws, is controlled in these circumstances, — that is, when used for purposes of war, — by the President, and he can-

<sup>1</sup> Const. U. S. art. 2, § 2.

Vanderheyden v. Young, 11 Johns. 150;

<sup>2</sup> Martin v. Mott, 12 Wheat. 19; Luther v. Borden, 7 How. U. S. 1, 45;

Ela v. Smith, 5 Gray, 121, 186.

not command it to operate against himself. When, in a time of peace, a judge calls for a military force to act as a *posse* to carry out some decree he has made, or to protect the officers of his tribunal, the case is entirely different; there, the President is not asked to employ the military force against himself.

§ 63. *Suspension of the Habeas Corpus* : —

**Connected with foregoing Discussion.** — The foregoing views — which are intended to be but an outline of doctrine — would be practically imperfect were we not to consider a clause of the Constitution which is sometimes quoted in this connection. It is : —

**Constitutional Provision.** — “ The privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.”<sup>1</sup>

**Habeas Corpus a Judicial Writ.** — Now, it is the principal use of a *habeas corpus* writ, and its great value is, that, by it, when a man is imprisoned, he may have the lawfulness of his imprisonment looked into at once, without awaiting the other and slower processes of the law. It is a writ which can be used only where the judicial power has jurisdiction.

**Prisoner of War.** — If a party is held by military arrest under the law-martial, — that is, as a prisoner of war,<sup>2</sup> — the judicial tribunals, even, it seems to the writer, by the common law as brought to this country from England, would have no jurisdiction to proceed in the case by *habeas corpus*;<sup>3</sup> much less has the

<sup>1</sup> Const. U. S. art. 1, § 9.

<sup>2</sup> This expression, “ prisoner of war,” is loosely used by some to distinguish those persons who, on being arrested by the military power, are treated in a certain way and held for exchange, from those who are put on trial for military offences, or are otherwise restrained for purposes inconsistent with a redelivery to the enemy on cartel. But the distinction is immaterial to the present argument, and the words in the text are used in the larger and true legal sense. See post, § 64, note.

<sup>3</sup> <sup>1</sup> Consult and compare *Rex v. Schiever*, 2 Bur. 765; *Anonymous*, 2 W. Bl. 1324; *Furly v. Newnham*, 2 Doug. 419. In the first of the above-mentioned cases, the man who asked for his discharge on *habeas corpus* was, according

to the facts before the court, held wrongfully as a prisoner. But the writ was denied. In the second case, faith had been broken with the parties applying for the writ, yet they took nothing by their motion. Said the court: “ If they can show they have been ill-used, it is probable they may find some relief from the board of admiralty.” In the third case, the application was for a *habeas corpus ad testificandum*. This was refused. “ The court thought there could be no *habeas corpus* to bring up a prisoner of war; and the solicitor-general mentioned a case where Aston, J., had delivered an opinion to that effect. Lord Mansfield said, the presence of witnesses under like circumstances was generally obtained by an order from the secretary of state. But it seems application had

“judicial power” any such authority under our Constitution, wherein the different functions of the government are intrusted to separate departments with accurately defined jurisdictions, acting independently of one another.<sup>1</sup>

§ 64. By whom Habeas Corpus suspended — (President — Congress). — The *habeas corpus*, therefore, is a judicial process, — an arm of “the judicial power.” This power is not controllable by the President; but only by Congress, and in the way of legislation. In pursuance of a plain implication in the clause of the

been made for such an order in this case without success.” Still the court could not interfere.

2. If in none of these cases a habeas corpus would lie, it is difficult to see how such a process could ever be available in favor of a man held by the military power in a time of war. And see, on this subject, *Vallandigham's Trial*, published in a volume in Cincinnati, 1863; *Ex parte Vallandigham*, 1 Wal. 243; *Bishop Secession and Slavery*, 13 et seq. I know, that in *Ex parte Merryman*, 24 Law Rep. 78, and some others, there is a doctrine apparently adverse to that of the text; but those cases were placed by the government upon the assumed right of the President to suspend the writ of habeas corpus; and I, for one, should agree with Taney, C. J., and some others, that he has no such right. Yet the right of a judicial tribunal to interfere, by habeas corpus, with the custody of a person held by the military power under military guard, in a time of civil war, is an entirely different thing. That such interference never, in our late civil war, unbarred a prison, shows, that, at least, it does no good. The President controls the army at such a time, and “the judicial power” can find in the Constitution no jurisdiction given it to control him, or assume indirectly the command in his stead.

3. But it may be suggested that the writ of habeas corpus could be obtained from a State judge, and he could call upon the militia of the State to assist in its execution. To this suggestion there are two objections: first, it has been held by the Supreme Court of the United States, that the State judiciaries have no

jurisdiction to interfere, by habeas corpus, with the custody of any person confined by United States authority. “No State,” said Taney, C. J., “can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet the sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.” *Ableman v. Booth*, 21 How. U. S. 506, 516. In the second place, if this obstacle were not in the way, still, should the militia of a State, under whatever pretext, just or unjust, make an attack, with implements of war, upon a camp, fortification, or other position held, in a time of war by the forces of the United States, this would be an act of war committed by the State, which, as we have seen, ante, § 48, is expressly forbidden by the national Constitution to engage in war without first obtaining the consent of Congress.

<sup>1</sup> This doctrine seems to be admitted in *Ex parte Milligan*, 4 Wal. 2, as to which case see post, § 64, note.

Constitution above quoted, Congress, by legislation, has authorized the courts to employ the *habeas corpus* as one of its writs. And it is not easy to see how the President, who has no legislative authority within himself alone, can suspend an act of Congress. Nor, as we have seen, is this necessary, or in any degree desirable, in any case where the martial power of war is called into action.

**Effect and Uses of Suspension.** — The suspension contemplated by the Constitution may be useful in circumstances or localities where the full martial power is not called out, and arrests for crimes are authorized in a way not martial yet it is not prudent to have a public examination of the criminal transaction on an application for the discharge of a prisoner, until the case comes on regularly for trial, or the pressure of some emergency is over. But —

**Not justify Arrest.** — The bare suggestion, that, to suspend the writ of *habeas corpus*, even by an act of Congress, will justify an arrest which would not otherwise be lawful, is a monstrosity in jurisprudence; and, in morals, it is of the ethics of the thief, who holds himself justifiable if he can but escape the pursuing constable.<sup>1</sup>

<sup>1</sup> 1. Views suggested by *Ex parte Milligan*. — Since this discussion originally appeared in the third edition of the present work, the subject has been before the Supreme Court of the United States. *Ex parte Milligan*, 4 Wal. 2. There are reported in this case various expressions, even from the bench, not in accordance with the doctrine of my text. Still I do not think the text needs to be modified, while yet it is important to examine the case somewhat in this note.

2. The case came before the Supreme Court from the Indiana circuit, on a division of opinion between the judges of the latter tribunal sitting to hear an application for the discharge of a prisoner from military custody, under St. 1863, c. 81, 12 Stats. at Large, 755. This statute provides in § 1 for the suspension, during the then-existing rebellion, of the privilege of the writ of *habeas corpus*, "in any case throughout the United States or any part thereof. And whenever and wherever the said privilege

shall be suspended as aforesaid, no military or other officer shall be compelled, in answer to any writ of *habeas corpus*, to return the body of any person or persons detained by him by authority of the President; but, upon the certificate, under oath, of the officer having charge of one so detained, that such person is detained by him as a prisoner under authority of the President, further proceedings under the writ of *habeas corpus* shall be suspended by the judge or court having issued the said writ, so long as said suspension by the President shall remain in force and said rebellion continue." Then, in § 2, it is provided "that the Secretary of State and the Secretary of War be, and they are hereby directed, as soon as may be practicable, to furnish to the judges of the Circuit and District Courts of the United States and of the District of Columbia a list of the names of all persons, citizens of States in which the administration of the laws has continued unimpaired in

§ 65. *Concluding Observations:—*

**As to foregoing Discussion.**—Thus we have traced, with some

the said Federal courts, who are now, or may hereafter be, held as prisoners of the United States, by order or authority of the President of the United States or either of said secretaries, in any fort, arsenal, or other place, *as state or political prisoners, or otherwise than as prisoners of war.*" And thereupon the statute proceeds to direct, that, if a prisoner who is thus described as a "state or political prisoner," held "otherwise than as a prisoner of war," shall not be indicted within a specified time, he may be discharged by the judicial power in a manner therein pointed out.

3. Under these circumstances, Milligan, who was a "prisoner,"—but whether he was a "state or political prisoner," or was a "prisoner of war," was the question on which the whole case really hinged,—made, as I have said, his application under the statute to be discharged. In *fact* he was, according to the papers appearing in the case, as I trust I shall be able to make plain in this note, a "prisoner of war," for whose discharge by the judicial power the statute made no provision. Whether he was rightfully or wrongfully held as a prisoner of war is another question, upon which there is perhaps room for some differences of opinion. But if the military power had wrongfully made him a prisoner of war, this, according to the doctrines of the English common law, as already shown (*ante*, § 63 and note), was a wrong which the civil courts had no jurisdiction to inquire into, and no authority to redress. And if this is so in England, much more is it so in the United States, the jurisdiction of whose civil courts is, by express constitutional provision, as we have already seen (*ante*, § 58), limited to the exercise of "judicial power." And it can never be a function of "judicial power" to control the movements of an army in the act of war.

4. "**Prisoner of War**"—"State Prisoner."—Contrary to the foregoing view, however, it was rather assumed than decided, that Milligan was detained, not as a prisoner of war, but as a state

prisoner. The judges all held him to be entitled to his discharge, but they differed in their reasoning. Chase, C. J., delivering the opinion of the minority, merely said on this point: "Milligan was imprisoned under the authority of the President, and was not a prisoner of war." p. 134. Davis, J., delivering the opinion of the majority, elaborated the point a little more, as follows: "But it is insisted that Milligan was a prisoner of war, and therefore excluded from the privileges of the statute. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the States in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; *for he was not engaged in legal acts of hostility against the government*, and only such persons, when captured, are prisoners of war. If he cannot enjoy the *immunities* attaching to the character of a prisoner of war, how can he be subject to *their pains and penalties?*" p. 131.

5. When the late civil war broke out, it found the loyal part of our politicians as ill prepared in respect of legal learning as of material accumulations. We had, therefore, from them all sorts of incongruous, not to say ridiculous, talk under the legal head. Thus, for example, they sometimes spake of prisoners of war as those, and those only, who were held for exchange by cartel. This sort of loose talk attended unthinking minds, and the minds of men who did not read, in some instances even to the end of the war. But that our whole Supreme Court should, without reflection, and without looking into the authorities, have accepted this as the true language of the law, seems at the first view surprising. But the loftiest mind, if it does not think, places itself on a level with the lowest, and the world never contained even one man, from whom

care, the thread of juridical argument through the various constitutional provisions upon which the question of martial law under

thought was not on some occasion absent.

6. According to this judicial defining, therefore, no persons are, when captured, "prisoners of war," except those who were "engaged in *legal* acts of hostility against the government." Either the grand march of the late rebellion was made in pursuance of the behests of law, and the government under which the court sat when it uttered this definition was guilty of the blackest crimes against law in suppressing the rebellion, or, assuming the defining to be correct, there was not so much as one "prisoner of war" taken by the military forces of the United States during the entire bloody period. But the judge certainly could not have meant this; for, in other places, he spake of the rebellion in terms implying that it was unlawful, and that there were prisoners of war taken, who, therefore, were *not* "engaged in *legal* acts of hostility against the government." Perhaps he meant, that, to constitute a prisoner of war, the person captured must have been a regularly enlisted soldier of the enemy's army, carrying on the fight according to the approved usages of military law. On this supposition, a member of a guerilla band, for example, could not be a prisoner of war, though captured in battle.

7. Now, if we search for the true meaning of the term "prisoner of war," we shall find it to be *any person captured by a military force carrying on war, and held as an enemy prisoner*. He may be wrongfully or rightfully so captured and held, that is immaterial; just as one arrested and held by the civil power is a prisoner, equally whether the proceedings against him were right or wrong. And that this is the true meaning, as legal language has been employed down to the time when this opinion was delivered, I need only turn to Vattel to prove; for his work is accepted everywhere as a legal classic on this subject. Under the title, as expressed in the margin, "The Right to make *Prisoners of War*," he says: "All those persons belonging to the op-

posite party (even the women and children) he [the prince carrying on a just war] may lawfully secure and make prisoners," when he deems such a measure to be necessary. Vattel *Law of Nations*, b. 3, c. 8, § 148. Let it be observed, that these persons, not enlisted in the enemy's military ranks, not even capable of bearing arms, are, when captured, termed by this classic author "prisoners of war." Again, under the title, as expressed in the margin, "How *Prisoners of War* are to be treated," he says: "Prisoners may be secured; and, for this purpose, they may be put into confinement, and even fettered, if there be reason to apprehend that they will rise on their captors, or make their escape. But they are not to be treated harshly, *unless personally guilty of some crime against him who has them in his power*. In this case, he is at liberty to punish them." *Ib.* b. 3, c. 8, § 150. Under this head, the case of a spy will occur to the mind of the reader. He is not usually captured in battle, or with arms in his hands, or in any way under the garb of an enemy, but more frequently he appears as a friend; yet he is a prisoner of war, who is to be tried by a military commission, or other military court, and, by sentence of the tribunal, suffer death. "If," said Davis, J., in the above-quoted passage from the opinion of the majority of the court in this Milligan case, "he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?" Assuming this expression to mean that, in the opinion of the learned judge, a person captured by the army, in a time of war, ceases to be a prisoner of war when he is made to suffer pains and penalties, and thereupon the judicial power is entitled to take him out of the war-grasp, this exposition is as new as it is alarming. The doctrine was before, as Vattel tells us, that the infliction of pains and penalties on certain classes of prisoners of war is right and just, and that nevertheless they remain prisoners of war until discharged, or relieved by death. Thus, still treat-

our government depends. It was not deemed necessary to cite, in the notes, all the crude utterances which have fallen from

ing of prisoners of war, he says: "As soon as your enemy has laid down his arms or surrendered his person, you have no longer any right over his life, unless he should give you such right by some new attempt, or *had before committed against you a crime deserving death.*" Ibid. b. 3, c. 8, § 149. In this case, the captured person is still a prisoner of war, though the war-arm inflicts upon him pains and penalties. And, whether this is so as a general proposition or not, it is plainly so within the meaning of this particular statute. It gives, as we have seen (ante, par. 2), to the judge or court authority to release from military custody, under the circumstances specified, all persons who are confined "as state or political prisoners, or otherwise than as prisoners of war." The statute contemplates, it thus appears, two classes of prisoners, — those of the one class being termed "state or political prisoners," and those of the other class "prisoners of war." Into the one or the other of these classes every prisoner arrested and detained by the military power must by construction be held to fall. But I shall now proceed to show, that no prisoner detained, as Milligan was, for trial before a military tribunal, has been heretofore deemed to be a state prisoner. Therefore, as well as for the reasons already given, every such prisoner is, in the contemplation of the statute, a "prisoner of war."

8. The expression "state prisoner," which occurs in the statute, has, therefore, a meaning equally well defined with the other. It means a *prisoner held for some political offence, or offence affecting the state, to be dealt with by the judicial power, and not by the military.* The statute itself partly defines it when it says, "state, or political, prisoners." One need only look over the various collections of English "State Trials" to see that this is so. The offences are of a political nature, and the trial is before a civil court. The same thing will appear if one looks into the book known as Wharton's "State Trials of the United States." There is

not, in that collection, any one of the numerous cases of spies and other prisoners of war who have been brought to trial before military tribunals. Such prisoners were never called "state prisoners," therefore their trials do not have place in a collection of "state trials."

9. The Statute explained. — Now, the statute under consideration was drawn by some one, I know not by whom, possessed of accurate ideas of legal language. It distinguishes, as I have said, between "state prisoners" and "prisoners of war," and it contemplates the arrest and temporary detention of the former by the same power which should also make prisoners of war; and, especially, their arrest by order of the President, who, while he is commander-in-chief of the army and navy, is chief executive officer also of the civil department. It requires, therefore, that the two classes shall be distinguished the one from the other. For this purpose, lists of the state prisoners were to be made out and sent to the judges; and jurisdiction was given them over these prisoners, but not over the others.

10. The Case. — When Milligan was arrested, his name was not returned as a state prisoner. On the other hand, the military power proceeded to deal with him as a prisoner of war, trying him by a military commission for the following offences, of a military sort: "Conspiracy against the government of the United States; affording aid and comfort to rebels against the authority of the United States; inciting to insurrection; disloyal practices; and violation of the laws of war." p. 6. That some of these were civil offences renders them no less military. Milligan was found, by the military commission, guilty of all. He was no less capable of being a rebel, — or, in other words, an enemy, — because he lived in Indiana, than if he had resided in South Carolina. Vattel says: "I account as associates of my enemy those who assist him in his war without being obliged to it by any treaty. Since



judges and from legislators on this subject. But such as were deemed of special importance, or as authoritative expositions of the law, have been referred to.<sup>1</sup>

they freely and voluntarily declare against me, they, of their own accord, choose to become my enemies. If they go no further than furnishing a determined succor, allowing some troops to be raised, or advancing money, — and, in other respects, preserve towards me the accustomed relations of friendship or neutrality, — I may overlook that ground of complaint; but still I have a right to call them to account for it." Vattel Law of Nations, b. 3, c. 6, § 97. *Prima facie* Milligan, living in a State the majority of whose people adhered to the national cause, — a State, therefore, not declared *in the mass* to be in rebellion, — was to be deemed and treated, not as an enemy, but as a friend; and this was one of the reasons, among others, why the military power should inquire into the case by commission, even to justify a continued imprisonment, as it would not have done if he had been arrested in South Carolina.

11. Much more might be said of this case; but the foregoing will point to the following conclusion concerning it. 'The court proceeded throughout upon a misapprehension of the meaning of those decisive statutory phrases which are a part of the fundamentals of our language, and of all languages spoken by people who claim a share in the law of nations. The decision, indeed, if accepted as sound and followed hereafter, overturns a part of the English language, and of the language of the universal law of nations; and, with it, a part of the law itself which is the common property of mankind. The court is our own supreme "judicial tribunal," and no more. If it were a "lexicographical tribunal," it would perhaps have jurisdiction of this question. As it is, I deny its jurisdiction. I deny that the decision is binding as law anywhere. See Bishop First Book, § 455, 456. Even if it had jurisdiction, the fact that this main point of the case was so evidently passed without a single real thought, and without so much as a glance into the authorities,

would render it, on familiar principles, nearly valueless as a future authority. These are the reasons, which, among others, have determined me not to modify my text to conform to this case. My readers have it before them in the book of reports, and they can follow it as implicitly as they choose.

12. There are expressions, in this case, indicating that the duty of preserving the rights of the citizen unimpaired, had not escaped the attention of the tribunal. Let me add, that, according to a view which seems to me tenable, liberty in a republic is best preserved by yielding implicit obedience to the constitution and laws as we find them, and correcting them, if wrong, not by usurpations of power, but by the means which they themselves provide. If, for example, our Constitution has withheld from the judiciary all corrective jurisdiction over the war power as wielded in actual warfare, — though a judge might deem that liberty would be better preserved if he could put the judicial restraints upon it, and call it to answer to the summons of an aggrieved party, — still he would best promote liberty on the whole, while yet he left the individual to suffer, by keeping the judicial action within the limits which the Constitution has drawn. There is wrong done everywhere, in all the relations which exist among us, — wrong in war, wrong in peace, — and wrong inflicted as well by the judicial powers as by the others. If war has its oppressions, so also do the courts take away a man's property or life to-day, and to-morrow overrule the doctrine of the decision; thus themselves acknowledging that they did wrong before.

<sup>1</sup> During the late Secession war this subject was much discussed by legal gentlemen, as well as by men who were mere politicians. **Whiting's War Powers.** — The most voluminous and important of the legal discussions is, perhaps, the one by Hon. Wm. Whiting, who, besides giving much private investigation to the subject, had it constantly before

§ 66. **Difficulties of Explaining this Subject.** — Though the constitutional provisions relating to this subject are, when fully examined, plain, it is difficult to tell the truth upon it without subjecting one's self to being misunderstood. The question has been so bandied about in politics that the ordinary reader is seeking to know whether the author belongs to his party or not, and is ready to approve or disapprove according as the answer to this query is satisfactory or otherwise. And more unfortunately in this instance, the author is not of the reader's party whichever it is; but is of those who hold truth to be superior to party, and who seek it alone, without asking or caring whether it pleases one party or another. Yet truth is a power within itself, wholly independent of the person from whose lips or pen it flows.

§ 67. **Observations on foregoing Views.** — The reader, therefore, may suppress his surprise at finding that the foregoing are not the views of any political party; being, instead, the teachings of the Constitution. If the author is told, that they accord to the President great power in a time of rebellion or of other war, his answer is, that he did not make the Constitution. If told, that, assuming these views to be correct, the government of this country is not the weak thing its enemies say it is, but, on the contrary, is one of the strongest governments in the world, his reply is, that not he, but the Higher Wisdom that inspired our forefathers when they framed the Constitution, ordained this result. If it is still objected that not even the Queen of England has such power of martial law as, according to the foregoing views, is possessed by

him during a period in which he rendered gratuitous assistance to the government as solicitor to the War Department. The results of his inquiries are embodied in the enlarged editions of his work on the "War Powers." How far his views and those expressed in my text correspond I do not know; at all events, his production is well worthy of an examination. **Vallandigham's Trial.** — An important point is also discussed on both sides by counsel in the Vallandigham trial, published in a thin 8vo volume at Cincinnati, 1863. **Pamphlets, &c.** — In various pamphlets, published speeches, and the like, much other matter, on the one side and on the other of particular points, may be found. I have not made special reference to any of these in my

notes; because my own discussion is an independent one, presenting views which certainly did not have their origin in any of these productions, and because it would serve no useful end to encumber my notes with references of this nature. **Decisions relating to the Rebellion.** — Possibly the following decisions, on questions connected with the Secession War, may be useful to some reader: *Hammond v. The State*, 3 Coldw. 129; *In re Egan*, 5 Blatch. 319; *Brooke v. Filer*, 35 Ind. 402; *Hatch v. Burroughs*, 1 Woods, 439; *Marsh v. Burroughs*, 1 Woods, 463; *Ex parte Law*, 35 Ga. 285; *The State v. Cook*, Phillips, 535. And see *Jim v. Territory*, 1 Wash. Ter. 76; *Allen v. Colby*, 47 N. H. 544.

the President of the United States, the answer to this objection is, that it may be so, or may not, but, whatever be the power of the English Queen, she derives it from the English Constitution, while our President derives his from the American. It has, indeed, been assumed in this chapter, that the common law of England is the common law of this country ; but, where our Constitution is distinct, as it is on this subject of martial law, it, and not the common law, must prevail. Moreover we shall see, in the proper place,<sup>1</sup> that, according to the highest judicial authority in this country, — an authority we are all bound to respect, though the doctrine probably requires some qualification, — there is no common law of the United States, in distinction from the several States.

§ 68. *Continued.* — But it should allay our apprehensions to reflect, that the power of the President as to martial law is not higher than, in judicial affairs, is exercised by the courts of law throughout the country. If the President may proceed wrongfully, so may a judge. If he may commit an error, so may the highest judges of the land. If a judge may be impeached, so equally may be the President. If the judge is bound to proceed, in civil affairs, according to judicial law ; so is the President, in martial affairs, bound to proceed according to the law-martial. If it is in the power of the President to ruin a man by violating the law-martial, so also it is in the power of the judge to do the same thing by violating the judicial law. If, from an inferior judge, there lies an appeal to a superior ; so also does there from an order of an inferior military officer to the President. If there are instances in which an inferior military officer may do a wrong which cannot find practical redress ; so likewise there are, in which an inferior judge may do a wrong which cannot be redressed by application above. In short, the difference between martial law and the law of the civil tribunals is, that the one is adapted to suppress what the other cannot, in a time of rebellion or other war ; while the other is adapted to a condition of pure peace. And let us not complain when we find our Constitution to have embodied a wisdom suited to all the emergencies of a nation.

<sup>1</sup> Post, § 190 et seq.

## CHAPTER V.

THE AUTHORITIES AND SOMETHING OF THEIR COMPARATIVE  
WEIGHT AND EFFECT.

§ 69. Introduction.

70-85. Books of Reports.

86-90. Authoritative Text-Books.

91-98. How far binding on our Courts.

§ 69. **What for this Chapter and how divided.** — The subject of this chapter is, as to the law in general, within the discussions of the author's "First Book of the Law." Therefore its purpose is, not to cover again that topic, but to give some needful elucidations, partly fragmentary, relating specially to the criminal law; as to, I. The Books of Reports; II. The Authoritative Text-Books; III. The Weight of the Books and Prior Decisions in Present Adjudication.

I. *The Books of Reports.*§ 70. *English and Irish* : —

**In General.** — In the remoter periods of our law in England, the reports of criminal causes generally appear in the same volumes with those of the civil. Volumes of mere chancery decisions do not embrace them; nor, in England, are they found in those devoted to the Court of Common Pleas and the Court of Exchequer. But throughout old volumes of miscellaneous causes, and those decided by the Court of King's or Queen's Bench, they are more or less distributed. And, on the criminal law, we have among the old reports that of —

§ 71. **John Kelyng.** — It is a thin folio entitled "A Report of divers Cases in Pleas of the Crown, adjudged and determined in the reign of King Charles II., with Directions for Justices of the Peace and others, collected by Sir John Kelyng, Knight, late Lord Chief Justice of His Majesty's Court of King's Bench."

Kelyng died in 1671, and not until 1708 were the cases published, by, it is said, one of his successors, Lord Holt.<sup>1</sup> The collection is of considerable value, and it has the marks of greater accuracy than most of the old posthumous reports.<sup>2</sup>

§ 72. **Later Crown Cases.** — There is nothing further, important in this connection, until we come to something like a series of Crown Cases, extending down to nearly the present time. This series, if such it may be called, commences with two volumes by Leach, never reprinted in the United States; the standard fourth edition of which contains cases from 1730 to 1815. The paging of the editions differs. Then we have six volumes, reprinted in a series in Philadelphia; one volume of the reprint, Jebb, consisting of Irish cases. The English five are Russell & Ryan's Crown Cases, 1799 to 1824, in one volume; Moody, two volumes, 1824 to 1844; and Denison, two volumes, 1844 to 1852. The later Crown Cases Reserved, not reprinted in this country, are Dearsly, one volume; Dearsly & Bell, one volume; Bell, one volume; Leigh & Cave, one volume, — in all, four volumes, — extending down to 1865, when the "Law Reports" commence. And the Law Reports were at first so arranged that the "Crown Cases Reserved" were bound by themselves. There are of these two thin volumes, the second of but 186 pages, extending to near the close of the year 1875. On the reorganization of the English courts, the make-up of the "Law Reports" was changed, and the crown cases reserved are placed in the "Queen's Bench Division."

§ 73. **Irregular, and not in Bank.** — Of reports not deemed regular, there is a volume by Temple & Mew, consisting of crown

<sup>1</sup> Wallace Reporters, 3d ed. 209; Foster, 204.

<sup>2</sup> Kelyng was a very haughty and overbearing judge, who leaned to kingly power and trampled on popular rights; till, at last, he humbled himself and became as abject as he had been arrogant, to escape impeachment. Lord Campbell had a mean opinion of every thing proceeding from him, even to this posthumous book. This learned person's life of him closes as follows: "I ought to mention, among his other vanities, that he had the ambition to be an author; and he compiled a folio volume of decisions in criminal cases, which are of no value

whatever except to make us laugh at some of the silly egotisms with which they abound." 2 Campb. Lives Ch. Just. Am. ed. 170. I do not think any one would value Kelyng's individual opinion on a question pertaining to the liberty of the citizen or to true personal dignity. Still, it seems to me, he has set down in this volume, which he did not publish through vanity, for it was not published by him, or any dependant of his, or in his lifetime, many useful things. And its general standing in the profession is, for a posthumous work, quite respectable. And see 8 Am. Law Rev. 45.

cases reserved, from 1848 to 1851; but the same cases are also in the regular reports above mentioned. Among decisions by single judges, we have, of some value, two 12mo volumes of "Cases determined on the Crown Side of the Northern Circuit," by Lewin, 1822 to 1838; they are made up of short notes of rulings on trials. More important than these is a yet unfinished series, by Cox, of "Reports of Cases in Criminal Law argued and determined in all the courts of England and Ireland," extending from 1843 downward. The cases are of all sorts; before collective judges passing on questions of law alone, and before single judges presiding in jury trials. Unhappily, the "Law Reports" omit many appealed cases which ought to be found in them; and, on account of these, as well as the rest, there can be no complete set of English criminal-law reports without Cox.

§ 74. *Nisi Prius*. — The English nisi-prius reports, of which there is a sort of series from 1820 to 1865, contain many rulings of value, but not of the highest authority, by single judges in jury trials; together with a few cases heard by the bench of judges on appeal. They are Peake, Espinasse, Campbell, Holt N. P., Starkie, Gow, Dowling & Ryland N. P., Ryan & Moody N. P., Carrington & Payne, Moody & Malkin, Moody & Robinson, Carrington & Marshman, Carrington & Kirwan, and Foster & Finlason.

§ 75. *Irish*. — In the Irish common-law reports, criminal cases are given, interspersed with civil. And we have seen that Cox contains Irish as well as English cases.

§ 76. *State Trials*. — The reports of "State Trials," known as Howell's, or Hargrave's, &c., according to the edition,<sup>1</sup> contain much that is useful to one who discriminates; but, viewed indiscriminately, they are of little authority. Townsend's "Modern State Trials," in two volumes, relates rather to advocacy than to pure law.

§ 77. *American Reports*: —

*In General*. — In the United States, it is exceptional that any book of reports is published containing criminal cases alone; but generally these are printed mingled with the other cases at common law. Of the exceptions we have —

§ 78. *Virginia Cases*. — These are chiefly criminal, decided by the General Court of Virginia from 1789 to 1826.

<sup>1</sup> See Bishop First Book, § 575, "Howell," note.

§ 79. **Wheeler's Criminal Cases** — are in three volumes. The first volume was originally called the "Criminal Recorder." The principal part of it is occupied with cases before the Recorder of New York City. The other two volumes consist of cases, in the main, before the inferior tribunals in New York City and State. It has some cases from other States, and some that were decided by the highest State courts and by the national tribunals. Of course, the value of the cases in it varies greatly. Principally, 1822 to 1825.

§ 80. **City Hall Recorder.** — This collection is by Daniel Rogers, in six volumes, usually bound in three. It consists chiefly of cases tried before juries "in the various courts of judicature for the trial of jury causes" in the New York City Hall, 1816 to 1821. Plainly, these reports are not of high value, though they are not exactly worthless.

§ 81. **Parker's Reports of Decisions in Criminal Cases** — are in six volumes, the dates of the decisions ranging from 1845 to 1868; when the last volume was published. They are decidedly respectable reports of causes of importance, averaging quite above those mentioned in the last two paragraphs. And they contain many valuable precedents. According to the title-page the decisions were "made at Term, at Chambers, and in the Courts of Oyer and Terminer of the State of New York."

§ 82. **Thacher's Criminal Cases** — consist of a single volume of decisions by the late Judge Thacher, who presided in the Municipal Court<sup>1</sup> of the city of Boston; edited, from his papers, after his death, by Horatio Woodman, 1823 to 1842. The judge was able, and many of the cases are interesting. But, his court having been an inferior one, they are not deemed of much value.

§ 83. **Morris's State Trials.** — These are reports of all sorts of criminal causes before the highest courts of the State of Mississippi, collected from the regular reports by the attorney-general, pursuant to a command of the legislature. The period covered is from 1818 to 1872. The collection occupies two thick volumes. In the second is an Appendix of "Precedents and Forms."

§ 84. **Texas Court of Appeals Reports.** — By the Constitution of Texas which went into effect in 1876, a new court termed the "Court of Appeals" was established. As a leading function, it

<sup>1</sup> This was the old Municipal Court, in criminal causes. The later tribunal of before which were the ordinary jury trials the same name is a sort of Police Court.

has final appellate jurisdiction in all criminal causes; the ordinary final jurisdiction in civil issues remaining in the "Supreme Court." Three judges, the concurrence of two of whom is necessary to a decision, constitute the tribunal. The result has been a new series of Reports, occupied exclusively with criminal causes. These reports are not only indispensable at home, but of great value in the other States.

§ 85. **Houston's Criminal Reports** — pertain to Delaware. They are exclusively of rulings at or connected with jury trials, of a sort not common elsewhere in this country. Two courts are reported, — the "Court of Oyer and Terminer," and the "Court of General Sessions of the Peace and Jail Delivery." The former is presided over by three of the highest judges of the State, the latter by two; and the decisions of both are final.

## II. *Authoritative Text-Books.*

§ 86. **How far back.** — It would serve no useful end to mention, among text-books, such as, not having attained the position of authorities, have substantially faded from view, and essays not of a practical sort. It is not customary, though it is sometimes desirable, to extend our legal investigations much into the books which were written at a period earlier than those of Lord Coke.<sup>1</sup> But —

§ 87. **Coke.** — The works of this great master, which ushered in a new era in legal science, should be consulted on every subject to which they relate. His disquisitions upon topics connected with the criminal law are in various places, but most prominently in the Third Institute "concerning High Treason and other Pleas of the Crown, and Criminal Causes." This is one of the books published after his death, not ranking, therefore, so high as his First Institute, or "Coke upon Littleton," published in his lifetime, — though perhaps higher than his Fourth Institute, "concerning the Jurisdiction of Courts," which was also posthumous.<sup>2</sup> Consequently, —

§ 88. **Hale and Hawkins.** — In this department of the law, the

<sup>1</sup> Bishop First Book, § 282.

<sup>2</sup> Holt said, "The 4 Inst. had not my Lord Coke's last hand; the judges have not allowed that so much as the other

parts; though 2 Inst. be a posthumous work, yet it is more perfect." *Rex v. Pain*, Holt, 294, 295.



treatises of Lord Hale and Serjeant Hawkins stand pre-eminent.<sup>1</sup> "Hale and Hawkins," said an American judge of great criminal-law learning, "are justly regarded, not as respectable compilers, but as standard authorities."<sup>2</sup>

**Hale.** — The work of Lord Hale is entitled "The History of the Pleas of the Crown." It was published from his manuscript a considerable time after his death, and it lacks the completeness, the compactness, and the finish which the very eminent author would doubtless have given it had he published it himself. Still it is of the highest value as containing a very considerable body of *law*, as distinguished from mere points; mingled, however, as most statements of law are, with those of points to illustrate them. This work, in its scope, is imperfect; treating only of treasons and felonies, not of misdemeanors.<sup>3</sup>

**Hawkins.** — The fact last mentioned is the one which mainly prompted Hawkins to write his excellent "Pleas of the Crown." Coming after Hale, he stretches his researches back into the old law, and downward well into the new. His work is not of higher authority than Hale's, and perhaps by those judges who pay special deference to what comes from under the judicial robe, its authority may not be deemed so high; but, in intrinsic merit, and in practical adaptation to be useful, it is unsurpassed among the old books of the law. It renders unnecessary any consultation of the Year Books, as to questions relating to the criminal law; and, indeed, it presents in almost perfect outline and color the olden glories of the English criminal jurisprudence, while in the very act of blending with the new. This book contains, not mere points, but also law.

§ 89. **Foster.** — No other treatises on the criminal law are of reputation so high as those of Hale and Hawkins. There is, by Sir Michael Foster, a book entitled "A Report of some Proceedings on the Commission for the Trial of the Rebels in the year 1746, in the county of Surry, and of other Crown Cases; to which are added Discourses upon a few Branches of the Crown Law." The preface to the first edition is dated in 1762. There were two subsequent editions by Michael Dodson. This is a

<sup>1</sup> Parke, J., in *Rex v. Long*, 4 Car. & P. 398, 405, 406; Abbott, C. J., in *Rex v. Rogier*, 1 B. & C. 272, 274; Dallas, C. J., in *Butt v. Conant*, 1 Brod. & B. 548, 570 et seq.; Ram. Leg. Judgm. 88, 169.

<sup>2</sup> Gaston, J., in *The State v. Johnson*, 1 Ire. 354, 363.

<sup>3</sup> And see Bishop First Book, § 202, 513, 574, *Hale*, note.

valuable book; but, as the reader sees, it is incomplete as a treatise. Nor, though the reputation of the Discourses is considerable, are they of the very highest order.

§ 90. **Modern English Books.** — There are respectable English books on the criminal law, of dates subsequent to the above; some of which may be deemed, in a modified sense, of authority. They are not, however, like the works of Coke, Hale, and Hawkins, regarded as depositories of the old and the traditional criminal law, whatever may be our estimate of their intrinsic merits. So they do not require specification in the present connection.

### III. *The Weight of the Books and Prior Decisions in Present Adjudication.*

§ 91. **As teaching our Common Law.** — The old English textbooks above mentioned, and such early reports as Kelyng's, explain the criminal common law of England as it stood when so much of it as was adapted to our situation and circumstances became common law with us. So that the law contained in them has, in each of our States, a weight of authority not belonging either to the modern English decisions or to those of the sister States. Still, —

§ 92. **Adopted or not.** — When such law is ascertained, the further question is always pertinent, whether or not it was adapted to the situation of our people, and therefore presumptively adopted by them.<sup>1</sup> Under this head, there is opportunity for the courts to shake off old absurdities and false notions. By reason of which there has come to be some difference between the common law of England and that of any one of our States, and in like manner there are some early as well as later differences in the common law of the respective States. But questions of greater importance relate to —

§ 93. *The Doctrine of Stare Decisis in Criminal Cases: —*

**In General.** — It is a little remarkable that this subject of the application of the doctrine of *stare decisis* in criminal cases, as distinguished from civil, has not in modern times<sup>2</sup> been judicially discussed. In a general way it may be said to prevail in the

<sup>1</sup> Bishop First Book, § 51–59.

<sup>2</sup> For a sort of discussion of this question by the notorious Jeffreys, see Rosewell's Case, 10 Howell St. Tr. 147, 267; Crim. Proced. I. § 18.

criminal department of our law as in the civil. In reason it does; but, in the civil department, the doctrine is applied differently in different classes of cases. If, for example, the courts have announced a rule of property, and the business community have accepted it as the guide in their transactions, and men have acquired rights in reliance upon it, a bench of judges would not act wisely to overturn the rule, and nullify transactions and divest vested rights, from the mere consideration that another rule would have been better or more harmonious with the general principles of the law. So, in cases of this sort, the doctrine of *stare decisis* has its full effect.<sup>1</sup> But not to all classes of litigation between private parties does this sort of consideration apply. And where no such reason prevails, what is intrinsically wrong, violative of just principle, and a blemish on the law, will, with greater or less freedom and certainty according to the circumstances, be, by enlightened judges, disregarded and overruled;<sup>2</sup> though, of course, a mere established practice, which originally might have been better some other way, will be followed.<sup>3</sup> And in various other cases the doctrine of *stare decisis* will and should prevail even against reasons of considerable weight.<sup>4</sup> Now, —

§ 94. **In Criminal Law.** — It is plain, in reason, that the decisions in the criminal law ought, in general, to stand among those particularly liable to be overruled when found to be wrong. But in reason, likewise, there are some exceptions to this proposition. So let us look at particular classes of criminal cases. Thus, —

§ 95. **Malum Prohibitum only.** — When a statute prohibits a thing not wrong in itself, one is in every view justified in doing it under circumstances which the highest courts of the State have held not to be within the enactment. Under such circumstances, to overrule the decisions, and punish a man for an act in itself innocent, and pronounced lawful by the tribunals, would be to inflict gross injustice; and, certainly unless in very special cases,

<sup>1</sup> *Carver v. Louthain*, 38 Ind. 530, 538, 539; *Harrow v. Myers*, 29 Ind. 469; *Barden v. Southerland*, 70 N. C. 528, 530; *Day v. Munson*, 14 Ohio State, 488; *Emerson v. Atwater*, 7 Mich. 12, 23; *Fisher v. Horicon Iron, &c. Co.*, 10 Wis. 351; *Reichert v. McClure*, 23 Ill. 516.

<sup>2</sup> *Willis v. Owen*, 43 Texas, 41, 48, 49; *Kneeland v. Milwaukee*, 15 Wis. 454, 691; *Magee v. White*, 23 Texas, 180, 189.

<sup>3</sup> *Bachman v. Sulzbacher*, 5 S. C. 58, 63.

<sup>4</sup> *Jansen v. Atchison*, 16 Kan. 358, 382; *Usill v. Hales*, 3 C. P. D. 319, 327; *Pugh v. Golden Valley Railway*, 15 Ch. D. 330, 334, 335; *Selby v. Bardons*, 3 B. & Ad. 2, 17; *Williams v. Germaine*, 7 B. & C. 468; *Goodtitle v. Otway*, 7 T. R. 399, 419; *Walton v. Tryon*, 1 Dickens, 244, 245.

it ought not to be done. Such overturning of established doctrine would be too much in the nature of *ex post facto* judicial legislation. But, —

§ 96. **Malum in Se.** — If what the man did was *malum in se*, so that he was conscious of wickedness in doing it, there would be no very weighty objection to overruling the former doctrine if clearly wrong,<sup>1</sup> and especially if upheld only by a single case.<sup>2</sup> Above all, —

§ 97. **Wrong Decisions adverse to Defendants.** — Where decisions palpably wrong in principle have been pronounced however frequently, and during however extended a series of years; adverse to the parties indicted, the courts in reason ought, on the request of any defendant, if fully satisfied of the error, to overrule them. Here the private party consents to the reversal for which he prays. The government, which is the other party, has no interest to perpetuate an unjust doctrine, and the judge must therefore deem that it both consents and joins the private party in his prayer. There are no vested interests to be divested, no injury is to follow to any mortal. Even if the question is of procedure, and the result is to be the discharge of one who has violated the law, justice has not failed; for he may be indicted over again, tried, convicted, and punished. Thus the action of the court in reversing the wrong doctrine is as beneficial to the community as fair to the prisoner.

§ 98. **In Conclusion.** — These are but general views. Something further of them will appear from time to time, and in their proper places, throughout these volumes and the others of the series. No considerate bench of judges will act upon them to the overruling of a case, except where the conclusion that it is wrong is positive and distinct, and all reasonable doubt is excluded. And the applications of the views will considerably vary with the cases. When, if ever, they fully control the tribunals, our criminal law will receive from the judicial hand an improvement which it is impossible for legislation to bestow.

<sup>1</sup> Post, § 295, 296.

<sup>2</sup> The State v. Williams, 13 S. C. 546.

## BOOK II.

## JURISDICTION AND LOCALITY.

## CHAPTER VI.

JURISDICTION OF CRIME AS BETWEEN THE UNITED STATES  
AND FOREIGN NATIONS.

§ 99-101. Introduction.

102-108. Territorial Limits of the United States.

109-123. Jurisdiction beyond those Limits.

124-135. Exemptions from her Jurisdiction within those Limits.

136-144. Acts Punishable both by her and by Foreign Governments.

§ 99. **How Subject of Locality divided.** — The subject of the locality of crime — that is, of the jurisdiction within which it is to be prosecuted — divides itself into two parts. The one concerns the local jurisdiction as respects the county, and the like, wherein the criminal act, committed within the general jurisdiction of the country, is to be tried. The other relates to the right and custom of nations and political sovereignties to take or decline jurisdiction over the criminal act, as committed within or without their territorial limits, on or off the high seas, in their own or foreign vessels, by their own subjects or the subjects of other nations or sovereignties, and the like. In our country, this second part divides and complicates itself, more than in others, by reason of the twofold relation sustained by our people, as subjects, on the one hand, of the United States, and, on the other hand, of a particular State.

**What for "Criminal Procedure."** — The first part — namely, as to the county, and the like, within which a criminal offence shall be prosecuted — is, by the author of these volumes, discussed in "Criminal Procedure."<sup>1</sup>

<sup>1</sup> *Crim. Proc'd.* I. § 45-67.

**What for this Chapter, &c.** — In treating, in this work, of the second part, we shall in the present chapter consider the question as between the United States and foreign nations as though there were no States, and the United States was sovereign without limit; leaving the question as between the United States and the several States for contemplation further on. Indeed, —

§ 100. **States no Authority, as to Foreign Nations.** — In the proper place, we shall see that in most particulars the question truly is as thus supposed. Though the States have their local powers, and are sovereign in their own territory and within their respective spheres, they have no diplomatic authority and are not known abroad.<sup>1</sup>

§ 101. **How the Chapter divided.** — Looking, therefore, at the United States as one nation, we shall consider, I. Her Territorial Limits; II. The Extent of her Jurisdiction beyond those Limits; III. Exemptions from her Jurisdiction of Persons within those Limits; IV. Acts Punishable both by her and by a Foreign Government.

### *I. Territorial Limits of the United States.*

§ 102. **By what Authorities determined.** — To ascertain the territorial limits of the United States, viewed as one nation, we must look to the law of nations, and to our treaties with those governments whose possessions border upon ours.

§ 103. *How on the Ocean:* —

**Determined by Law of Nations.** — The law of nations determines our territorial limits on the ocean, there being no treaties concerning them.

**Ocean Common to All.** — But the ocean is a common highway of nations; therefore, in reason, no nation can hold it as its own. Attempts have been made, by various sovereign powers at different times, to appropriate exclusive empire over portions of the sea; yet they have been resisted by other powers; and, down to a recent period, the question has been unsettled in international law, whether it is possible for this kind of dominion to exist. At length the doctrine is established, that no such general claim, by any one nation, will be allowed by any other. The reason is

<sup>1</sup> *People v. Curtis*, 50 N. Y. 321.

twofold: first, no one can hold such an actual and constant possession of the billows and tides of the deep as is necessary to give either property or dominion; and, secondly, if this could be done, it would not be morally right, because the oceans, like the air, were plainly intended by God for the common use of all men.<sup>1</sup>

§ 104. **Territorial Line extends into Ocean — How far.** — But there is no occasion for the common use to touch the water-margin. And a nation bordering on the sea can hold possession of it as far from the shore as cannon-balls will reach; while dominion to this extent is necessary for the safety of the inhabitants, who might otherwise, being neutral, be cut down in a time of war by the artillery of contending belligerents. So much of ocean, therefore, the authorities agree, is within the territorial sovereignty which controls the adjacent shores. A cannon-shot is, for this purpose, estimated at a marine league,<sup>2</sup> which is a little short of three and a half of our English miles; or, exactly, 3.4517. But the rule of computing, for this purpose, a cannon-shot at a marine league, was established before the late improvements in guns and gunnery; and, in reason, the distance would seem now to require extending, though no sufficient authority is before the author showing the extension to have actually been made in the law of nations.<sup>3</sup> The true measurement would seem to be from low-water mark, and from the actual shore, not from the shoals.<sup>4</sup> But, —

**Islands.** — If there are islands, too near for the water between them and the mainland to be common sea, the measurement outward must be from them. They need not be inhabitable; for, though they are of sand and rock, they come within the reason of the rule, especially if sufficient to sustain fortifications.<sup>5</sup>

<sup>1</sup> Wheaton Int. Law, 6th ed. 248; Flanders Maritime Law, § 38, 40; 1 Kent Com. 26; The Twee Gebroeders, 3 Rob. Adm. 336, in which case, however, Lord Stowell said: "There may, by legal possibility, exist a peculiar property, excluding the universal or common use. Portions of the sea are prescribed for." Yet even if we admit this possible doctrine, we may doubt its applicability to any part of our own coasts.

<sup>2</sup> The Ann, 1 Gallis. 62; The Twee Gebroeders, 3 Rob. Adm. 336; Rex v.

Forty-nine Casks of Brandy, 3 Hag. Adm. 257, 289, 290; The Anna, 5 Rob. Adm. 373; 1 Kent Com. 29; Wheaton Int. Law, 6th ed. 233, 234, 245, 496.

<sup>3</sup> See Wheaton Int. Law, 2d annotated ed. by Lawrence, 321, note, 715, note.

<sup>4</sup> Soult v. L'Africaine, Bee, 204; Rex v. Forty-nine Casks of Brandy, 3 Hag. Adm. 257, 289. As to the entire paragraph, see Reg. v. Keyn, 2 Ex. D. 63; 1 Bishop Mar. & Div. 6th ed. Introduction and places there referred to.

<sup>5</sup> The Anna, 5 Rob. Adm. 373, 385 c.

§ 105. **Arms of the Sea — Harbors — Bays.** — Coves, harbors, and other arms of the sea, so narrow that the naked eye may reasonably discern objects on the opposite shore, are, it will be shown further on,<sup>1</sup> within the bodies of counties. Plainly, therefore, such places are parts of the territory of the country. Besides this, it is clear, that, if a gulf or bay puts up, and the distance across it, where it joins the ocean, does not exceed two marine leagues, which is one league from each of the opposite shores to the centre, it is a part of the country in which it lies; and, supposing the land girding it to belong to one nation, the whole of it, thus cut off from the main waters, whatever its breadth further up, is the proper territory of such nation.<sup>2</sup> Pretty clearly, also, the doctrine as to such places extends even further; though it is difficult to say how far. Thus, the Chesapeake Bay,<sup>3</sup> which is twelve miles across at the ocean, and the Delaware Bay,<sup>4</sup> which is a little more,<sup>5</sup> are claimed, no doubt justly, to be within the territorial limits of the United States.<sup>6</sup> Though vessels may pass up such places beyond reach of cannon-balls, they cannot enter the harbors without leave; nor, through them, can they reach the ports of other powers. Consequently there cannot be pleaded for such places that common necessity which renders the outer ocean the common highway of nations. In this particular, and in the fact that the repose of the adjacent country may be more menaced within those localities than on the open ocean at equal distance from the shore, we see a difference, well justifying a departure from the general rule.

§ 106. **Vessels of One Nation in Waters of Another.** — Thus far we have been speaking of that perfect territorial sovereignty which, in the language of Marshall, C. J., “is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself.” Over waters within this sovereignty, though the vessels of all nations are in the habit of passing under an implied license, they have no right to pass if the license is revoked.<sup>7</sup>

<sup>1</sup> Post, § 146.

<sup>2</sup> Wheaton International Law, 6th ed. 248, 249, 252; Flanders Maritime Law, § 42.

<sup>3</sup> Commonwealth v. Gaines, 2 Va. Cas. 172; The State v. Hoofman, 9 Md. 28.

<sup>4</sup> 1 Kent Com. 29.

<sup>5</sup> The distance is stated differently in the books which I have consulted; some

putting it at but a fraction over twelve miles, others as high as eighteen; and I have not at hand the means of settling the question.

<sup>6</sup> And see Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 Ap. Cas. 394.

<sup>7</sup> Schooner Exchange v. McFaddon, 7 Cranch, 116.



**Imperfect Jurisdiction over Parts of the Ocean.**— Outside of these lines there is sometimes exercised a sort of cautionary jurisdiction, for the safety of the country, and for preventing the infraction of its laws, hardly allowable at points still farther in the ocean. Thus, observes Kent: "The statute 9 Geo. 2, c. 35, prohibited foreign goods to be transhipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1799, c. 128, § 25, 26, 27, 99, contained the same prohibition; <sup>1</sup> and the exercise of jurisdiction, to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court in *Church v. Hubbard*<sup>2</sup> to be conformable to the laws and usages of nations."<sup>3</sup> And the same learned commentator adds: "Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands; as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi."<sup>4</sup>

§ 107. *How our Land Boundaries :—*

**Established by Treaties, &c.**— The foregoing doctrines determine our territorial limits on the Atlantic Ocean, the Gulf of Mexico, and the Pacific Ocean. Our remaining northern and southern boundaries are established by treaties with Great Britain on the one side, with Spain and Mexico on the other, and with Russia as to Alaska; and by the awards of commissioners to settle boundaries under the treaties. The treaties and awards are published in the volumes of laws of the United States, and they need not be particularly set out here.

§ 108. **The Lines how run.**— Concerning these remaining boundaries, the rule of international law runs the line in the middle of rivers and other streams of water dividing two countries; unless a treaty or a prescription otherwise provides in a particular

<sup>1</sup> See R. S. of U. S. § 2760, 2811, 2812, 2814, 2867, 2868.

<sup>2</sup> *Church v. Hubbard*, 2 Cranch, 187.

<sup>3</sup> 1 Kent Com. 31.

<sup>4</sup> 1 Kent Com. 30. See Wheaton International Law, 6th ed. 496; *The Apollo*, 9 Wheat. 362.

instance.<sup>1</sup> And our treaties and the awards of commissioners have usually followed this general doctrine in express words; extending it also to lakes, especially to the great lakes which form a part of our northern limits. The lines have been so run, moreover, both in river and lake, as not to divide islands, but to leave the whole of each island in the territory of one or the other of the adjoining powers.

**Mutual Navigation.** — Our treaties provide also for some mutual rights of navigation, by the vessels of the two nations, in each other's waters, along these lines.

**Our Northern Lakes.** — Since the lakes between the British possessions and ours would constitute, were they in one country, parts of its territory,<sup>2</sup> evidently the respective portions assigned by the treaties to each power belong, where the treaties are silent, in the same complete way to it; no third power having the right, by reason of its possessions bordering upon or connecting with the lakes, to interfere.<sup>3</sup>

## II. *Jurisdiction beyond Territorial Limits.*

§ 109. **Laws not Extra-territorial — Exceptions.** — In general, the laws of a country have no effect beyond its territorial limits;<sup>4</sup> because it has neither interests nor power to enforce its will beyond. And, as to crime, the common law of England provided no tribunal for punishing what was done even out of the county in which the court sat;<sup>5</sup> unless, indeed, we deem the admiralty jurisdiction to be an exception. But this lack of jurisdiction does not necessarily imply a lack of law; and, to an extent not at all points distinct, the criminal laws do have a force beyond the territorial bounds, and are enforceable whenever there is a court competent to exercise the jurisdiction.

§ 110. **Act done out of Country.** — The general proposition, therefore, is, that no man is to suffer criminally for what he does out of the territorial limits of the country.<sup>6</sup> Yet —

<sup>1</sup> The Twee Gebroeders, 3 Rob. Adm. 336; Flanders Maritime Law, § 44.

<sup>2</sup> Wheaton International Law, 6th ed. 252, 253.

<sup>3</sup> And see *Tyler v. People*, 8 Mich. 320; *People v. Tyler*, 7 Mich. 161.

<sup>4</sup> 1 Bishop Mar. & Div. § 365; post, § 110.

<sup>5</sup> *Crim. Proc.* I. § 45 et seq.

<sup>6</sup> *Musgrave v. Medex*, 19 Ves. 652; *Commonwealth v. Green*, 17 Mass. 515, 540; *Rex v. Hooker*, 7 Mod. 193; *Put*

**Taking Effect here.** — One who is personally out of the country may put in motion a force which takes effect in it; and, in such a case, he is answerable where the evil is done, though his presence was elsewhere.<sup>1</sup> Thus, —

**Murder — Libel — False Pretences, &c.** — If a man, standing beyond the outer line of our territory, by discharging a ball over the line kills another within it; <sup>2</sup> or, himself being abroad, circulates through an agent libels here; <sup>3</sup> or in like manner obtains goods by false pretences; <sup>4</sup> or does any other crime in our own locality against our laws; <sup>5</sup> he is punishable, though absent, the same as if he were present.

§ 111. **Accessory before, in Felony.** — But where the court has no jurisdiction to try the offender, he cannot be brought to justice however palpable his guilt. Therefore, according to some adjudications, if what is done is felony, and it proceeds from the personal volitions of a guilty agent here, who under our laws is the principal felon, the procurer, being an accessory before the fact, can be indicted only in the foreign country, if at all; <sup>6</sup> in obedience to the rule, that he must answer where, and only where, he does the procuring.<sup>7</sup> Yet, without questioning the doubtful doc-

*nam v. Putnam*, 8 Pick. 433; *Adams v. People*, 1 Comst. 173; *Manley v. People*, 3 Seld. 295. And see *Graham v. Monsergh*, 22 Vt. 543.

<sup>1</sup> *Crim. Proced. I.* § 53.

<sup>2</sup> *Adams v. People*, 1 Comst. 173, 179; *United States v. Davis*, 2 Sumner, 482, 485. In the *United States v. Davis*, a ball discharged from a gun on board an American ship, killing a person in a foreign vessel in a foreign harbor, was held not to subject to punishment the person discharging it, as for an offence against the United States laws,—the act, in legal contemplation, being done on board the foreign vessel.

<sup>3</sup> *Commonwealth v. Blanding*, 3 Pick. 304; *Rex v. Johnson*, 7 East, 65, 3 Smith, 94.

<sup>4</sup> *Adams v. People*, 1 Comst. 173; *People v. Adams*, 3 Denio, 190, 610.

<sup>5</sup> *Commonwealth v. Gillespie*, 7 S. & R. 469; *Rex v. Munton*, 1 Esp. 62; *Barkhamsted v. Parsons*, 3 Conn. 1, 8; *Wooten v. Miller*, 7 Sm. & M. 380; *The State v. Chapin*, 17 Ark. 561. "If a man employ a conscious or unconscious agent

in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction." Lord Campbell, C. J., in *Reg. v. Garrett*, Dears. 282, 241, 6 Cox C. C. 260, 22 Eng. L. & Eq. 607.

<sup>6</sup> *The State v. Moore*, 6 Fost. N. H. 448; *The State v. Chapin*, 17 Ark. 561. See *People v. Adams*, 3 Denio, 190. In Indiana the statute provides, that "every person, being without this State, committing or consummating an offence by an agent or means within the State, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offence within the State." And this is held not to authorize the punishment of a person who, out of the State, becomes accessory before the fact to a felony committed within the State; the courts construing it to apply only to persons who are principals in the crime. *Johns v. The State*, 19 Ind. 421.

<sup>7</sup> And see *Crim. Proced. I.* § 52, 58, and some accompanying sections.

trine of the accessory being answerable only in the county in which he entices the principal, as applied to offences committed wholly in our own country or State, there is reason for another view; namely, that, since we cannot take notice of any power of the foreign government over the procurer, or recognize his liability to answer in the place of the procurement, we must regard him as we do one who, in our own country, performs an act of crime through an innocent agent; that is, punish him as principal; the same reason of necessity existing in the one instance as in the other.<sup>1</sup> This is plainly so in true legal principle.

§ 112. **Questions of Law and Jurisdiction blending** — (**Interpretation of Statutes — Law of Nations**). — Owing to the technicalities of the common law, and to the fact that neither in England nor the United States has there ever been a tribunal having, in terms, jurisdiction to punish every extra-territorial offence which it might take cognizance of consistently with the law of nations, the decisions in our books are not so clear on the questions now in contemplation as we might desire. Most of the cases have arisen in this way: a statute creates a jurisdiction in the court where a specified offence is committed under circumstances named; then, on one being indicted, the court has to decide, first, whether or not the case is within the statutory terms; secondly, whether or not, assuming it to be, the principles of the law of nations exclude it. Doubtless, if the legislature, by words admitting of no interpretation, commands a court to violate the law of nations, the judges have no alternative but to obey. Yet no statutes have ever been framed in a form thus conclusive; and, if a case is *prima facie* within the legislative words, still a court will not take the jurisdiction should the law of nations forbid.<sup>2</sup>

**Homicide — (Blow and Death in different Jurisdictions — Sea, Land, &c.).** — Under statutes punishing homicides abroad, or on the high seas, various questions have arisen, profitable now to be examined. Thus, in England, 9 Geo. 4, c. 31, § 8, provided, “that, where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, &c., in England, &c., every offence committed

<sup>1</sup> See *Commonwealth v. Gillespie*, 7 S. & R. 469, 478; *The State v. Grady*, 34 Conn. 118; *Commonwealth v. Pettes*, 114 Mass. 307; *Noyes v. The State*, 12 Vroom, 418.

<sup>2</sup> See, as explaining the principle, *Stat. Crimes*, § 75, 82, 88, 114, 123, 131–137. And see post, § 115, and note, par. 9; *Attorney General v. Kwok-a-Sing*, *Law Rep.* 5 P. C. 179, 8 Eng. Rep. 143, 169, 160.

in respect of any such case, &c., may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, &c., shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place." Thereupon it was held, that, where a person was beaten on board an American ship bound from New York to Liverpool, and died in Liverpool of the beating so inflicted, none of the parties being English subjects, and the ship, it is seen, not being English, the English court had no jurisdiction of the offence. Said Willes, J.: "That section ought not, therefore, to be construed as making a homicide cognizable in the courts of this country by reason only of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given." For the court considered, that the English legislature had no right to make what was done by foreigners, on board a foreign ship, a crime against English law.<sup>1</sup> And the fact that the ship had, under false representations, been registered as British, if it was not in truth British, could make no difference.<sup>2</sup> In New Jersey, under a statute construed to apply to murder only, not also to manslaughter, it was attempted to convict one of the latter form of homicide, where the blow was in New York, and the death in New Jersey. But the court deemed, that, even if the act had been less narrow, it could not have this operation; and, by Vredenburgh, J., observed: "Such an enactment, upon general principles, would necessarily be void; it would give to the courts of this State jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons, in all cases where personal injuries are followed by death. . . . No act is done in this State by the defendant. He sent no missile, or letter, or message, that operated as an act within this State. The coming of the party injured into this State afterwards was his own voluntary act, and in no way the act of the defendant. . . . An act, to be criminal, must be alleged to be an offence against the sover-

<sup>1</sup> *Reg. v. Lewis*, Dears. & B. 182, 186, 7 Cox C. C. 277. And see *Reg. v. Bernard*, 1 Fost. & F. 240; *Attorney General v. Kwok-a-Sing*, *supra*; *Reg. v. Anderson*, Law Rep. 1 C. C. 161, 11 Cox C. C.

198; *Reg. v. Seberg*, Law Rep 1 C. C. 264, 11 Cox C. C. 520; *Hoong v. Reg.*, 7 Cox C. C. 489; *Reg. v. Sattler*, Dears. & B. 525, 7 Cox C. C. 431.

<sup>2</sup> *Reg. v. Bjornsen*, Leigh & C. 545.

eighty of the government. This is the very essence of crime punishable by human law. How can an act done in one jurisdiction be an offence against the sovereignty of another ? ” <sup>1</sup>

§ 113. *Continued* — (*Whether Locality of Homicide follows Place of Blow or Death*). — The reader perceives, that, according to these cases, the crime in felonious homicide consists in inflicting the blow, while the act of dying, which is performed by the injured person, does not constitute any part of it, or at least such a part as to lay the foundation for a jurisdiction over the offence. This accords with what was before held in England, that a homicide is committed in a county if the blow is inflicted in it, though the death takes place elsewhere.<sup>2</sup> It accords also with the Tennessee doctrine ; there, a statute having provided, that, “ in all criminal cases, the trial shall be had in the county in which the offence may have been committed,” this was adjudged to require the trial to be in the county of the blow, though the death had taken place in another county. “ It would be doing violence to language,” observed Green, J., “ to say that the offence was committed in the county where the death happened, although the stroke were given in another county.” <sup>3</sup> It accords, moreover, with adjudication in California, that a homicide is committed when the fatal blow is struck, and not afterward when the death occurs.<sup>4</sup> And it accords with much more to be found in the books ; though, on the other hand, there are authorities which hold that the complete offence is not committed, in point of law, in the county where the blow is given, if the death is in another.<sup>5</sup>

§ 114. *Continued*. — Holding to the latter view, the majority of the Michigan court, and the undivided court in Massachusetts, have pronounced judgments directly contrary to the English and New Jersey doctrine. Thus, in Michigan, by statute, “ if any such mortal wound shall be given, or other violence or injury

<sup>1</sup> The State v. Carter, 3 Dutcher, 499, 500, 501.

<sup>2</sup> Grosvenor v. St. Augustine, 12 East, 244. *Blow pardoned*. — “ Also,” says Hawkins, “ it hath been adjudged that, if a general act of pardon extend to all felonies, offences, injuries, misdemeanors, and other things done before such a day, it pardons a homicide from a wound given before the day, whereof the party died not till after the day ; because the

stroke, which is the cause of the death, being pardoned, all the effects of it are consequently pardoned.” 2 Hawk. P. C. Curw. ed. p. 538, § 21. See also People v. Gill, 6 Cal. 637.

<sup>3</sup> Riley v. The State, 9 Humph. 646, 657.

<sup>4</sup> People v. Gill, 6 Cal. 637.

<sup>5</sup> See, for authorities on both sides, Crim. Proced. I. § 51, 52. Also Hunter v. The State, 11 Vroom, 495, 547.

shall be inflicted, or poison administered, on the high seas, or on any other navigable waters, or on land, either within or without the limits of this State, by means whereof death shall ensue in any county thereof, such offence may be prosecuted and punished in the county where such death may happen ;” and it was adjudged, Campbell, J., dissenting, that, where the mortal wound was given on a river within a county in Canada, and the death was in Michigan, the person inflicting the blow was indictable in Michigan, though he did not appear by any evidence to be a citizen of the State. Said Manning, J.: “The shooting itself, and the wound which was its immediate consequence, did not constitute the offence of which the prisoner is convicted. Had death not ensued, he would have been guilty of an assault and battery, not murder ; and would have been criminally accountable to the laws of Canada only. But the consequences of the shooting were not confined to Canada. They followed Jones [the deceased] into Michigan, where they continued to operate until the crime was consummated in his death. If such a killing did not by the common law constitute murder in Michigan, we think it the clear intent of the statute to make it such, to the same extent as if the wounding and the death had both occurred in this State.”<sup>1</sup> The Massachusetts statute is in substance the same with this one, and the court reached the like result by the like reasoning ; holding, that, where blows and other injuries had been inflicted on a seaman in a British ship on the high seas, by persons not citizens of Massachusetts, and the seaman died of the injuries in Massachusetts, the offenders could be convicted and punished by the courts of the latter State.<sup>2</sup>

§ 115. Continued — (How in Principle). — If we look at this question in the light of legal principle, guided also in a good measure by adjudication, the following will be the result. When the citizen abroad commits an offence, it is competent, and consistent with the law of nations, and in every respect just, for his own government to provide for his punishment through its own courts. But in most other circumstances, one government has no just right to punish what is done within the territorial limits, or the ships on the high seas, of another government. Now, felo-

<sup>1</sup> *Tyler v. People*, 8 Mich. 320, 334.      <sup>2</sup> *Commonwealth v. Macloon*, 101  
See also *Bromley v. People*, 7 Mich. 472; *Mass. 1.*  
*People v. Tyler*, 7 Mich. 161.

nious homicide consists, in a certain sense, of the twofold element of a mortal injury inflicted on a human being, and death actually following. But, in reason, and on the better authorities, the mere death is not such a part of the offence as to furnish proper foundation for taking jurisdiction over an act done under another government by persons in no way amenable to ours. And a statute, like the English one, the one in Michigan, and the one in Massachusetts, which, in general terms, authorizes a jurisdiction in this class of cases, should be construed in harmony with the law of nations,<sup>1</sup> and be held to apply only to citizens of our own country or State, or, if to foreigners, to be limited to those cases in which some special ground for interference, consistent with international law, exists. The question is not one of constitutional authority, but of the construction of statutes in connection with the law of nations. Some further views, with observations on one of the cases, follow in a note.<sup>2</sup>

<sup>1</sup> Ante, § 112.

<sup>2</sup> 1. *Commonwealth v. Macloon*, 101 Mass. 1, already cited, is, I think, the latest American case on this subject. For the English cases, see ante, § 112, note. I shall make the doctrines of the text more clear, and help the reader in various respects, if, in a sort of review of this last American case, I point out some of the errors into which one, not carefully considering the subject, may fall. Let us look at two instances in this case illustrating the liability to err, then pass to the main question.

2. First. The learned judge, in reviewing the dissenting opinion of Campbell, J., in the Michigan case, says: "It is further asserted that 'there are very high authorities for saying that at common law a trial might always be had in the county where the mortal blow was given, for that alone is the act of the party, and the death is but a consequence;' for which are cited 1 East P. C. 361, 1 Hale P. C. 426, and 1 Bishop's Crim. Law, § 454 [a misprint for § 554]. But both Lord Hale and Mr. East are speaking only of the 'more common opinion' before the Stat. of 2 & 3 Edw. 6, c. 24; and the words 'that alone is the act of the party' are an addition of Mr. East, not to be found in

Lord Hale, who immediately afterwards says, 'On the other side, as to some respects, the law regards the doath as the consummation of the crime, and not merely the stroke,' of which he gives several illustrations, besides some already mentioned in the earlier part of this opinion." p. 19. The learned judge then proceeds to other parts of his argument. What inference is the reader to draw with regard to the third citation made by Campbell, J.? The inference of most men, and the one which the learned judge must be presumed to have intended, would be, that Bishop merely followed Hale and East, and added nothing further by way of authority: In fact, however, there is, at the place thus referred to (Crim. Law I. § 554, 555 of the 1st and 2d editions, transferred afterward to Crim. Proced. I. § 67, 68 of the 1st edition, and § 51, 52 of the 2d) a pretty full, though not perfect, collection of authorities on both sides. For example, the Tennessee case, cited to ante, § 113, is there; in which it was held that the offence is committed at the place of the blow, though the death is elsewhere, within a statute requiring "all criminal cases" to be tried "in the county in which the offence may have been committed." Said Green, J., in delivering



§ 116. *How in Principle.* — In reason and according to the better authorities, when a crime is really committed a part in one

the opinion of the court: "The statute of Edw. 6 was enacted to remove all doubt upon the subject, because different opinions, growing out of the refinements of that period of the common law, had been expressed. We find no decision in which it had been held that the murderer, in such case, could be indicted in neither county. On the contrary, East says, the common opinion was, that he might be indicted where the stroke was given. That alone is the act of the party. He commits this act, and the death is only a consequence. Therefore, when the legislature enact that the party shall be tried in the county where the offence may have been committed, they intended where the active agency of the perpetrator was employed." *Riley v. The State*, 9 Humph. 646, 658.

3. Secondly. Two objections had been made to the indictment, one that it was multifarious, and the other that it did not charge the injuries to have been "mortal." The former was clearly not well taken; but the court dispose of the two together, thus: "In such a case it is abundantly established by precedents that it is sufficient to allege that the death resulted from all these means, without otherwise alleging either of them to have been mortal, and to prove that it resulted from all or any of them. 2 West's Simb. § 801, 308; Weston's Case, 3 Inst. 50, 135; Jackson's Case, 18 Howell St. Tr. 1069, 1075, 1111; 2 Hawk. P. C. c. 23, § 88; *Rex v. Clark*, 1 Brod. & B. 473; *Commonwealth v. Stafford*, 12 Cush. 619." p. 23, 24. Now, on the point whether or not the word "mortal" should be employed, there is nothing in any one of the places referred to affording any real light whatever. The brief forms in West's Simboleography, however, do not happen to contain the word; but, even if this were a book of authority, the omission would amount to nothing as against actual adjudication; for it is common to see forms taken from books of high standing pronounced ill for some cause which did not occur to the compiler. But weak as this refer-

ence is, it is the strongest in the collection,—in no one is it said, or by any words except as just stated is it intimated, that the presence of the word "mortal" is unnecessary. In the cases thus referred to generally, the indictment is not given in full, this question was not raised, and whether it contained the word "mortal" or not we cannot know. The passage referred to in Hawkins does not relate to this point, but the other. Now, in fact, from early times to the present day, the law, as actually adjudged and administered, has required the word "mortal." Thus, if the death proceeds from a wound inflicted by the defendant, the allegation is that it was "mortal" (*Crim. Proced. II. § 521*); if from the defendant's neglect, the indictment charges, that, by reason of it, the deceased "sickened and languished with a mortal sickness," &c. (*Crim. Proced. II. § 538*); if death proceeded from starvation, the charge is, that the deceased became "mortally emaciated and consumed" (*Crim. Proced. II. § 557*); or, if from poisoning, the indictment alleges that the deceased was made "mortally sick and distempered in his body" (*Crim. Proced. II. § 553*). The doctrine is laid down by Hale thus: "As well in the indictment of manslaughter as murder, the stroke is to be alleged to be *mortalis plaga*, and given *felonice*, and in both cases *interfecit*." 2 Hale P. C. 186. And in 1773, while our original States were English colonies, this question came for solemn adjudication before all the judges of England, De Grey, C. J., only being absent, and they "unanimously agreed" that the word "mortal" is essential, and adjudged the indictment in controversy bad for omitting it. *Rex v. Lad*, 1 Leach, 4th ed. 96. This doctrine, to which the practice has conformed, is laid down in all the text-books, to the present day. For example, it is in 1 East P. C. 343; 1 Stark. *Crim. Pl.* 2d ed. 93; 3 Chit. *Crim. Law*, 752; 2 Deac. *Crim. Law*, 928; 2 Gab. *Crim. Law*, 241; 1 Russ. *Crimes*, 3d Eng. ed. 561; Train & Heard *Prec.* 250. This is the general doctrine. And

country and a part in another, the tribunals of either may properly punish it; provided, that what is done in the country which

it is in terms affirmed in a subsequent case in Massachusetts, reported in the very next volume of reports. *Commonwealth v. Woodward*, 102 Mass. 155, 160. Some of the text-books speak of it in connection merely with cases in which the death proceeded from a stroke or wound; and, in *Lad's case*, the fact was that the death was caused by ravishment. Whether the doctrine does really extend to every kind of felonious killing—or, if not, what are its limits—is a question which seems not to be settled by adjudication. In this *Macloon's case*, blows producing wounds were charged as one of the means of the killing, the wounds were not alleged to be mortal either alone or in combination with the rest; and so, even if we should admit that the injury suffered from the neglect need not be charged as mortal (and certainly no reason appears in principle why it need not be), the part alleging the blows and wounds must, in principle, at least be rejected as surplusage. A good count might perhaps still remain; but irrelevant testimony had, in this view, been admitted at the trial to the prejudice of the defendants. I do not say what the consequence would be. The learned judge observed: "It is sufficient to allege that the death resulted from all these means, without otherwise alleging *either* of them to have been mortal, and to prove that it resulted from all or *any* of them." In this case, therefore, if blows alone were proved (what was the fact, I do not know), then the defendants were certainly convicted on an allegation uniformly held to be inadequate. If the learned judge was aware of this state of the law, it was extraordinary to turn off the point thus. If he looked into any of those books to which lawyers seeking information on questions of this sort go first, he saw how it stood. If he did not, but, avoiding them, and avoiding the digests, went direct to West's *Simboleography*, to Coke's posthumous *Third Institute*, to the *State Trials*, and, as we see in other parts of the opinion, to the *Year Books*, to Selden's *Fortescue*,

and to the *Hargrave Manuscripts*, together with various other ancient books, which, however worthy of regard, are not the *first* to be consulted, still we are conducted to the same conclusion. It is, that, for some reason, and it is immaterial what, the judicial mind was not, when this decision was pronounced, in a condition of such enlightenment as to render it of weight in the scale of general judicial authority.

4. We come now to consider a few of the questions involved in the general discussion. One is, whether, by the principles of the common law, a homicide is committed in the locality in which the blow is given, or in that in which the death takes place, or partly in the one and partly in the other. (See, for a collection of authorities, ante, § 113; *Crim. Proced. I. § 51, 52.*) It has been assumed, that, if we can ascertain what was the county in which under the ancient common law the indictment should be found, we should then have the whole difficulty solved. But, even as to this, we have little light; since, in 1548, a statute (2 & 3 Edw. 6, c. 24, § 2) directed that the indictment might be in the county of the death, and this statute is common law in our country. *Crim. Proced. I. § 52.* Yet, to my mind, the effect of the inquiry into the county in which the indictment must have been found under the ancient common law requires some observation. In the early times, the *petit jurors were the witnesses, and the witnesses were the jurors.* And the jurors, in cases of life and limb, were not permitted to find a verdict on their belief produced by the testimony of others, they must speak of their own knowledge. They could not be summoned from out the county in which the indictment was found, or even from the whole body of the county. The grand jury were required to find the particular vill, parish, ward, or other minor locality in which the offence was committed, as a guide to the sheriff in searching for the jurors. *Crim. Proced. I. § 362-366.* From this, it seems to me, it must have

takes the jurisdiction is a substantial act of wrong, and not merely some incidental thing, innocent in itself alone. But evi-

happened, though the proposition is disputed, that sometimes, if a blow were given in one county and death took place in another, the grand jury could not find an indictment in either; because it could not, in either, find witnesses both to the blow and the death. Plainly the death must be proved, whether regarded as a part of the offence, or as a collateral circumstance like the ownership in larceny, or the character of the building as a dwelling-house or not in burglary, and so on. Accordingly Starkie says: "It seems to have been held, that no collateral circumstance could be inquired of, if it happened in a second county, though the facts in which the offender was personally concerned were confined wholly to the first; so that (see preamble to 2 & 3 Edw. 6, c. 24; Staunf. 89; 2 Hale P. C. 163; 6 H. 7, 10; 10 H. 7, 28; 10 H. 7, 20; Fitz. Ind. 23), if A inflicted a mortal wound on B in one county, of which B died in the adjoining one, A could be indicted in neither; for a jury of the first [being, as I have just said, *witnesses*, and compelled to find their verdict, not in any degree on the testimony of others, but wholly on their personal knowledge] could not take notice of the death in the second, and a jury of the second could not inquire of the wounding in the first. Though it appears from the preamble to the Stat. 2 & 3 Edw. 6, c. 24, that such was the law at that time with respect to indictments of homicide, yet it was otherwise with respect to appeals of death, which, when the blow was struck in one county and the party died in another, used to be tried by a jury from both counties. 4 H. 7, 18; Br. Cor. pl. 141; 1 Hawk. P. C. c. 31, § 13; 2 Hawk. P. C. c. 23, § 35; 2 Inst. 49. . . . But it was held that an indictment must be taken in one county only. 4 H. 7, 18. *And the difficulty was frequently avoided by carrying the dead body back into the county where the blow was struck, and there [where the witnesses to the stroke, who were to be the jurors, might identify the body, and thus learn of their own knowledge that the man was dead] a jury might inquire both of*

*the stroke and of the death.* 6 H. 7, f. 10; 1 Hawk. P. C. c. 31, § 13; 7 H. 7, f. 8. And even without such removal it seems to have been doubted, whether a jury of the county where the stroke was given might not inquire of the felony." 1 Stark. Crim. Pl. 2d ed. 3 and note. This practice of removing the dead body and its effect are spoken of in other books in the same way as by Starkie,—it is so in the opinion of the court in this *Macloon* case, p. 9,—yet persons in modern times, who have commented on it, seem strangely to have overlooked its significance. I have never seen it disputed, while it is asserted often, that, whatever might be the legal rule in the absence of the dead body, if the body were brought back to the county where the blow was given, there might, before the statute of Edw. 6, be an indictment and conviction in such county. Yet every fact, essential to the crime, must have transpired in the county where the indictment was found. Crim. Proced. I. § 54. Now, the bringing back of the dead body could not change facts. It was as true after the body was brought back as before, that the death took place in the other county. And if the law was really as it is thus asserted on all sides to have been, it is thereby demonstrated, that the death was but a collateral circumstance, though a necessary one; and, in contemplation of law, the guilt of the homicide consisted in giving the "*mortal*" stroke. Hence the necessity of alleging, as, we have seen, the law required the pleader to do, that the wound was *mortal*; otherwise the complete criminal act would not appear to have been committed at the time and place when and where the blow was charged to have been inflicted, the blow not being shown to be any thing more than a battery. One thing is certain; namely, that, if the effect of bringing the body back to the county of the blow was as thus stated, nothing was necessary to constitute the complete offence except the mortal wound and the dead body. Is, then, the mere dead body a part of the crime? And, after a man is felon-

dently this principle should not be carried to all lengths. Suppose, in homicide, we regard the death as a part of the crime, still

iously slain, can the friends of the deceased take the dead body, and, consistently with sound principles of jurisprudence, cause the offender to be indicted in any civilized country where he can be confronted with it? Yet, in reason, the absurdity of such a proceeding would hardly exceed that of indicting the offender wherever, in a foreign state whose laws were not violated by the blow, the man might choose to die. I have never seen any case cited in our law, from analogy to which the latter proceeding would seem to me to be justified. Let us look at some which have been supposed to be analogous.

5. In *Macloon's* case, the doctrine of larceny in one county or State and the stolen goods carried into another is mentioned. We shall see (post, § 137-143), that there is in the books much fog on this subject. But goods may be stolen, by the same thief, or different ones, over and over, as many times as wickedness prompts, and come out fresh and ready to be stolen again. On the other hand, a felonious homicide can be committed on the same person but once. And those doctrines of larceny which have been supposed to furnish analogies for our present subject rest on the idea that the goods have been stolen a second time. Larceny is constituted by any manual removal, however slight, of the goods, by trespass, where the trespasser has the felonious intent to convert them to his own use. If, therefore, a man steals personal effects in Maine and brings them into Massachusetts, they are not his here, — our laws, taking no cognizance of the felony in Maine, do still look into the ownership in Massachusetts, — then, if he commits on them the trespass of removal here, as he does in bringing them however short a distance across the line, and if, while he is committing the trespass, he means to steal them, he commits a complete larceny in this State under our ordinary laws. Let us see what analogy to homicide this doctrine presents. In the one case, the injured person is he whose goods are stolen; in the

other, he who receives the blow. In both, the injury was inflicted in Maine. The wounded man comes to Massachusetts and dies here. Then, to carry the comparison along, the one whose goods were taken, not the goods, must come to Massachusetts, and enter bankruptcy. But no one pretends that this will make the thief liable for larceny in Massachusetts, — why, then, should it make the one who inflicted the blow liable for homicide here? But, if the thief brings the goods to Massachusetts, instead of the injured person coming here; then, to make the analogy good, the assailant must bring his club here, while the wounded man remains and dies in Maine. No instruction can be drawn from this view.

6. The other supposed analogies may be answered in similar ways. But the answers will occur to the reader. If the new doctrine is to be carried out to its legitimate consequences, let us see what we shall have. A man sends to another a libellous letter, indictable because of its tendency to create a breach of the peace. The consequences of this letter do not end, any more than do those of a mortal blow, when it is received. They continue to act on the person who received it as long as he keeps it in his pocket. But the writer starts off on foreign travel. The other starts after him, still clinging to the letter. According to the new doctrine, the writer may be indicted in any country on whose soil the other sets foot. In like manner, it is not sufficient to hold, as the courts do, that, if a man publishes a libel in Maine and sends it into Massachusetts, he may be indicted in the latter State; but the analogy goes further and produces the doctrine which the courts do not hold, that, if one in Maine, to whom a libel is sent, of his own motion sends it to Massachusetts, the original offender may be indicted here. So, if an assault creating a wound not mortal is given in Maine, and the injured person comes to Massachusetts, where he feels a pain from it, the offender may be indicted in Massachusetts for the battery.

it is not a part which has occasioned any breach of the peace of the country in which it takes place. Thus, if, where all is within

7. But it is not proposed to go over this whole ground. Since our States have local limits, and all intercourse with foreign nations is by the general government, it seems important that, if a foreigner is to be called to answer for what he did in his own country or on board a foreign ship, it shall be by the United States, not by a State. If the foreign state complains, it should be able to complain to the power by which the prosecution was carried on. In this *Macloon* case, one of the defendants was a citizen of Maine. He was, therefore, a citizen of the United States; and, perhaps, in strict law, only a citizen of the United States when he was beyond the jurisdiction of Maine. There ought to have been a law of Congress under which he could be punished. The other defendant, who was convicted, was an English subject, and he ought to have been demanded by the British government, surrendered under the treaty, and punished at home. If Congress had failed to provide a proper law for the one case, and the British government was remiss in its duty in the other, that furnishes no reason why Massachusetts should interfere, unless she had a jurisdiction based on sound legal principles. And it is not generally, among men, recognized as sound to hold, that a wound, not even described as mortal, is a force from him who inflicts it, operating as an abiding presence of the wrong-doer, in every country into which the injured person may choose to carry the wound.

8. The true view, therefore, is, that the infliction of the mortal blow constitutes the crime in felonious homicide; yet, until death, the mortality of the wound cannot be established in evidence. Therefore it is contrary to sound doctrine to hold a foreigner responsible to our laws, which he violated by no act, merely because this collateral evidence culminated on our territory. True, the United States tribunals have held, that, if a blow is given on the high seas and death follows on land, this is not a homicide fully committed on the high seas.

(See *United States v. McGill*, 4 Dall. 426; *United States v. Bladen*, 1 Cranch, C. C. 548.) But this holding has been mainly in consequence of the early cases not having been well argued, and is a remnant of the old doctrine which necessarily prevailed when the petit jurors were also the witnesses. And it is not uncommon in the law, even where no obscurity clouds the vision of the judges, to cling to a technical rule when the reason of it has passed away. Thus, in this very matter, the rule that the indictment must allege in what vill or other local place within the county the offence was committed, in order to guide the sheriff in selecting the men who were to serve in the double capacity of witnesses and petit jurors, was continued in England long after the reason of it had become obsolete; and it appears not to have been fully overthrown till 1825, or perhaps 1851, when the doctrine long before demanded by the altered law was established by statute. *Crim. Proc.* I. § 365-368. Yet all such doctrine, resting on a technical reason, is, admitting for the argument's sake that it is sound, a mere peculiarity of the jurisprudence of those countries in which the common law prevails, and it cannot claim a place in the law of nations.

9. But it is said, that the courts must follow the legislative mandate, whether wise or unwise, and whether conformable to sound principles of law and of international rule or not, unless it is repugnant to some provision of the Constitution. Now, how far this may be so, we need not inquire; because, thus far, there has been no call for the application of any such doctrine. All statutes are to be construed in connection with one another, with the common law, with the Constitution, and with the law of nations. *Stat. Crimes*, § 86-91, 123. "For example, a statute general in its terms is always to be taken as subject to any exceptions which the common law requires. Thus, if it creates an offence, it includes neither infants under the age of legal capacity, nor insane persons, nor

one jurisdiction, a man inflicts a mortal wound, then repents and strives to bring back to health the dying person, this repentance does not mend his case, but he is guilty the same as though he had not repented. Yet if the blow is given by a foreigner in a foreign vessel on the high seas, then he repents and turns to our shores that he may administer comfort to the dying man on land as he could not at sea, — in such a case, so far from our peace being broken, we have received the light of an angel visit, to revenge which by hanging the visitor would be to violate every principle of justice. And in any view it cannot be a disturbance of our peace for a man to die among us; so that, even if the wrong-doer were responsible, as ordinarily he is not, for the man's coming here, this could not be a just ground for inflicting punishment on a foreigner who had done no wrong on our territory.<sup>1</sup>

§ 117. **Offences on Shipboard.** — The vessels of a nation, whether public or private, traversing the ocean, which is the common high-

ordinarily married women acting in the presence and by the command of their husbands. If it creates a forfeiture, it does not apply to women under coverture." *Ib.* § 131. And, in the language of Story, J., speaking for the whole Supreme Court of the United States: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted, in construction, to places and persons upon whom the legislature have authority and jurisdiction." *The Apollon*, 9 Wheat. 362, 370; *Stat. Crimes*, § 141; *ante*, § 112; *post*, § 121. Now, the Massachusetts statute, in like terms with the Michigan, is: "If a mortal wound is given, or other violence or injury inflicted, or poison is administered, on the high seas, or on land either within or without the limits of this State, by means whereof death ensues in any county thereof, such offence may be prosecuted and punished in the county where the death happens." p. 4, 5, in the report of

Macloon's case. If, therefore, a citizen of Massachusetts inflicts a blow on any person, outside the limits of the State, it is, by the principles of our law, an "offence" against his own State, and it would be punishable at the common law but for the want of a court having jurisdiction over it. *Post*, § 121. This statute removes the difficulty, and gives a jurisdiction in cases where, and only where, death follows within a county. But for an Englishman to beat another Englishman on board a British merchant vessel is no "offence" with us; and, *by the very terms of the statute*, such a case is excluded. Still, if this were not so, the principle stated by Story, J., as above quoted — a principle sound in itself, and everywhere followed by the courts (see *post*, § 121) — would lead to the same result. A similar course of reasoning applies to the British statute, which differs not greatly from this one. At all events, no just ground appears for construing the Massachusetts statute less favorably to defendants than the British.

<sup>1</sup> Consult, on the subject of this section, the dissenting opinion of Campbell, J., in *Tyler v. People*, 8 Mich. 320, and the case of *Commonwealth v. Macloon*, 101 Mass. 1.

way of nations,<sup>1</sup> are deemed to be floating parts of her territory, and, over a crime committed on board, and not within the bounds of any other nation, the courts of the country to which the vessel belongs have a complete territorial jurisdiction.<sup>2</sup>

**In Foreign Port, or on Tidal River.**—If the vessel is a private one, and enters a foreign port, all on board are, while there, as we shall by and by see,<sup>3</sup> subject to the laws of the foreign country; but it does not follow that they are not also subject to their own laws, criminal<sup>4</sup> and civil, except in particulars directly repugnant to the local law. If this conflicts with theirs, it must evidently prevail; and the clear deduction from well-settled principles would be, that, on the ground of necessity, the persons attached to such vessel are excused at home for doing what is thus compelled. And this doctrine, of the binding effect of the laws of one's country upon subjects afloat in her ships and belonging to them, even while within the territorial limits of foreign states, appears to be recognized alike in the legislative acts and judicial decisions both of England and the United States.<sup>5</sup>

§ 118. **Offences on High Seas not under recognized Flag.**—Since the oceans are common to all nations, the inference may seem to be, that, if persons on them, not under the protection of the flag of any nation, commit an offence there, they may be arrested and punished by any power.<sup>6</sup> The offence, however, must be disturbing to the common peace of the travelling nations; because it is fundamental doctrine in the criminal law that injury done must precede punishment inflicted.

<sup>1</sup> Ante, § 103.

<sup>2</sup> Wheaton International Law, 158, 174; Polson Law of Nations, 25; United States v. Pirates, 5 Wheat. 184; United States v. Imbert, 4 Wash. C. C. 702; United States v. Holmes, 5 Wheat. 412; United States v. Wiltberger, 5 Wheat. 76; Reg. v. Serva, 2 Car. & K. 53, 1 Den. C. C. 104; Reg. v. Bjornsen, Leigh & C. 545. And see Reid v. Ship Vere, Bee, 66; United States v. Palmer, 3 Wheat. 610; Rex v. Amarro, Russ. & Ry. 286.

<sup>3</sup> Post, § 130.

<sup>4</sup> Polson Law of Nations, 25.

<sup>5</sup> Rex v. Allen, 7 Car. & P. 664, 1 Moody, 494; Reg. v. Menham, 1 Fost. & F. 869; Reg. v. Anderson, Law Rep. 1 C. C. 161, 11 Cox C. C. 198; United

States v. Gordon, 5 Blatch. 18; United States v. Stevens, 4 Wash. C. C. 547; Church v. Hubbard, 2 Cranch, 187; United States v. Pirates, 5 Wheat. 184; United States v. Smith, 1 Mason, 147; United States v. Ross, 1 Gallis. 624; United States v. Hamilton, 1 Mason, 152; United States v. Imbert, 4 Wash. C. C. 702; Rex v. Depardo, 1 Taunt. 26; United States v. Howard, 3 Wash. C. C. 340; United States v. Wiltberger, 5 Wheat. 76; United States v. Holmes, 5 Wheat. 412; Reg. v. Lopez, Dears. & B. 525; People v. Tyler, 7 Mich. 161. Act of March 3, 1825, c. 65, § 5; R. S. of U. S. § 730.

<sup>6</sup> See United States v. Klintonck, 5 Wheat. 144.

§ 119. *Continued.* — Again, this doctrine of principle should not be so applied as to render punishable, for instance, by the tribunals of our country, persons, not our citizens, doing some of the minor acts of wrong which might be brought within it; simply on the ground that the government to which they were attached had not been recognized by ours. The general proposition, that our tribunals can take cognizance of no foreign government whose existence has not been acknowledged by the executive authority of the United States,<sup>1</sup> has its limitations;<sup>2</sup> and the one now suggested should be added to those already received.

§ 120. *Continued.* — But there is not much occasion for practical resort to the general principle above stated, whether qualified or not; and, though we assume it to be sound, it probably cannot be said to be actually adopted into the law of nations. Something like it is applied to the one offence of —

**Piracy.** — Piracy, however, is usually committed under the flag of some known government; and the rule in it, therefore, reaches to the further point, that the crew of any vessel committing it casts off thereby its national character; and so the guilty persons, though the acknowledged subjects of some known government, may be apprehended and punished by the authorities of any nation.<sup>3</sup> This rule refers only to piracy as defined in international law, not to offences made such by the local jurisprudence of a particular country.<sup>4</sup> Yet —

**Distinction.** — We should not forbear to notice the distinction, that, when a vessel is sailing under a recognized government, it is thereby made a part of the territory of the government, as such is protected from being encroached upon by authority of other governments, and piracy is deemed a crime of so great and general enormity as to break down this protection; while, on the other hand, if a vessel were sailing with no such charmed lines

<sup>1</sup> *Berne v. Bank of England*, 9 Ves. 347; *The Nueva Anna*, 6 Wheat. 193. See *The Santissima Trinidad*, 7 Wheat. 283.

<sup>2</sup> *The Josefa Segunda*, 5 Wheat. 338; *United States v. Palmer*, 3 Wheat. 610; *Stoughton v. Taylor*, 2 Paine, 655.

<sup>3</sup> *United States v. Pirates*, 5 Wheat. 184; *Adams v. People*, 1 Comst. 173, 177; *The Marianna Flora*, 11 Wheat. 1, 40; *United States v. Palmer*, 3 Wheat.

610; *United States v. Gibert*, 2 Sumner, 19, 24, note; 4 Bl. Com. 71; *United States v. Demarchi*, 5 Blatch. 84; *Wheaton International Law*, 6th ed. 185.

<sup>4</sup> *Wheaton International Law*, 6th ed. 185; *Dole v. New England, &c. Ins. Co.*, 2 Cliff. 394, 418; *Attorney-General v. Kwok-a-Sing*, Law Rep. 5 P. C. 179, 200, 8 Eng. Rep. 143, 161; *In re Ternau*, 9 Cox C. C. 522; Vol. II. § 1057 et seq.



around her, crimes of less magnitude would seem, on common principles, to justify the interference of any adequate corrective power.<sup>1</sup>

**Arrests abroad — On High Seas.** — The like distinction forbids us to go upon the territory of another State to arrest an offender against our own laws;<sup>2</sup> while we can go thus upon the high seas.<sup>3</sup>

§ 121. **Criminal Injury by one to another Subject abroad.** — Says Lord Ellenborough: "The king has an interest in the protection of his subjects in parts beyond the realm; and there is a writ known to the law of England, if subjects have suffered in their persons or goods in foreign parts. And the persons who have maltreated them there, when they come into this country, are called upon by a writ out of chancery to answer for it: so that the king's subjects are considered as under the protection of the king, even out of the realm."<sup>4</sup> Therefore an indictment *at common law* was adjudged to lie against a British subject for murdering another British subject in a foreign state, — a statute having merely created a tribunal with a jurisdiction adequate to try the case.<sup>5</sup> According to international law, the person offending must be a subject of the government whose tribunals call him to account;<sup>6</sup> and, therefore, —

**How the Statutes construed.** — A statute creating a jurisdiction over offences committed abroad is construed to apply only to citizens;<sup>7</sup> and, perhaps, in general, but certainly not of necessity, only to what is done to the injury of a citizen.<sup>8</sup> Yet —

<sup>1</sup> And see Wheaton International Law, 6th ed. 159.

<sup>2</sup> Post, § 135; *Tyler v. People*, 8 Mich. 320.

<sup>3</sup> *Francis v. Ocean Insurance Company*, 6 Cow. 404. See *Rose v. Himely*, 4 Cranch, 241; *Hudson v. Guestier*, 6 Cranch, 281. A distinction doubtless prevails between the arrest in a foreign vessel, sailing under the foreign flag, and that of offenders not so protected. Chancellor Kent observes, referring to *The Marianna Flora*, 11 Wheat. 1, 42: "It has been held, in this country, that foreign ships, offending against our laws, within our jurisdiction, may be pursued and seized upon the ocean, and rightfully

brought into our ports for adjudication." 1 Kent Com. 122.

<sup>4</sup> *Rex v. Sawyer*, 2 Car. & K. 101, 111.

<sup>5</sup> *Rex v. Sawyer*, *supra*, reported also, but more briefly, Russ. & Ry. 294, Car. Crim. Law, 3d ed. 103. See likewise *The State v. Dunkley*, 3 Ire. 116, 122; *Respublica v. De Longchamps*, 1 Dall. 111; *Rex v. Speke*, 3 Salk. 358.

<sup>6</sup> Wheaton International Law, 6th ed. 174, 175; *The State v. Knight*, 2 Hayw. 109. And see *Commonwealth v. Gaines*, 2 Va. Cas. 172.

<sup>7</sup> See ante, § 112.

<sup>8</sup> *Rex v. Depardo*, 1 Taunt. 26, Russ. & Ry. 134; *Rex v. Helsham*, 4 Car. & P. 394; *Rex v. De Mattos*, 7 Car. & P. 458;

**Subject injuring Foreigner abroad.** — A legislative act may well provide for the punishment, at home, of depredations committed by the subjects of our government on those of other governments abroad, either in or out of their own country,<sup>1</sup> if indeed the right is not sufficiently inherent in the common law without the help of any statute.

§ 122. **Jurisdiction to try Offence abroad** — (**Foreign Government consenting or not**). — Yet neither can our courts sit abroad, nor our law exclude the local law there, however it may operate concurrently with it, without the consent of the foreign government; for each independent nation is supreme within its own dominions.<sup>2</sup> But —

**Consular Jurisdiction and Courts.** — We have with some nations treaties under which the consuls of each in the other's territory exercise limited judicial powers both civil and criminal.<sup>3</sup> Thus, observes Mr. Lawrence, the editor of a late edition of Wheaton's "International Law:"<sup>4</sup> "In the treaty of 1828, with Prussia, art. 10,<sup>5</sup> there is a provision, that the consuls, vice-consuls, and commercial agents shall have a right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities; unless the conduct of the crews or of the captain should disturb the order and tranquillity of the country, or the consuls should require their assistance. An act of Congress, passed 8th of August, 1846, for carrying into effect the provisions of this and similar treaties, gives authority to the Circuit and District Courts of the United States, and the commissioners appointed by them, to issue the necessary process to enforce the award, arbitration, or decree of the consul.<sup>6</sup> A provision similar to that in the treaty with Prussia is to be found in the 12th art. of the treaty of 1837, with Greece; 8th art. of the treaty of 1832, with Russia; in the 9th art. of the treaty of 1846, with Hanover;

Reg. v. Azzopardi, 1 Car. & K. 203, 2 Moody, 288; The Apollon, 9 Wheat. 362; Reg. v. Lewis, Dears. & B. 182, 7 Cox C. C. 277; Stat. Crimes, § 141; ante, § 115, note, par. 9.

<sup>1</sup> Reg. v. Azzopardi, 1 Car. & K. 203, 2 Moody, 288; Reg. v. Zulueta, 1 Car. & K. 215.

<sup>2</sup> Foster v. Glazener, 27 Ala. 391.

<sup>3</sup> And see Dainese v. Hale, 1 MacAr. 86, reversed 8 Chic. Leg. News, 97.

<sup>4</sup> Wheaton International Law, 6th ed. 171, 172, note. And see Ib. p. 165, 166.

<sup>5</sup> 8 U. S. Statutes at Large, 382.

<sup>6</sup> 9 U. S. Statutes at Large, 79.

and in the 1st art. of the treaty of the 3d of April, 1852, between the United States and the Hanseatic towns.”<sup>1</sup>

§ 123. *Continued.* — So “the consuls of the Christian states of Europe have, throughout the Levant, for centuries, exercised jurisdiction over their countrymen, as well as over others under their protection; and controlled, to a greater or less degree, the relations of the Franks with the people of the country.”<sup>2</sup>

*Still ampler Jurisdiction.* — By our treaty with China, and the laws passed pursuant to it, we have over our citizens there almost as complete and exclusive a government, with the necessary judicial tribunals, as over the District of Columbia at home.<sup>3</sup> So also has the British government over the Subjects of Great Britain in China.<sup>4</sup> Other illustrations might be cited,<sup>5</sup> but these will give form to the general idea; while persons seeking fuller information will find it in other books.

### III. *Exemptions of Persons within our Territorial Limits.*

§ 124. *Our Laws govern All.* — In the United States, there are few exemptions of foreigners from the duty of obeying our laws while here; for, beyond provisions like those in the treaty with

<sup>1</sup> See 8 and 9 U. S. Statutes at Large, *ut supra*, and Treaties of United States, 1854, p. 95.

<sup>2</sup> Wheaton International Law, 6th ed. 172, note.

<sup>3</sup> Wheaton International Law, 6th ed. 166, 173, note.

<sup>4</sup> A curious illustration of this appears in the case of *Hart v. Gumpach*, Law Rep. 4 P. C. 439, where, two British subjects being in the employ of the Chinese government, one of them was permitted to maintain, in “Her Majesty’s Supreme Court for China and Japan,” sitting at Shanghai, a suit against the other for an alleged wrong done him by the latter in *official acts* performed in the service of the Chinese government!

<sup>5</sup> “Among Christian nations it [consular jurisdiction] is generally confined to the decision of controversies in civil cases, arising between the merchants, seamen, and other subjects of the state, in foreign countries; to the registering

of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects, deceased within the territorial limits of the consulate. The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties; and, in offences of a higher grade, the functions of the consul are similar to those of a police magistrate, or *juge d’instruction*. He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial.” Wheaton International Law, 6th ed. 166.

Prussia before mentioned,<sup>1</sup> we have never permitted any foreign laws to supersede our own, further than they are entitled to do under the general law of nations.<sup>2</sup>

**Exceptions by Law of Nations.** — To the law of nations every government is bound to conform,<sup>3</sup> and every municipal statute is construed as subject to the exceptions required by it.<sup>4</sup> Let us see what the exceptions are; or, in other words, in what cases our laws do not operate within our own territory.

§ 125. **Foreign Sovereign and Attendants.** — First. If a foreign friendly sovereign comes personally upon our territory, he has our implied license exempting him and attendants from responsibility to our laws. His sovereignty covers alike him and them and his effects. And whether he is passing through our country, or temporarily sojourning here, neither he nor they can be proceeded against in our courts for any criminal act committed.<sup>5</sup>

§ 126. **Embassador, &c.** — Secondly. If the sovereign, instead of coming himself, sends his embassador or other diplomatic agent, such an agent occupies, concerning the exemption, the place of his master. It protects him while coming, remaining, and going; and, according to the better opinion, it also protects one not sent to us, but passing through our territory, on his way to or from another country.<sup>6</sup> The person of such a functionary, his secretary, attendants, and retinue; his house and household; his carriages, his couriers, and even his domestic<sup>7</sup> servants, — are privileged. They cannot be arrested; his house cannot be broken open or entered, even under civil process (but he is not permitted to furnish therein an asylum for persons not attached to him); and neither he nor his is liable to our laws for crime.<sup>8</sup> The only

<sup>1</sup> Ante, § 122.

<sup>2</sup> Post, § 134.

<sup>3</sup> Pollard v. Bell, 8 T. R. 434, 437; *The Le Louis*, 2 Dods. 210, 251.

<sup>4</sup> See ante, § 112, 115, note, par. 9; also ante, § 121.

<sup>5</sup> 1 Phillim. Int. Law, 364; Polson Law of Nations, 25; Wheaton International Law, 6th ed. 143, 146.

<sup>6</sup> Wheaton International Law, 6th ed. 301-304; Vattel Law of Nations, b. 4, § 84; 1 Kent Com. 38; Dupont v. Pichon, 4 Dall. 321.

<sup>7</sup> United States v. Lafontaine, 4

Cranch C. C. 173. It would be a mistake to infer, from this case, that the Supreme Court of the United States could take jurisdiction of a crime committed by the privileged person. See the statute of 1789, c. 20, § 13, 1 Stats. at Large, 80, and R. S. of U. S. § 687. See also Who Privileged from Arrest, 1 Opin. Att'y Gen. 26.

<sup>8</sup> Vattel Law of Nations, b. 4, § 80-82, 117-124; 1 Kent Com. 38, 39; Wheaton International Law, 6th ed. 143, 284, et seq.; *The State v. De La Foret*, 2 Nott & McC. 217; *Republica v. De Long-*

remedy for his misbehavior is to discharge him and send him home.<sup>1</sup>

§ 127. **Continued — (Conduct in Nature of Treason).** — The general law of nations seems to have excepted, out of the rule, the extreme case of the minister's having undertaken the death of the sovereign to whom, or the overthrow of the government to which, he is accredited; and to hold, that for such an offence he forfeits his protection, and the government menaced may proceed against him in self-defence.<sup>2</sup> But our legislation provides, in the broadest terms, that "any writ or process" against a foreign minister or other exempted person shall be void.<sup>3</sup> And all persons who participate in violating this provision are punishable.<sup>4</sup> Yet, —

**Self-defence.** — If a public minister assaults a citizen, the latter is not debarred the right of self-defence; he may repel force by force.<sup>5</sup>

§ 128. **All Public Ministers — Secretary of Legation.** — The immunity extends to every class and order of public ministers;<sup>6</sup> including the secretary of legation, who, receiving his appointment directly from his government, carries ministerial dignity in himself.<sup>7</sup>

§ 129. **Consuls.** — Consuls, being "commercial agents, appointed

champs, 1 Dall. 111; Bowyer Universal Public Law, 67; Schooner Exchange v. McFaddon, 7 Cranch, 116.

<sup>1</sup> 1 Kent Com. 38, 39. "The person offended may prefer a complaint to his own sovereign, who will demand for him an adequate satisfaction from the minister's master." Vattel Law of Nations, b. 4, § 80.

<sup>2</sup> Vattel Law of Nations, b. 4, § 99-101; Rex v. Owen, 1 Rol. 185. But see Wheaton International Law, 6th ed. 285. And see Commonwealth v. Kosloff, 5 S. & R. 545.

<sup>3</sup> 1 U. S. Stats. at Large, 117, act of April 30, 1790, c. 9, § 25; R. S. of U. S. § 4063.

<sup>4</sup> *Ib.* § 26; R. S. of U. S. § 4064; United States v. Benner, Bald. 234; United States v. Liddle, 2 Wash. C. C. 205; United States v. Ortega, 4 Wash. C. C. 531. And see Respublica v. De Longchamps, 1 Dall. 111; United States v. Hand, 2 Wash. C. C. 435.

<sup>5</sup> Vattel Law of Nations, b. 4, § 80; United States v. Benner, United States v. Liddle, and United States v. Ortega, *supra*.

<sup>6</sup> Vattel Law of Nations, b. 4, § 60-74; 1 Kent Com. 39.

<sup>7</sup> Vattel Law of Nations, b. 4, § 122; Ex parte Cabrera, 1 Wash. C. C. 232. And see United States v. Benner, Bald. 234; Respublica v. De Longchamps, 1 Dall. 111. A secretary of legation, in charge of the executive of the legation, under direction of the minister plenipotentiary, and acting as *chargé d'affaires* in the latter's absence, is, within 7 Anne, c. 12, "a public minister of a foreign prince," entitled to the privileges of an ambassador; and it appears that he does not lose his protection in the courts by engaging in trade. Taylor v. Best, 14 C. B. 487, 23 Law J. n. s. C. P. 89, 18 Jur. 402, 25 Eng. L. & Eq. 383.

to reside in the seaports of foreign countries, with a commission to watch over the commercial rights and privileges of the nation deputing them,"<sup>1</sup> do not enjoy this immunity.<sup>2</sup> And "if any consul be guilty of illegal or improper conduct, he is liable to have his *exequatur*, or written recognition of his character, revoked, and to be punished according to the laws of the country in which he is consul; or he may be sent back to his own country, at the discretion of the government which he has offended."<sup>3</sup> He is, in general, as to both civil and criminal affairs, "subject to the local law in the same manner with other foreign residents, owing a temporary allegiance to the state."<sup>4</sup>

§ 130. **Foreign Friendly Army — Armed Vessels.** — Thirdly. The sovereignty of every country goes with its army and navy. Therefore, if an armed vessel of a foreign power enters our waters peaceably, or lies peaceably at our wharves, we extend to it by implication the exemption from our laws.<sup>5</sup> And the same principle applies where we permit a foreign army to pass through our territory. But —

**Foreign Merchant Ship.** — A foreign merchant ship coming within our harbors is subject to our local jurisdiction, the same as any foreign private person,<sup>6</sup> except where we may have agreed otherwise by treaty.<sup>7</sup>

§ 131. **Enemies in War.** — Fourthly. When war comes between sovereign powers, the men who compose the respective armies are not deemed criminal for what they do in the heat and conflict of battle;<sup>8</sup> or, in general, for belligerent acts.<sup>9</sup> On a like principle, Mr. Wheaton even lays it down, that —

**Privateer Depredating on Wrong Nation.** — "The officers and crew of an armed vessel, commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in

<sup>1</sup> 1 Kent Com. 41.

<sup>2</sup> Wheaton International Law, 6th ed. 304; 1 Kent Com. 44; United States v. Ravara, 2 Dall. 297, 299, note; The State v. De La Foret, 2 Nott & McC. 217; Commonwealth v. Kosloff, 5 S. & R. 545.

<sup>3</sup> 1 Kent Com. 43. See *Respublica v. De Longchamps*, 1 Dall. 111.

<sup>4</sup> Wheaton International Law, 6th ed. 805; *Flynn v. Stoughton*, 5 Barb. 115. See further, as to the office of consul, *Robson v. The Huntress*, 2 Wal. Jr. 59; *The Adolph*, 1 Curt. C. C. 87.

<sup>5</sup> The Constitution, 4 P. D. 39.

<sup>6</sup> United States v. Dickerman, 92 U. S. 520; *Schooner Exchange v. McFaddon*, 7 Cranch, 116; as to which see the *Santissima Trinidad*, 7 Wheat. 283. And see *Polson Law of Nations*, 25; Wheaton International Law, 6th ed. 144.

<sup>7</sup> Ante, § 122.

<sup>8</sup> 1 Hale P. C. 59; and the authorities cited in the next section.

<sup>9</sup> *Commonwealth v. Holland*, 1 Duvall, 182. See *The State v. Cook*, Phillips, 535.

thus exceeding their authority. The state by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under color of its authority.”<sup>1</sup>

§ 132. **Hostile Acts in Peace — in War.** — In principle, but perhaps not certainly on judicial authority, if a foreigner who is not a spy,<sup>2</sup> or within the same reason, comes here during either peace or war by command of his sovereign, with whom in times of peace we maintain diplomatic relations, and upon our territory commits any wrong, our courts are not to pursue him as for a crime, but we are to look for redress solely to his sovereign. All admit this to be so, if the two nations are at war; but it must be so also while they are in other respects at peace. One reason is, that, as the subject acted under compulsion from the highest earthly power above him, he should be permitted to set up this compulsion in excuse, on the ground of necessity, — a reason, however, which might not be quite conclusive alone. Another is, that, as in all crimes the government is the party offended,<sup>3</sup> it should not seek a double redress, both of the immediate offender and of the sovereign who commanded him, but suffer the greater to absorb the less; for this is a widely different case from those ordinary ones in which the principal and his agent are alike punishable. But the controlling consideration is, that, if we first take our full redress, according to the measure which our law deems proper for the offence committed, out of the servant, we have no claim left to present to his master; or, if we have, still such a proceeding would embarrass the settlement with the master. An immense public evil would thus be done; while the philosophy of the criminal law is, that no man shall receive punishment, however he may merit it, unless it will promote the public good.<sup>4</sup>

**Hostile Act not commanded, but afterward ratified.** — By such reasoning we may carry the doctrine to the extent, doubtful on more general principles pertaining to the criminal law and to the sovereignty of nations, that, if the foreign subject acts under color of authority from his government, or in its name expecting his doings will be approved at home but without authority in

<sup>1</sup> Wheaton International Law, 6th ed. 184.

<sup>2</sup> Vattel Law of Nations, b. 3, § 179.

<sup>3</sup> Ante, § 32.

<sup>4</sup> Post, § 209-211.

fact; still, if his government afterward adopts his act, he is to be held exempt in the same manner as if he had originally proceeded under command from his sovereign. Our jurisprudence furnishes some analogies for the latter doctrine;<sup>1</sup> and, on the whole, it seems to be just; though it is a little exceptional to suffer any action of a foreign power to defeat the operation of our law after it has once attached.<sup>2</sup> But—

**Our own Citizen.**—One of our own citizens cannot set up, in this way, foreign authority in excuse for the violation of our law.<sup>3</sup>

§ 133. **Further of the Reason.**—Practical views of just statesmanship render the foregoing doctrine imperative. If we were to punish the agent of the foreign government, it would follow, that, should a technical difficulty in making proof, or any other technicality, or any confusion or perverseness of the jury, produce the acquittal of the agent in the courts, our government must deem the alleged injury not to have been done. And the settlement of a grave international wrong would thus be committed, in the first instance, not to the head of the government, but to a judge of perhaps inferior jurisdiction, and twelve men casually drawn to serve as petit jurors,—a result contrary to the entire framework and spirit of every well-organized government;

<sup>1</sup> Case of Thorshaven, Edw. Adm. 102, 108; The Emulous, 1 Gallis. 563, 568; Vattel Law of Nations, b. 2, § 74.

<sup>2</sup> This question was drawn into very full discussion, in 1841, in the case of Alexander McLeod, a British subject, indicted in the State court in New York, for the murder, in 1837, of Amos Durfee, an American, in Niagara County. The homicide was committed in the execution of military orders, during a rebellion in Canada. The defendant, with others, had come over the river to destroy, on the American side, a steamboat supposed to be employed in carrying aid to the rebels; and, in the course of the transaction, Durfee lost his life. The British government approved the act, and demanded the release of her subject. The American government conceded, that, after this approval, the defendant could not be convicted; but maintained, that the discharge must come from the courts, not from the executive authority. The Supreme Court of New York, on the

contrary, held, that these facts together would furnish no defence for the prisoner; but the decision did not give universal satisfaction to the legal profession. The defendant was finally acquitted on the facts. *People v. McLeod*, 1 Hill, N. Y. 377, 25 Wend. 483 (where the correspondence between the two governments is given in the notes); *McLeod's Trial*, by Gould, pamphlet. For the correspondence between Mr. Webster and Lord Ashburton, see 6 Webster's Works, 247. And for reviews and discussions of the case, see 4 Law Reporter, 169; 26 Wend. 663; 3 Hill, N. Y. 635; 1 Am. Law Mag. 348. See also *Commonwealth v. Blodgett*, 12 Met. 56; *Maisonnaire v. Keating*, 2 Gallis. 325, 335; *Suits against Foreigners*, 1 Opin. Att'y Gen. 45, 46; *Actions against Foreigners*, 1 Opin. Att'y Gen. 81; *Buron v. Denman*, 2 Exch. 167; *Phillips v. Eyre*, Law Rep. 6 Q. B. 1, 24.

<sup>3</sup> *United States v. Pirates*, 5 Wheat. 184. And see *The Santissima Trinidad*, 7 Wheat. 233.



and, in our case, contrary to the national Constitution, which in effect leaves such things with the President and Senate, or, in some circumstances, with the entire national legislature. For the proposition is too plain for doubt, that no executive would be justified in assuming the fact of a particular violation of law, if the accused person had been tried by a court of the executive's country, and by it pronounced innocent.

§ 134. **Our Laws bind and protect All.** — Subject to the exceptions enumerated above, which severally rest on peculiar reasons, the doctrine is general, that our laws bind alike all persons, natives and foreigners, found within our territory.<sup>1</sup> On the other hand, also, they equally protect all;<sup>2</sup> and thus, —

**Killing Alien Enemy.** — If, even in time of war, an alien enemy comes here, it is murder to kill him, except in the actual heat and exercise of war.<sup>3</sup> If he submits, and lays down his arms, his life must be spared.<sup>4</sup>

§ 135. **Arrest and Surrender of Fugitives** — (Effect here of unlawful Arrest abroad). — A foreign power cannot carry away a fugitive from its justice found within our territory; for the arrest would be an unwarrantable interference with the local sovereignty of our government.<sup>5</sup> Yet the fugitive himself, arriving home, could not there so take advantage of the unauthorized proceeding as to have the prosecution against him dismissed.<sup>6</sup> We may, perhaps, surrender such fugitives if we will;<sup>7</sup> though the governor of one of our States has not the authority, derived solely from his office;<sup>8</sup> neither, it appears, have our courts.<sup>9</sup> Indeed, the whole question of the surrender of fugitives to foreign powers

<sup>1</sup> 1 Kent Com. 36; 1 Hale P. C. 59; *Adams v. People*, 1 Comst. 173; *People v. McLeod*, 1 Hill, N. Y. 337, 406, 423; *Rex v. Delamotte*, 1 East P. C. 53; ante, § 124.

<sup>2</sup> *The State v. Jones*, Walk. Missis. 83.

<sup>3</sup> 4 Bl. Com. 198; 1 East P. C. 227.

<sup>4</sup> *Vattel Law of Nations*, b. 3, § 149.

<sup>5</sup> *People v. McLeod*, 1 Hill, N. Y. 377, 25 Wend. 483, 581; ante, § 119. See *Church v. Hubbard*, 2 Cranch, 187. And so the sheriff of one State cannot pursue into and retake in another a person who has escaped from his custody. *Bromley v. Hutchins*, 8 Vt. 194.

<sup>6</sup> *Ex parte Scott*, 4 Man. & R. 361, 9 B.

& C. 446; *The State v. Smith*, 1 Bailey, 283; *The State v. Brewster*, 7 Vt. 118, 121; *Crim. Proced. I.* § 224 *b*.

<sup>7</sup> *Mure v. Kaye*, 4 Taunt. 34, 43; *Rex v. Kimberley*, 2 Stra. 848.

<sup>8</sup> *Ex parte Holmes*, 12 Vt. 631. In *Holmes v. Jennison*, 14 Pet. 540, the majority of the court were of opinion, that the governor cannot do so, even if he has the authority of State law; because the Constitution of the United States impliedly forbids. "The power," said Taney, C. J., "is a part of the foreign intercourse of this country."

<sup>9</sup> *Case of Jose Ferreira dos Santos*, 2 Brock. 493.

pertains, not to our States, but to our national government.<sup>1</sup> But whether on general principles of international law we should in any case make the surrender, is uncertain ;<sup>2</sup> the doctrine of our tribunals, established after some conflict of opinion, seems to be, that we should not.<sup>3</sup> Yet we have treaties with most foreign governments, under which, in cases and circumstances therein mentioned, we give up the fugitives.<sup>4</sup>

**As between our States.** — Likewise between the States, the Constitution of the United States requires the surrender of fugitives from justice, on demand of the executive of the State whence they escaped.<sup>5</sup>

#### IV. *Acts punishable both by our Government and a Foreign one.*

§ 136. **Same Act an Offence against both.** — It is evident, on consideration of what is set down in the foregoing discussions of this chapter, that, under various circumstances, the same act of wrong may be a violation of the laws and a disturbance of the peace of each of two distinct governments. Whether both will punish it, is a question for another connection.<sup>6</sup> But, —

**Our Government punish, if other does not.** — Though an act of wrong is properly punishable by another sovereignty, yet, if the other does not punish it, this liability to punishment abroad furnishes no good reason why we should not pursue the offender for violating our laws.

§ 137. *Larceny of the same Goods within two Jurisdictions :—*

**Distinct Larcenies of same Goods.** — Larceny may be committed any number of times of the same goods.<sup>7</sup>

**Punishable where committed.** — And this offence, like every

<sup>1</sup> *People v. Curtis*, 50 N. Y. 321 ; In *re Vogt*, 44 How. Pr. 171.

<sup>2</sup> *Wheaton International Law*, 6th ed. 176.

<sup>3</sup> *Wheaton International Law*, 6th ed. 177 ; 1 *Kent Com.* 36, 37, and notes ; *Commonwealth v. Deacon*, 10 S. & R. 125 ; *Ex parte Holmes*, 12 Vt. 631 ; *Case of Jose Ferreira dos Santos*, 2 Brock. 493.

<sup>4</sup> *Wheaton*, ut supra ; *British prisoners*, 1 Woodb. & M. 66 ; In *re Metzger*, 1 Barb. 248, 1 *Parker C. C.* 108 ; In *re Heilbonn*, 1 *Parker, C. C.* 429.

<sup>5</sup> As to which see *Jones v. Van Zandt*, 5 How. U. S. 215 ; *Commonwealth v. Tracy*, 5 Met. 536, 550 ; *United States v. Smith*, 4 Day, 121 ; *The State v. Howell*, R. M. Charl. 120 ; *The State v. Loper*, Ga. Decis. part ii. 33 ; *The State v. Allen*, 2 Humph. 258 ; *Matter of Fetter*, 3 Zab. 311. See also *Crim. Proced. I.* § 219-224b.

<sup>6</sup> *Post*, § 983 et seq.

<sup>7</sup> *Ante*, § 115, note, par. 5 ; *Vol. II.* § 781, 789, 839.

other, is punishable in the jurisdiction where committed ; yet not in any in which it is not committed.

**What results from this.** — From these two propositions, each of which is axiomatic, we derive the answer to a question which has greatly vexed our tribunals. It is, in the misleading form in which it is generally put, whether, if a man commits larceny of goods in one country, or in one State of our Union, and carries them into another country or State, he can be convicted of larceny of them in the latter locality, in analogy to the rule which holds where goods are stolen in one county, and conveyed by the thief into another one, within the same State.<sup>1</sup> Now, this form of the question, being the common form, betrays the misapprehension out of which the differences have arisen. Our courts cannot punish offences against a foreign government ; neither can a man excuse himself for a criminal act done here, by alleging that he did the like elsewhere. From which propositions we conclude, that, as a question of principle, a man can neither be punished nor escape punishment for a larceny here, by reason of his having committed larceny of the same goods also in another State or country.

§ 138. **Larceny abroad not punishable at Home.** — Therefore when, in a Pennsylvania case, the jury found, “ that the defendant did feloniously steal, take, and carry away the goods . . . within the State of Delaware, and that he brought the same into the city of Philadelphia, within the jurisdiction of this court,” the judges properly refused to pass sentence on the verdict.<sup>2</sup> A tribunal in Pennsylvania cannot punish a man for a theft in Delaware. But, —

**Larceny at Home punishable.** — On a proper indictment, these facts would have justified the jury in finding, had they chosen, that the prisoner stole the goods in Pennsylvania. Always, when a man has with him property in the State where any legal inquiry concerning it arises, the courts look into the legal relation he sustains to it there ; if he stole it in another State, he has not even the right to its custody in the new locality ; and the rule of larceny is, that, when a man, having in his mind the intent to steal, makes any removal or carrying away of goods to the custody of which he has no title, he commits the crime.

<sup>1</sup> Crim. Proced. I. § 59, 60 ; II. § 727-729.

<sup>2</sup> Simmons v. Commonwealth, 5 Binn. 617.

§ 139. **Compared to Larcenies of same Goods in two Counties. —** The question now under discussion differs, in one aspect, from that of goods stolen in one county and conveyed by the thief into another in the same State. In another aspect, it is the same. There can be no conviction for any offence, except on proof of its complete commission within the county.<sup>1</sup> If the first taking is in the same State, but in another county, this fact appearing at the trial shows the relation of the thief to the goods to be felonious; hence an inference of theft in the second county proceeds from the mere added fact of a possession there. Yet where the first taking is abroad, no such inference can be drawn from the mere possession; while, if inquiry establishes also a trespass in our State, then the fact of there being in the possessor here no right to the possession, to the custody, or to any handling whatever of the goods, added to proof of intent to appropriate them wrongfully here, with a knowledge of the ownership being in another, establishes the full offence. This is not convicting one here for what he did abroad, but for his felonious act, on our own soil, against our own laws. Our courts cannot ignore the existence of the property here, or the relation sustained to it by the defendant here, or the trespass committed upon it here, or the felonious intent which here existed. And to let him go free of punishment for the felony which he has committed against our laws because he had before committed a similar felony against the laws of another country is to suffer foreign laws to suspend the action of our own.

§ 140. **Foreign Laws not suspend ours — Further Reasons. —** The proposition, that a man is to escape punishment for the violation of our laws because he first violated those of a foreign country, is absurd in itself, and mischievous in its practical application. Nothing is plainer than that, when a man is found here with property, our courts will inquire after the owner of it, equally whether such owner is alleged to be a foreigner or a citizen, present personally, or absent. Nothing is plainer than that our courts will protect the rights of property, equally whether it is in the owner's grasp, or wrongfully in the grasp of a felon. And no principle in the law of larceny is better established, as general doctrine, than that any physical removal, however slight, of the entire physical thing alleged to be stolen, to which thing

<sup>1</sup> Crim. Proced. I. § 54.

the remover has not the right of possession, though he has it lawfully or unlawfully in custody, is, where the felonious intent exists, larceny. If, therefore, the complete offence is not committed here, by one bringing here from a foreign country personal goods which he has there stolen, using them here as his own, and meaning at the same time here to deprive the owner of his ownership therein, then is it impossible for any man, under any circumstances, to do acts completely falling within all the descriptions and definitions given in the books of this offence.<sup>1</sup>

**Another View.** — There is another path through this discussion, conducting to the same end. Though our courts are not permitted to recognize a foreign larceny, and punish it, they can take cognizance of a foreign civil trespass to personal goods; and, if they obtain jurisdiction over the parties, they will redress the wrong done in the foreign country. The method under the common-law procedure is by the familiar transitory action of trespass.<sup>2</sup>

<sup>1</sup> In *The State v. Bennett*, 14 Iowa, 479, the court affirms both the reasoning of these sections and the conclusion to which it conducts. So also do the courts in *Ferrill v. Commonwealth*, 1 Duvall, 153; *Watson v. The State*, 36 Missis. 593; and *The State v. Newman*, 9 Nev. 48. And see *Graves v. The State*, 12 Wis. 591. **Axiomatic Propositions.** — There are, in the law, propositions which, to minds accustomed to legal investigation, are so much in the nature of axiomatic truths that to be stated is equivalent to being proved; and one who announces such a proposition knows, on its announcement, that it will work its way against all opposition, and any amount of venerable authority, as surely as the electric forces will, when the conditions have matured, part the cloud. The foregoing propositions of my text are of this sort. When, therefore, in preparing the first edition of this work, I discovered that all the cases discussing this subject had proceeded on inadequate views of the principles involved; perceiving the axiomatic nature of the foregoing propositions of my text, I said to myself, "I will make this simple statement of the true principles, and thus the conflict will be ended." Having done so, I observed

the cases afterward decided on this subject, to discover whether the prediction was yet verified. Case succeeded case in the same eclipse of the judicial understanding which had prevailed before; each containing indubitable internal evidence that the judges had not looked into my book upon the subject. And it was not until I came to prepare the fourth edition that I was able to cite any one case decided by judges who had seen the views thus presented. The result could not, in the nature of things, be otherwise than as anticipated. In numerous instances of axiomatic views presented, differing from what had been before entertained, I have witnessed the like result; and, indeed, I never knew the instance wherein any competent lawyer or judge withheld his assent from a truth of this sort, *after it had been so brought to his mind that he really understood it*. Not all the law can thus be reduced to axiomatic propositions; but such of it as can, is as absolutely certain to gain in the end the assent of the entire legal fraternity as if it were a demonstration in geometry.

<sup>2</sup> *Mostyn v. Fabrigas*, Cowp. 161; *Glen v. Hodges*, 9 Johns. 67.

Now, in every larceny there is a civil trespass, as well as a criminal one.<sup>1</sup> This civil trespass, when committed abroad, our courts can recognize, and practically enforce rights growing out of it, to the same extent as if done on our own soil. So much is settled doctrine, about which there is no dispute. It is equally settled doctrine in larceny, that, if one has taken another's goods by a mere civil trespass, even though it was unintended, then, if finding them in his possession the intent to steal them comes over him, and with such intent he deals with them contrary to his duty, this is larceny.<sup>2</sup> Applying these two plain doctrines to the present case we have the result, that, where a thief brings goods from a foreign state into ours, our courts are required to look upon him as a trespasser; and, when he commits any asportation of them here, such as he necessarily did in bringing them across the territorial line, the intent to steal impelling him, they should regard him as a felon under our laws.<sup>3</sup>

§ 141. **How in Authority.**—When we turn to the authorities, we find that they have not always proceeded on the principles thus stated. In an old English case, where goods seized piratically on the ocean were carried by the thief into a county of England, the common-law judges refused to take cognizance of the larceny, and committed the offender to answer to the admiralty; “because,” said they, “the original act, namely, the taking of them, was not any offence whereof the common law taketh

<sup>1</sup> Post, § 264, 267, 268, 271.

<sup>2</sup> Vol. II. § 839.

<sup>3</sup> The case of *Stanley v. The State*, 24 Ohio State, 166, decided in 1873, holds, that it is not larceny in Ohio to steal goods in Canada and bring them into the State. The court was referred to the discussion of this subject in my fifth edition; and, when I first partly read the case, I thought that the learned judge had made himself acquainted with my views, and, dissenting from them, had set himself to answering them. But, on looking at it further, I discovered to my regret that he had not. It is much to be desired, that, when a court suffers a textbook to be cited, it should look into the author's views. Then, if they are discovered to be unsound, the learned judge can explain wherein, others will be put

on their guard against a seducing error, and the cause of juridical truth will be promoted. “It is conceded,” said McIlvaine, J., “that, in order to convict, the jury must have found that the goods were stolen by the defendant in the dominion of Canada, and carried thence by him to the State of Ohio.” Therefore we see that the case had been unfortunately argued. I cannot imagine how any counsel could have made such a concession. After this, one cannot blame the court, however it may have drifted. The reasoning of the learned judge is, at its principal points, based on misapprehensions of the law of larceny. I was about to show this; but I see it would make my note long, and, on the whole, it may not be necessary.

knowledge ; and, by consequence, the bringing of them into a county could not make the same felony punishable by our law.”<sup>1</sup> And the doctrine has been since applied, in England, to goods stolen both in other parts of the king’s dominions<sup>2</sup> and in foreign countries.<sup>3</sup> This doctrine has been followed by the courts of New York,<sup>4</sup> New Jersey,<sup>5</sup> Pennsylvania,<sup>6</sup> North Carolina,<sup>7</sup> Tennessee,<sup>8</sup> Indiana,<sup>9</sup> Louisiana,<sup>10</sup> and Nebraska.<sup>11</sup> It has been discarded, and the opposite<sup>12</sup> held in Connecticut,<sup>13</sup> Vermont,<sup>14</sup> Maine,<sup>15</sup> Mississippi,<sup>16</sup> Iowa,<sup>17</sup> Kentucky,<sup>18</sup> Nevada,<sup>19</sup> Illinois,<sup>20</sup> and Oregon.<sup>21</sup> In Massachusetts, the court discarded it also, holding defendants liable where the original larceny was in another of the United States ;<sup>22</sup> but afterward, where it was in one of the British provinces, the conviction was overthrown,<sup>23</sup> — a distinction which the Maine tribunal has refused to recognize, deeming it without foundation.<sup>24</sup> So, in Ohio, a conviction was sustained where the original taking had been in another State of the Union,<sup>25</sup> but reversed where it had been in Canada.<sup>26</sup> The rule which holds the offender guilty in the State to which he brings his stolen goods has likewise been prescribed, by statute, in New York<sup>27</sup> since the before-mentioned adjudication was made ;

<sup>1</sup> Butler’s Case, cited 13 Co. 53, 3 Inst. 113. And see *Reg. v. Wallace*, Car. & M. 200.

<sup>2</sup> *Rex v. Anderson*, 2 East P. C. 772 ; *Rex v. Prowes*, 1 Moody, 349.

<sup>3</sup> *Reg. v. Madge*, 9 Car. & P. 29 ; *Reg. v. Debruiel*, 11 Cox C. C. 207.

<sup>4</sup> *People v. Gardner*, 2 Johns. 477 ; *People v. Schenck*, 2 Johns. 479. See *People v. Burke*, 11 Wend. 129.

<sup>5</sup> *The State v. LeBlanch*, 2 Vroom, 82.

<sup>6</sup> *Simmons v. Commonwealth*, 5 Binn. 617.

<sup>7</sup> *The State v. Brown*, 1 Hayw. 100.

<sup>8</sup> *Simpson v. The State*, 4 Humph. 456, 459.

<sup>9</sup> *Beal v. The State*, 15 Ind. 378.

<sup>10</sup> *The State v. Reonnals*, 14 La. An. 278.

<sup>11</sup> *People v. Loughridge*, 1 Neb. 11.

<sup>12</sup> Ante, § 137.

<sup>13</sup> *The State v. Ellis*, 3 Conn. 185 ; *The State v. Cummings*, 33 Conn. 260.

<sup>14</sup> *The State v. Bartlett*, 11 Vt. 650.

<sup>15</sup> *The State v. Underwood*, 49 Maine, 181.

<sup>16</sup> *Watson v. The State*, 36 Missis. 593 ; ante, § 140, note.

<sup>17</sup> *The State v. Bennett*, 14 Iowa, 479 ; ante, § 140, note.

<sup>18</sup> *Ferrill v. Commonwealth*, 1 Duvall, 153 ; ante, § 140, note.

<sup>19</sup> *The State v. Newman*, 9 Nev. 48 ; ante, § 140, note.

<sup>20</sup> *Myers v. People*, 26 Ill. 173.

<sup>21</sup> *The State v. Johnson*, 2 Oregon, 115.

<sup>22</sup> *Commonwealth v. Cullins*, 1 Mass. 116 ; *Commonwealth v. Andrews*, 2 Mass. 14 ; *Commonwealth v. Rand*, 7 Met. 475, 477 ; *Commonwealth v. Holder*, 9 Gray, 7.

<sup>23</sup> *Commonwealth v. Uprichard*, 3 Gray, 434.

<sup>24</sup> *The State v. Underwood*, supra.

<sup>25</sup> *Hamilton v. The State*, 11 Ohio, 435.

<sup>26</sup> *Stanley v. The State*, 24 Ohio State, 166 ; ante, § 140, note.

<sup>27</sup> *People v. Burke*, 11 Wend. 129.

also in Alabama,<sup>1</sup> Missouri,<sup>2</sup> Kansas,<sup>3</sup> Michigan,<sup>4</sup> and some other States.<sup>5</sup>

§ 142. **Further of the Doctrine.** — And it is remarkable, that, in all the discussion which this question has received, the precise aspect of it presented in the foregoing sections had, until the cases mentioned in a note to the section before the last occurred, been no more than indistinctly shadowed; while evidently the view there taken places it, to one familiar with the principles governing the offence of larceny, beyond doubt. Yet where this view has partially appeared, the objection seems to have arisen, that it renders the prisoner liable to be twice convicted and punished for one offence, in violation of the spirit of the common law; but this objection is without weight. The common law either admits of two convictions in such a case, or it does not; if it does, there is nothing in the objection; if it does not, then the first conviction, in whichever locality it takes place, may be pleaded in bar of the second. The common law, however, knows no such plea in defence of a prosecution as *liability to indictment* elsewhere.<sup>6</sup>

§ 143. *Other Offences:—*

**In General.** — And the doctrine may be laid down generally, in respect to States, as to counties, that, if a complete offence is committed in the locality of the prosecution, quite immaterial is it what is done or attempted in a foreign locality.<sup>7</sup> Thus, —

**Duel.** — A challenge here to fight a duel in another State

<sup>1</sup> The State *v.* Seay, 3 Stew. 123; The State *v.* Adams, 14 Ala. 486; Murray *v.* The State, 18 Ala. 727; La Vaul *v.* The State, 40 Ala. 44.

<sup>2</sup> Hemmaker *v.* The State, 12 Misso. 453; The State *v.* Williams, 35 Misso. 229.

<sup>3</sup> McFarland *v.* The State, 4 Kan. 68.

<sup>4</sup> Morissey *v.* People, 11 Mich. 327; People *v.* Williams, 24 Mich. 156.

<sup>5</sup> And see Fox *v.* Ohio, 5 How. U. S. 410, 434; United States *v.* Pitman, 1 Sprague, 197; The State *v.* Stimpson, 45 Maine, 608; Henry *v.* The State, 7 Coldw. 331.

<sup>6</sup> As to the form of the indictment, see Crim. Proced. II. § 727-729.

<sup>7</sup> And see, as illustrating the general

doctrine, Commonwealth *v.* Cone, 2 Mass. 132; Commonwealth *v.* Judd, 2 Mass. 329; Commonwealth *v.* King, 1 Whart. 448; The State *v.* Carr, 5 N. H. 367; People *v.* Babcock, 11 Wend. 586; Rex *v.* Dick, 1 Leach, 4th ed. 68; Rex *v.* Kirkwood, 1 Moody, 311; Johnson *v.* People, 4 Denio, 364; Rex *v.* McKay, Russ. & Ry. 71; Rex *v.* McKenay, 1 Moody, 130; Commonwealth *v.* Hensley, 2 Va. Cas. 149; Cummings *v.* Commonwealth, 2 Va. Cas. 128; People *v.* Cæsar, 1 Parker C. C. 645; Morgan *v.* Pettit, 3 Scam. 529; The State *v.* Haskell, 33 Maine, 127; People *v.* Burke, 11 Wend. 129; Lewis *v.* Commonwealth, 2 S. & R. 551; People *v.* Flanders, 18 Johns. 164.



is indictable, the same as if the duel were to be fought here.<sup>1</sup>

**Blow and Death in Homicide.** — It has indeed been held by some tribunals, as we have already seen,<sup>2</sup> that, when a blow is inflicted on the high seas, and death follows on land, or in one State and the person expires in another, there can be no indictment for the murder as committed in the former place ; but even this doctrine, which we also saw does not rest well on principle, proceeds simply on the error, that the murder is not complete where the blow is given.

§ 144. **Conclusion.** — Thus we have embraced, within a single chapter, many questions of vast magnitude and immense national importance. Some of them are more fully discussed in the works on international law ; but, in this briefer view and simpler picture, what is most material appears, and, it may be, more distinctly before the eye of uninformed readers than where separated over wider spaces and enveloped in superfluous words.

<sup>1</sup> *The State v. Farrier*, 1 Hawks, 487 ; *The State v. Taylor*, 1 Tread. 107, 3 Brev. 243.

<sup>2</sup> Ante, § 112-116.

## CHAPTER VII.

## JURISDICTION AND LOCAL LIMITS OF THE STATES.

§ 145. **Outward Boundaries.** — We have already considered the boundary lines of the United States, viewed as one nation.<sup>1</sup> The outward boundaries of the States on the borders are coincident with these.<sup>2</sup>

§ 146. **Counties.** — States are divided into counties. A State may have portions of its territory not within any county, though it has the right<sup>3</sup> to extend its county lines over the whole. Thus —

**County Lines on the Sea.** — On the seaboard and against the open sea, a county, at common law, reaches only to the water-margin, and there the line pulsates in and out, with the ebb and flow of the tide;<sup>4</sup> while, as we have seen,<sup>5</sup> the territory of the State, and consequently its territorial jurisdiction, reach beyond low-water mark to the distance of a marine league. But at points where the sea puts up inland, the rule is different; for arms of the sea, as rivers, harbors, creeks, basins, and bays, so closely embraced by land that a man standing on the one shore can reasonably discern with the naked eye objects and what is done on the opposite shore, are within county limits.<sup>6</sup> And it is not material to this rule, whether the shore is main-land or island.

§ 147. **Boston Harbor.** — On this principle, the harbor of Boston, enclosed by numerous islands with narrow straits between, belongs

<sup>1</sup> Ante, § 102–108.

<sup>2</sup> *United States v. Bevans*, 3 Wheat. 336; *Commonwealth v. Peters*, 12 Met. 387, 394; *Commonwealth v. Alger*, 7 Cush. 53, 81–83; *Pollard v. Hagan*, 3 How. U. S. 212; *People v. Tyler*, 7 Mich. 161; *The Martha Anne, Olcott*, 18. And see *Neal v. Commonwealth*, 17 S. & R. 67; *The State v. Cameron*, 2 Chand. 172; *Smith v. Maryland*, 18 How. U. S. 71.

<sup>3</sup> See post, § 149.

<sup>4</sup> *Constable's Case*, 5 Co. 106 a, 107 a;

3 Inst. 113; 2 East P. C. 803; 1 Gab. Crim. Law, 815; 2 Hale P. C. 17, 20; 2 Hawk. P. C. 6th ed. c. 9, § 14; *United States v. Grush*, 5 Mason, 290. See *Reg. v. Gee*, 1 Ellis & E. 1068.

<sup>5</sup> Ante, § 104.

<sup>6</sup> 2 East P. C. 805; 1 Gab. Crim. Law, 815; *Rex v. Bruce*, Russ. & Ry. 243, 2 Leach, 4th ed. 1093. And see *Rex v. Sologuard*, Andr. 231, 234; *Direct U. S. Cable Co. v. Anglo-American Tel. Co.* 2 Ap. Cas. 394.

to the county of Suffolk, in which Boston is situated. Yet the precise limits of the county outward appear not to be settled.<sup>1</sup> "Upon the evidence before me," said Story, J., "I incline strongly to the opinion, that the limits of the county of Suffolk, in this direction, not only include the place in question [between Lovel's Island, George's Island, and Gallop's Island], but all the waters down to a line running across from the light-house on the Great Brewster to Point Alderton. In the sense of the common law, these seem to me to be the *fauces terræ*, where the main ocean terminates."<sup>2</sup>

§ 148. **Statutes as to Counties on the Sea.** — In New York,<sup>3</sup> in Virginia,<sup>4</sup> and in some other States, there are statutes by force of which the counties are made to extend seaward as far as the State lines reach.

**Long Island Sound.** — Long Island Sound is not a part of the State either of New York or of Connecticut.<sup>5</sup> But —

**Islands — Goose Island.** — The islands adjacent the Connecticut shore belong to this State. Among them is Goose Island, in Long Island Sound.<sup>6</sup>

§ 149. **County Lines between Shores.** — It seems to be the doctrine in England, that, if there are tide waters between two shores, and the land on both sides belongs to the British crown, and the waters themselves are within British territorial jurisdiction, the counties extend over these waters.<sup>7</sup> In such a case, should there be counties on the opposite sides of a channel, doubtless the line between them will be the middle of the channel.<sup>8</sup>

**On our Great Lakes.** — And probably the ordinary common-law rule, as to the bounds of counties on the sea, does not apply to our great lakes;<sup>9</sup> so that over them the counties extend to the

<sup>1</sup> Commonwealth v. Peters, 12 Met. 387; United States v. Grush, 5 Mason, 290; United States v. Bevans, 3 Wheat. 336.

<sup>2</sup> United States v. Grush, 5 Mason, 290, 302.

<sup>3</sup> Manley v. People, 3 Seld. 295; People v. Wilson, 3 Parker C. C. 199.

<sup>4</sup> Commonwealth v. Gaines, 2 Va. Cas. 172.

<sup>5</sup> The Elizabeth, 1 Paine, 10; The Martha Anne, Olcott, 18. And see fur-

ther, as to this matter in New York, People v. Wilson, 3 Parker C. C. 199; Stryker v. New York, 19 Johns. 179.

<sup>6</sup> Keyser v. Coe, 9 Blatch. 32, 37 Conn. 597.

<sup>7</sup> Reg. v. Cunningham, Bell C. C. 72. I understand the doctrine of the text to be deducible from this case, though it is not therein stated in exact words.

<sup>8</sup> Ante, § 108; post, § 150.

<sup>9</sup> Ante, § 105, 108; post, § 173, 176.

limits of the State.<sup>1</sup> In New York, those bordering on Lakes Ontario and Erie reach, by statutory direction, to the division line between the United States and the British dominions.

§ 150. **Line between States.** — The line between two States is generally an easy fact to determine if the place be land. If it be water, doubtless the rule which runs it in the middle of the stream<sup>2</sup> will commonly prevail. But —

**Ohio River** — (**Kentucky and Ohio**). — The Ohio River, where it flows between Ohio and Kentucky, is all within the latter State; and Ohio extends to the ordinary low-water mark on her side of the stream.<sup>3</sup>

**Hudson River** — (**New York and New Jersey**). — In like manner, the exclusive jurisdiction over the waters of the Hudson, where they divide the States of New York and New Jersey, is in the former State.<sup>4</sup>

**Potomac** — **Chesapeake.** — “By the charter of Maryland, the Potomac River to its mouth belonged originally to Maryland; and by the charter of Virginia, the Chesapeake from its mouth to the mouth of the Potomac belonged originally to Virginia. The Compact of 1785 gave a right in common to both States to the river and the bay.”<sup>5</sup>

§ 151. **States in own Territorial Limits.** — The jurisdiction of a State is not in all respects absolute even in its own territory; because the United States government has, by the Constitution, control over some things within State limits, sometimes ousting entirely the State jurisdiction, and sometimes acting concurrently therewith. But this topic is for another chapter.

§ 152. **Extra-territorial Jurisdiction of States.** — That a State of our Union has no diplomatic power, is, we have seen,<sup>6</sup> plain. But it does not quite follow from this, that she may not exercise some sort of extra-territorial control over her own citizens; punishing them for wrongs done abroad. At the same time, there may be reason to suppose that a State can have no authority, even over

<sup>1</sup> *People v. Tyler*, 7 Mich. 161.

<sup>2</sup> *Ante*, § 108; *Philips v. The State*, 55 Ill. 429. See *The State v. Mullen*, 35 Iowa, 199.

<sup>3</sup> *Booth v. Shepherd*, 8 Ohio State, 243; *McFall v. Commonwealth*, 2 Met. Ky. 894.

<sup>4</sup> *The State v. Babcock*, 1 Vroom, 29.

<sup>5</sup> So it was observed by counsel in *The State v. Hoofman*, 9 Md. 28; referring to *Binney's Case*, 2 Bland, 90, 123. **Georgia and Alabama.** — As to the line between Georgia and Alabama, see *Alabama v. Georgia*, 23 How. U. S. 505.

<sup>6</sup> *Ante*, § 100; *post*, § 188-186.

its own citizens, upon the high seas beyond its own lines ; because there is the point of contact with other nations, and all international questions belong to the general government. There is room for doubt also, whether always, when a citizen goes out of his own State, though not intending to abandon it, he is not so far a subject of the United States in distinction from the particular State, as to be exempt from the criminal laws of the latter, and answerable only to those of the locality where he is, and of the general government. But in a Virginia case, the court took the exact contrary view.<sup>1</sup> So did the Wisconsin court.<sup>2</sup> In North Carolina it was said : " This State cannot declare that an act done in Virginia [another State], by a citizen of Virginia, shall be criminal and punishable in this State ; our penal laws can only extend to the limits of this State, except as to our own citizens." <sup>3</sup> On the other hand, a case before some of the judges of New York goes apparently to the extent, that the legislature of one State cannot make indictable any act done in another State, even by one of its own citizens.<sup>4</sup> And this has been held in Michigan,<sup>5</sup> and probably elsewhere, and it is perhaps the better doctrine in principle.<sup>6</sup> Still, in many and perhaps most of the cases in which this question was properly involved, it has been taken for granted, without inquiry or discussion, that one of our States occupies the same position as an independent nation with respect of the right to take cognizance of criminal acts performed by one of its citizens abroad.

<sup>1</sup> *Commonwealth v. Gaines*, 2 Va. Cas. 172.

<sup>2</sup> *The State v. Main*, 16 Wis. 398.

<sup>3</sup> *The State v. Knight*, 2 Hayw. 109, Taylor, 65.

<sup>4</sup> *People v. Merrill*, 2 Parker C. C. 590. On the subject of this section the reader may profitably consult the cases cited post, § 154.

<sup>5</sup> In *Tyler v. People*, 8 Mich. 320, 342, Campbell, J., said : " I do not conceive that any State of this Union has any extra-territorial power over its citizens. This power is inseparably connected with the duty of protection. This duty cannot, under our Federal Constitution, be exercised abroad by the individual States. It belongs to the power which can levy troops, maintain navies, declare

war, and hold diplomatic intercourse with other nations. This every State in the Union is forbidden to do. Even within the Union, the citizens of one State are protected in another by virtue of the Federal Constitution. Their own State cannot protect them. And upon no principle can its peace and dignity be considered as invaded, where, if its own citizens are aggrieved, it has no right, as a State, to communicate with the public authorities at all, whether to supplicate or to demand their rights." This extract is from a dissenting opinion, but I do not understand that the views of the other judges differed from these on this point.

<sup>6</sup> But see *The State v. Main*, 16 Wis. 398.

§ 153. **Belligerent Act abroad by Command of State.** — We may also doubt whether one can justify himself in a foreign country for committing there an act in violation of the law of the place, by showing that he did it under command from his State, as he could do if the command proceeded from the general government.<sup>1</sup> The Federal Constitution having shorn the States of diplomatic and war-making authority, the reason of the doctrine would not apply in such a case; moreover, the foreign government would not know the State.<sup>2</sup>

§ 154. **Indian Territory.** — Questions have arisen, concerning the power of the States to extend their jurisdiction over Indian territory within their limits,<sup>3</sup> and concerning the power of Congress to exercise the Federal jurisdiction over Indian territory within the States;<sup>4</sup> but, as these questions are not of universal interest, it will be sufficient for us simply to refer to some adjudications.

**Further of Indians.** — Our Indian tribes are independent political communities.<sup>5</sup> Congress has, by the Constitution, power to "regulate commerce . . . with the Indian tribes;"<sup>6</sup> and this is held to authorize the suppression of the traffic in spirituous liquors between such tribes or their members, within or without State limits.<sup>7</sup> But if the members of an Indian tribe scatter themselves among the people of a State, they become amenable to the State laws.<sup>8</sup>

§ 155. **State and United States Jurisdiction over same Act.** — A

<sup>1</sup> Ante, § 132, 133.

<sup>2</sup> *Commonwealth v. Blodgett*, 12 Met. 56. And see *Luther v. Borden*, 7 How. U. S. 1; *United States v. Bright*, 1 Whart. Pa. Dig. 6th ed. p. 506.

<sup>3</sup> *Worcester v. Georgia*, 6 Pet. 515; *United States v. Cisna*, 1 McLean, 254; *Caldwell v. The State*, 1 Stew. & P. 327; *The State v. Tassels*, Dudley, Ga. 229; *The State v. Foreman*, 8 Yerg. 256; *United States v. Ward*, McCahon, 199; *United States v. Stahl*, McCahon, 206; *United States v. Sacoodacot*, 1 Abb. U. S. 377; *The State v. Tachanatah*, 64 N. C. 614; *The State v. Duxtater*, 47 Wis. 278; *The State v. Harris*, 47 Wis. 298.

<sup>4</sup> *United States v. Rogers*, 4 How. U. S. 567; *United States v. Bailey*, 1 McLean, 234; *United States v. Yellow Sun*, 1 Dillon, 271; s. c. nom. *United*

*States v. Sacoodacot*, 1 Abb. U. S. 377; *United States v. Cha-to-kah-na-pe-sha*, Hemp. 27; *United States v. Sanders*, Hemp. 483; *United States v. Rogers*, Hemp. 450; *United States v. Ragsdale*, Hemp. 497; *Hunt v. The State*, 4 Kan. 60; *Shapoonmash v. United States*, 1 Wash. Ter. n. s. 188; *Painter v. Ives*, 4 Neb. 122.

<sup>5</sup> *McKay v. Campbell*, 2 Sawyer, 118.

<sup>6</sup> Const. U. S. art. 1, § 8.

<sup>7</sup> *United States v. Shaw-mux*, 2 Sawyer, 364. And see *United States v. Seveloff*, 2 Sawyer, 311.

<sup>8</sup> *Ex parte Reynolds*, 5 Dil. 394. As to a citizen of the United States who has married an Indian woman and lives with the tribe, see *Grinter v. Kansas Pacific Railway*, 23 Kan. 642.

wrongful act may violate the peace both of the United States and of a State. Therefore each government has the authority to punish it, and either may take the jurisdiction regardless of the other's claims. Perhaps, likewise, in principle, when one has inflicted its punishment, the other may inflict its punishment also, notwithstanding what has been suffered.<sup>1</sup> There is authority, also, both for this doctrine and its opposite, and for various modifications of doctrine between these two extremes. The question will come under review in other connections.<sup>2</sup>

<sup>1</sup> Ante, § 142; post, § 984, 987-989.

<sup>2</sup> See post, § 178, 179, 987-989; and see *Crim. Proced. II.*, § 271; *Sizemore v. The State*, 3 Head, 26; *Commonwealth v. Tenney*, 97 Mass. 50; *People v. White*,

34 Cal. 183; *Jett v. Commonwealth*, 18 Grat. 953; *The State v. McPherson*, 9 Iowa, 53; *The State v. Brown*, 2 Oregon, 221; *People v. Kelly*, 38 Cal. 145; *Commonwealth v. Felton*, 101 Mass. 204.

## CHAPTER VIII.

## THE JURISDICTION OF THE UNITED STATES WITHIN STATE LIMITS.

§ 156. **Defined by Constitution.** — We should distinguish between the powers of our general government within State limits and without. As to the former, the Constitution is express: “The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.”<sup>1</sup>

§ 157. **Powers “Prohibited to States.”** — The words “prohibited by it to the States” are important; because, from them, the inference is irresistible, that, if a particular thing pertaining to governmental authority is by the Constitution prohibited to the States, or is found not to be within what is practicable for the States to exercise, it therefore pertains to the United States. Rejecting this construction, we should witness masses of governmental things dropping from existence, — contrary to reason, contrary to the necessities of government, contrary to the usages of nations, and contrary to what is practicable among men. Indeed, the United States is, by the Constitution, made a nation in very distinct terms;<sup>2</sup> therefore, as to all things pertaining to nationality, wherein the individual States are forbidden to act, or are in any way found to be wanting in the rightful jurisdiction, the jurisdiction may be deemed to be, by express force of the Constitution, in the general government.

§ 158. **United States beyond State Limits.** — As the States have no power beyond their local limits, it follows that the jurisdictional power of the United States is there full and complete, — to be exercised, of course, in accordance with the principles laid down in the Constitution. This was somewhat considered in the chapter before the last; it will be more exactly discussed in the next chapter.

<sup>1</sup> Const. U. S. amend. art. 10.

<sup>2</sup> Post, § 182 et seq.



§ 159. **Forts, Dock-yards, &c.** — “The Congress,” says the Constitution, “shall have power . . . to exercise exclusive legislation . . . over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.”<sup>1</sup> Over such localities the sway of the several States does not extend, except that sometimes a special reservation in the act ceding the place otherwise provides.<sup>2</sup> The difficulty as to such places is, whether the State authority has ceased before Congress has exercised over them its full legislative powers.<sup>3</sup> Where the statute of the State ceding the place reserves “concurrent jurisdiction” *to serve in it State processes*, civil and criminal, this does not restrain the United States from exercising over it exclusive *legislative and judicial* authority.<sup>4</sup> An offence, therefore, is triable, not in the State court, but the United States.<sup>5</sup> The mere purchase of lands within a State, by the United States, for national purposes, does not, of itself alone, oust the jurisdiction and sovereignty of the State over them.

§ 160. **Whence United States Jurisdiction within State Limits.** — The sources of the national jurisdiction upon State territory are in the Constitution. To point out all is beyond the bounds of the present work. But —

§ 161. **Guarantee of Republican Government.** — One source of a special temporary jurisdiction, by the general government, over a State and all its concerns, is the guaranty clause of the Constitution. It is: “The United States shall guarantee to every State in this Union a republican form of government.”<sup>6</sup>

<sup>1</sup> Const. U. S. art. 1, § 8. And see *United States v. Donlan*, 5 Blatch. 284; *United States v. Barney*, 5 Blatch. 294; *Franklin v. United States*, 1 Col. Ter. 35; *Reynolds v. People*, 1 Col. Ter. 179.

<sup>2</sup> *United States v. Bevans*, 3 Wheat. 338; *United States v. Davis*, 5 Mason, 356; *New Orleans v. United States*, 10 Pet. 662, 737; *Mitchell v. Tibbets*, 17 Pick. 298; *United States v. Cornell*, 2 Mason, 60.

<sup>3</sup> See *United States v. Bevans*, 3 Wheat. 336.

<sup>4</sup> *United States v. Davis*, 5 Mason, 356.

<sup>5</sup> *Mitchell v. Tibbets*, 17 Pick. 298. **National Cemetery.** — The Tennessee

act, ceding to the United States lands for national cemeteries, is held not to exclude the State from executing process within the cemetery grounds, and punishing offences therein committed. But over adjacent grounds, while temporarily occupied by the United States forces in preparing the cemetery, the national jurisdiction is exclusive. *Wills v. The State*, 3 Heisk. 141. **Military Reservation.** — Kansas exercises criminal jurisdiction over the military reservation at Fort Leavenworth. *Clay v. The State*, 4 Kan. 49.

<sup>6</sup> Const. U. S. art. 4, § 4. The whole section is: “The United States shall guarantee to every State in this Union a

§ 162. **Republican Government, continued.** — When, for any reason, — as, for instance, when a State has passed what has been termed an ordinance of secession, — there ceases to be within it a government under the Constitution of the United States, the “guaranty” of this section attaches, and “The United States” becomes obligated to provide for it “a republican form of government.” To see this distinctly, we should bear in mind, that our State governments are recognized by the national, the same as are those of foreign nations; and that the national government may refuse to recognize a particular government of a State, or may withdraw a recognition already given. Thus, in Rhode Island, in the time of the Dorr rebellion, there were two governments, each of which claimed to be the lawful one, and “The United States” recognized one of them, rejecting the other.<sup>1</sup> And when South Carolina and several other States “seceded,” as it was called, “The United States,” though requested, declined to recognize the new governments, deeming them to be unauthorized and null. Yet, in fact, they occupied the places of the old ones in those States; which, therefore, ceased to have governments under our Constitution. Consequently the relations of the

republican form of government; and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.” I have separated the parts of this section, by semicolons, into three clauses. By the first clause, to be more fully expounded in the text, “The United States” undertakes, whenever any State shall cease to have what it (the United States) can recognize as a government under the national Constitution, to give to it one, to wit, “a republican form of government.” By the second clause, “The United States” undertakes to protect the State “against invasion,” — the word “invasion” denoting a hostile force coming upon the State *from without*. The third clause requires “The United States,” when there is a State government, to interfere for the suppression of domestic violence *from within* the State, provided application for help is made by the legislature or the governor. If there is an attempt to set up, within a State, a monarchy, in oppo-

sition to the will of the republican State government, the case is provided for in the third clause; if a foreign power undertakes to establish a monarchy within the State, the case is provided for by the second clause; and, as these are the only two cases in which, while there is a republican State government within the State, there can be any question about the establishment of a monarchy, it follows that the first clause did not contemplate, and was not intended as a provision against, this kind of emergency. The first clause is operative when, and only when, there has ceased to be, within the State, what the Constitution terms “a republican form of government.” If the State ceases to have any government, then it ceases to have a republican form of government, and the case is within this clause. If it has a government, but the government has lapsed from the republican form, this clause controls the case also. And see *Texas v. White*, 7 Wal. 700.

<sup>1</sup> *Luther v. Borden*, 7 How. U. S. 1.

United States to those States were upon this controlled by the clause now under consideration, and by such others as might be found specially applicable.

§ 163. *Continued* — (United States full Power in State). — We have thus a State without a State government, and a power — to wit, the United States — under obligation to give it one. Meanwhile it is absurd to suppose that the State waiting for the government to be conferred upon it, is to abide ungoverned. Over the people of the State, therefore, in this emergency, and until the new State government is organized, full governmental power is, by the Constitution itself, conferred on “The United States.” The locality, indeed, still bears the name of State; yet the relations between it and the general government have changed in law with the change in facts, in a manner which the Constitution itself points out.<sup>1</sup> It is thus: by various clauses, all governmental powers are prohibited to the States which have not governments within the Union; but this instrument has no provision whereby any governmental power is annihilated. Yet, as we have seen,<sup>2</sup> it has this, that “the powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.” The power of local government is, in these circumstances, “prohibited to the State;” therefore it is not “reserved” to the State or to its people, and, of necessity, it is in the United States until the new State government is organized.

§ 164. *Continued*. — That there can be no governmental power in a State without a government is plain; because only through a government is a governmental power exercised. And this axiomatic proposition is made a doctrine of the Constitution by conclusive words. For example, “the members of the several State legislatures, and all executive and judicial officers . . . of the several States, shall be bound by oath or affirmation to support this Constitution.”<sup>3</sup> And there are some other provisions having a similar effect. Therefore, when a State ceases to have these officers, it is barred by the Constitution from exercising any governmental functions; since governmental acts can be done only through them.

§ 165. *Continued*. — Except, therefore, for the clause guaran-

<sup>1</sup> Bishop First Book, § 112, 113.

<sup>3</sup> Const. U. S. art. 6.

<sup>2</sup> Ante, § 158.

teeing republican governments to the States, "The United States" might, if it chose, after a State has committed what is called an act of secession, or otherwise ceased to have a government, legislate for it for ever, to the exclusion of any subsequent State legislation. But the clause under consideration provides that "The United States" shall "guarantee" to the State "a republican form of government." Therefore, as soon as the guaranty is executed, the right of legislation, received from the defunct State government, ebbs back into the new State government.

§ 166. **Views relating to the Guaranty.** — The following should be borne in mind : First, it is by judicial decision settled, that the President and the two houses of Congress are to decide whether or not a particular government within a State is republican, and to recognize it or not accordingly ; and their determination of this question is conclusive, binding the courts, the State itself, and the nation. In other words, the term "United States," in this clause of the Constitution, refers primarily to the President and the two houses of Congress.<sup>1</sup> It is not, therefore, for any class of persons, in a State which has ceased to have a government, to set up one on their own motion ; though, should a class do so, and Congress with the President recognize the irregularly organized government, the act of recognition would bind the country and the courts.<sup>2</sup> Such action, however, might be reversed by Congress afterward.

§ 167. **Continued.** — In the next place, the word "guarantee" refers to a duty which first rested on a party called the principal ; but, this party having failed in its performance, it afterward is cast upon another, called the guarantor. Now, cannot the principal, after a lapse, still step in and perform, if he will, and thus relieve the guarantor ? He can, if in a condition to perform ; otherwise, not. A State that has ceased to have a government is not in a condition to perform. To order an election, to determine who shall be the voters, to fix the basis of representation, and other similar things, — these require governmental action,

<sup>1</sup> *Luther v. Borden*, 7 How. U. S. 1.

<sup>2</sup> Such a case of irregular proceeding would be, in a good measure, analogous to what took place in the admission of California ; which State, it is remembered, — acting, of course, through unauthorized persons, and in an unauthor-

ized manner, — formed, while a Territory, a State Constitution without a previous act of Congress, and was afterward admitted, and its government recognized. And there are other precedents of the like sort.

and, where there is no government, they cannot be done. Therefore, as the State cannot do them, Congress must. True, as already said, if the President, or a general in the field, or irresponsible persons do it, and Congress afterward adopts the act, the proceeding, though irregular, binds the country and the courts.

§ 168. *Continued.* — Finally, the government which “The United States” guarantees to each State is “a republican form of government.” The jurisdiction to decide what is such a government and what is not, is, we have seen, in the President and Congress, composing the political department of the United States government.<sup>1</sup> Now, what, by competent authority, is held in our country to be “a republican form of government”? When the Constitution was adopted, there were, and there have been ever since, State governments, recognized as republican, with principal and well-known features alike; but differing chiefly in this, that a part of them rested on a basis of what is called universal suffrage, while in others the right of suffrage was restricted to persons of specified property qualifications, or to white persons. There have always been those who deemed, that no government is republican wherein the suffrage is not universal; or, that none is republican wherein a part of the people are slaves. And there can be no slaves now under our amended Constitution. But whatever be the true doctrine in principle, the *adjudged law* is, that each of the differing forms of government mentioned above is republican.<sup>2</sup>

§ 169. **What a Republican Government for a State.** — It would seem, therefore, that, as a general proposition, unless Congress is prepared to overrule her own “precedents,” when she undertakes to establish, in a State whose government has become vacated, a new State government, she may select any one of the forms previously in use in any one of the States. Yet —

**Under Special Facts.** — The circumstances of the particular case may limit her choice. Thus; if a part of the people of a State

<sup>1</sup> *Luther v. Borden*, 7 How. U. S. 1.

<sup>2</sup> This question has been, in effect, passed upon by each of the two houses of Congress, not once, but by a sort of continuous action, ever since the Constitution was adopted. For, as each house is by the Constitution the judge of the qualifications of its own members, and,

as to be elected by voters who were constitutionally disqualified would disqualify the member, and as members have always been present elected by these several kinds of constituency, and no objection has been made, there has been, in effect, a series of adjudications too vast to be numbered.

throw off their State government in an act of rebellion against the government of the United States, Congress has no constitutional power, in establishing the new State government, to make those persons who rebelled voters, and exclude from the elective franchise those who did not rebel.<sup>1</sup>

§ 170. *Continued.* — The proposition just stated is supported by the following consideration: The duty to guarantee the republican government rests on Congress from the moment there ceases to be a government, under the national Constitution, in the rebellious State. If Congress discharges it promptly, the fact at the time of its discharge is, that the rebels are unwilling to carry on a republican government under the Constitution, while the others are willing; and a republican government can rest only on a basis of willing voters. Therefore Congress is bound to accept the willing. If Congress postpones the performance of a constitutional duty, such postponement cannot divest rights which have already vested in individuals or classes of individuals. And though a pardon may be granted to the rebels, and they may be thus restored to the elective franchise, yet, since the right to the franchise had already vested in those who were not rebels, Congress cannot take it away. If one Congress should attempt to do so, and in pursuance of the attempt should acknowledge a government in one of these States based on the action of a few

<sup>1</sup> As this subject borders on political discussions, there are persons who, on account of political views, will not be pleased to see, in a law-book, the particular doctrines which the law compelled me to state. But I never yet bent what I deemed to be the truth, to meet any man's politics, even my own; neither did I ever, in a law-book, dodge the discussion of any legal question which fairly and properly sprang up in my path. And I am here presenting purely legal views, not political. I adopt, as my guide on every occasion of this sort, the rule which, in *The Louisville and Nashville Railroad v. Davidson*, 1 Sneed, 687, was laid down for the court. Said Caruthers, J.: "If the construction and administration of our laws, supreme or subordinate, were to be governed by the opinions of judges as to the genius or general principles of republicanism, de-

mocracy, or liberty, there would be no certainty in the law, no fixed rules of decision. These are proper guides for the legislature, where the Constitution is silent, but not for the courts. It is not for the judiciary or the executive department to inquire whether the legislature has violated the genius of the government, or the general principles of liberty, and the rights of man, or whether their acts are wise and expedient or not; but only whether it has transcended the limits prescribed for it in the Constitution. By these alone is the power of that body bounded; that is the touchstone by which all its acts are to be tried; there is no other. It would be a violation of first principles, as well as their oaths of office, for the courts to erect any other standard. There is no 'higher law' than the Constitution known in our system of government." p. 668.

only of the voters, constituting an oligarchy, or based on the votes of those who had rebelled, excluding the mass of the people who had not, it would be the constitutional duty of a subsequent Congress to undo the work, by withdrawing the acknowledgment, and ordering a new election for a constitutional convention in the State, with the right of the always loyal to vote.

§ 171. **Further of Legislation for State without Government.** — We have seen, that, if a State is without a government, Congress may legislate for it while in transition to a new government of its own. Now, suppose the argument by which that conclusion was reached is not sound, still it is derivable also from the guaranty clause alone. For, as Congress is to give the State a new republican government, this obligation carries with it the governing power over the State during the transition period, in pursuance of a doctrine expressed by Lord Coke, and recognized by all our tribunals, as follows: "When the law granteth any thing to any one, that also is granted without which the thing itself cannot be."<sup>1</sup> To constitute a grant by implication within this doctrine, the thing implied need not be absolutely inseparable from the thing mentioned; as, in the case wherein these words occur, a statute authorizing justices of the peace to take the oaths of persons was held to confer the power to compel their appearance by writ, though it was physically possible to go personally to their homes and administer the oaths there. A State cannot exist without a government; therefore, if it has none, the power bound to give it one may legislate for it during the interval. Indeed, if governmental jurisdiction over the State were not thus fully in the United States, the latter could not transfer it to a new governmental body; in other words, "The United States" must take up the full governmental authority which the defunct State government laid down, in order to pass it to a new State government.

§ 172. **National Powers not forbidden to States.** — There are jurisdictional powers granted by the Constitution to the United States, yet not forbidden to the States. As to these, the true rule of construction undoubtedly is, that, until Congress acts, the States may exercise the full governmental authority, if the thing be within their territorial limits; but, after Congress has

<sup>1</sup> Oath before the Justices, 12 Co. 130, 131. And see *Heard v. Pierce*, 8 Cush. 338, 343, 345; *Stat. Crimes*, § 137.

acted, the thing is, or may be made by the national statute, no longer within the competency of the States.<sup>1</sup> Without tracing this doctrine into detail, let us look at some things adjudged.

§ 173. **Maritime Jurisdiction within States.** — “The judicial power of the United States shall extend,” says the Constitution, “to all cases of admiralty and maritime jurisdiction;”<sup>2</sup> and maritime jurisdiction is by our courts held, contrary to the English rule, to embrace locally, not only the high seas, but all the internal navigable waters, as rivers and lakes, on which commerce is borne.<sup>3</sup>

“**Regulate Commerce**” — **Offences on Public Ways.** — The United States have also constitutional power “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;”<sup>4</sup> which power extends to the regulation of navigation,<sup>5</sup> and necessarily implies certain rights of creating, by legislation, offences against commerce, committed on the public ways of the nation.

§ 174. **States and United States as to Public Ways.** — Still the powers thus given to Congress by the Constitution of the United States, over navigable waters within the States, slumber until legislation awakens them into practical life.<sup>6</sup> Therefore, as a general proposition, the law permits the States to exercise full control over public ways of all kinds, both by land and water, within their respective localities.<sup>7</sup> Even roads may be laid out

<sup>1</sup> See *Weaver v. Fegely*, 5 Casey, 27; *People v. Westchester*, 1 Parker C. C. 659; *Newport v. Taylor*, 16 B. Monr. 699; *Mobile v. The Cuba*, 28 Ala. 185; *People v. Coleman*, 4 Cal. 46.

<sup>2</sup> Const. U. S. art. 3, § 2.

<sup>3</sup> *Genesee Chief v. Fitzhugh*, 12 How. U. S. 443; *Fretz v. Bull*, 12 How. U. S. 466. Previously to these decisions, it was understood to extend only to tide-waters. The *Thomas Jefferson*, 10 Wheat. 428; *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *United States v. Coombs*, 12 Pet. 72; *Waring v. Clarke*, 5 How. U. S. 441; *Rossiter v. Chester*, 1 Doug. Mich. 154. And see *Steamboat New World v. King*, 16 How. U. S. 469; *The Huntress*, Davis D. C. 82.

<sup>4</sup> Const. U. S. art. 1, § 8.

<sup>5</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *North River Steamboat Co. v. Livingston*,

3 Cow. 713; *Ogden v. Gibbons*, 4 Johns. Ch. 150; *Gibbons v. Ogden*, 17 Johns. 488; *Livingston v. Van Ingen*, 9 Johns. 507; *Mobile v. The Cuba*, 28 Ala. 185; *Brig Wilson v. United States*, 1 Brock. 423; *Gilman v. Philadelphia*, 3 Wal. 713.

<sup>6</sup> *Waring v. Clarke*, 5 How. U. S. 441; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401. See *Pennsylvania v. Wheeling and Belmont Bridge*, 13 How. U. S. 518; *Bailey v. Philadelphia Railroad*, 4 Harring. Del. 389; *Georgetown v. Alexandria Canal*, 12 Pet. 91; *People v. St. Louis*, 5 Gilman, 351; *People v. Coleman*, 4 Cal. 46; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

<sup>7</sup> *People v. St. Louis*, 5 Gilman, 351; *Commonwealth v. Alger*, 7 Cush. 53; *Moore v. Sanborne*, 2 Mich. 519; *Bailey v. Philadelphia Railroad*, 4 Harring. Del. 389; *Rogers v. Kennebec and Portland*



by a State across lands within its limits belonging to the United States; being a matter with which the general government cannot interfere.<sup>1</sup> But Congress, under the power to regulate commerce, may exercise any jurisdiction over the public ways of the country required for this object;<sup>2</sup> and perhaps some authority also under other provisions of the United States Constitution.<sup>3</sup> Perhaps the United States courts, under their general equity powers, without special legislation, may order the abatement of bridges and other structures over navigable rivers, if clearly they embarrass commercial intercourse between the States, though authorized by the legislatures of the States in which they are located.<sup>4</sup> This power has been denied where the river is entirely within the territorial limits of the State, not extending, as a public highway, into any other State.<sup>5</sup> There has, indeed, been much question of the right, in any case, thus to go in advance of the action of the legislative department of the government; and, whether those courts which have maintained the right have done well or not, they surely should not act under it in any doubtful circumstances.

§ 175. *Continued.* — A statute of the State may go as far as the legislature chooses, subject only to the interference of the United States tribunals or of Congress, as respects even the large rivers and the harbors of the country.<sup>6</sup> But where, in these cases,

Railroad, 35 Maine, 319, 323; *Eldredge v. Cowell*, 4 Cal. 80; *Cox v. The State*, 3 Blackf. 193; *Depew v. Trustees*, 5 Ind. 8; *Kellogg v. Union Company*, 12 Conn. 7; *Willson v. Black Bird Creek Marsh*, 2 Pet. 245; *Savannah v. The State*, 4 Ga. 26; *Stoughton v. The State*, 5 Wis. 291; *Morgan v. King*, 18 Barb. 277; *Withers v. Buckley*, 20 How. U. S. 84; *Parker v. Cutler Mill Dam*, 20 Maine, 353; *Illinois River Packet Co. v. Peoria Bridge*, 38 Ill. 467; *Chicago v. McGinn*, 51 Ill. 266; *Attorney-General v. Stevens*, Saxton, 369; *Hutchinson v. Thompson*, 9 Ohio, 52; *Flanagan v. Philadelphia*, 6 Wright, Pa. 219; *People v. Tibbetts*, 19 N. Y. 523; *Mobile v. Eslava*, 9 Port. 577; *Avery v. Fox*, 1 Abb. U. S. 246; *Delaware and Hudson Canal v. Lawrence*, 2 Hun, 163.

<sup>1</sup> *United States v. Railroad Bridge Co.*, 6 McLean, 517.

<sup>2</sup> *United States v. New Bedford Bridge*, *supra*; *Pennsylvania v. Wheeling and Belmont Bridge*, 18 How. U. S. 421; *Gibbons v. Ogden*, 9 Wheat. 1. It may forbid or regulate the construction of a bridge across the Mississippi. *United States v. Milwaukee and St. Paul Railway*, 5 Bis. 410.

<sup>3</sup> See *Pennsylvania v. Wheeling and Belmont Bridge*, *supra*.

<sup>4</sup> *Pennsylvania v. Wheeling and Belmont Bridge*, 13 How. U. S. 518, 18 How. U. S. 421; *Georgetown v. Alexandria Canal*, 12 Pet. 91; *United States v. Railroad Bridge Co.*, 6 McLean, 517; *Gilman v. Philadelphia*, 3 Wal. 713.

<sup>5</sup> *Milnor v. New Jersey Railroad*, 6 Am. Law Reg. 6, Grier, J. See *Silliman v. Hudson River Bridge Co.*, 1 Black, 582.

<sup>6</sup> See cases cited to the last section; *Hudson v. The State*, 4 Zab. 718; *Palmer*

the national legislature has already laid down a rule, it bounds the legislative authority of the State.<sup>1</sup> Congress may constitutionally legalize a bridge already erected.<sup>2</sup>

§ 176. Continued — Crimes against Commerce. — Although Congress may regulate the ways of commerce within the States, concurrently with them,<sup>3</sup> or doubtless even to the exclusion<sup>4</sup> of State laws should she be so unwise; yet, as to crimes, she has not to any considerable<sup>5</sup> extent provided against what is done within counties. Therefore, —

**Within Counties.** — Within the counties, the dominion of the States, and the common-law jurisdiction of their courts, are practically almost as exclusive as if Congress had no constitutional authority in exceptional localities there.<sup>6</sup> But some things are by acts of Congress made punishable when done “upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State;”<sup>7</sup> the construction of which words appears practically to be, that “out of the jurisdiction of any particular State” do not qualify “high seas,” but

*v. Cuyahoga*, 3 McLean, 226; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

<sup>1</sup> *Columbus Insurance Co. v. Curtienius*, 6 McLean, 209; *Columbus Insurance Co. v. Peoria Bridge*, 6 McLean, 70; *Jolly v. Terre Haute Draw-Bridge*, 6 McLean, 237; *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>2</sup> *Clinton Bridge*, 10 Wal. 454.

<sup>3</sup> See *Waring v. Clarke*, 5 How. U. S. 441. And see *Rex v. Bruce, Russ. & Ry.* 243, 2 Leach, 4th ed. 1093.

<sup>4</sup> *Commonwealth v. Peters*, 12 Met. 387.

<sup>5</sup> See *People v. Westchester*, 1 Parker C. C. 659. An act of Congress provided, that, “if any person or persons shall plunder, steal, or destroy any money, goods, merchandise, or other effects from or belonging to any ship, or vessel, or boat, or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea or upon any reef, shoal, bank, or rocks of the sea, or in any other place, . . . every person so offending shall be deemed guilty of

felony,” &c. And it was held, that the courts of the United States have jurisdiction over the offence, — the statute proceeding on the power to regulate commerce, — if committed while the wrecked vessel is lying upon the shore, and even after the property is thrown upon the shore, separated from the vessel. *United States v. Pitman*, 1 Sprague, 196; *United States v. Coombs*, 12 Pet. 72. See R. S. of U. S. § 5358.

<sup>6</sup> *United States v. Bevans*, 3 Wheat. 386; *Thompson v. Steamboat Morton*, 2 Ohio State, 26. **Internal Commerce of States — Oysters.** — The States may regulate their own internal commerce. And a law forbidding citizens of other States to take oysters from the waters of the State has been held to be constitutional. *Corfield v. Coryell*, 4 Wash. C. C. 371. **Gold Mines.** — So of a law requiring from foreigners a license fee for the privilege of working the gold mines of a State. *People v. Naglee*, 1 Cal. 232.

<sup>7</sup> And see R. S. of U. S. § 5339, and some subsequent provisions.

do qualify the subsequent words: so that, if the offence is upon seas washing an open coast, and within the marine league belonging to the territory of the State, still it is punishable as committed against the United States; but not, if it is in a harbor or the like place, within the limits of a county.<sup>1</sup> The consequence seems to be, that whatever of wrong is done on the open coast below the water-margin is exempt from punishment; unless it is within some act of Congress, or unless the State has made, as Virginia has,<sup>2</sup> a statutory provision for such localities; or has extended over them her county lines, as has New York.<sup>3</sup>

§ 177. **Nature of Criminal Thing.** — The nature of the criminal thing done, though within the local limits of a State, may make it an offence against the United States.<sup>4</sup> Therefore, —

**Treason.** — Treason is a crime against either the United States or an individual State, according as it aims at the subjugation of the one government or the other.<sup>5</sup> But —

**Statute required.** — As we have no common-law national crimes, the thing cannot be deemed an offence against the general government unless there is a statute, within the constitutional powers of Congress, forbidding it and probably also prescribing the punishment.<sup>6</sup>

§ 178. **Acts offending both United States and State.** — There are, we have seen,<sup>7</sup> wrongful acts of a nature to violate duties both to the United States and a particular State. And some of these acts are declared crimes by the positive laws of each. It is probably the doctrine of the courts, though not free from doubt in principle, that, whenever Congress has the constitutional power to render a thing punishable as a crime against the United States, she can make this legislation exclusive of State law.<sup>8</sup> But however this may be, if the national statute neither in terms nor by

<sup>1</sup> *United States v. Grush*, 5 Mason, 290; *Commonwealth v. Peters*, 12 Met. 387; *United States v. Bevans*, 3 Wheat. 386. And see further, on this question, *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Holmes*, 5 Wheat. 412.

<sup>2</sup> *Commonwealth v. Gaines*, 2 Va. Cas. 172.

<sup>3</sup> *Ante*, § 149.

<sup>4</sup> See, for illustrations, *United States v. Coombs*, 12 Pet. 72; *The State v. Caro-*

*line*, 20 Ala. 19; *United States v. Bailey*, 9 Pet. 238; *United States v. Barton*, Gilpin, 439.

<sup>5</sup> *Charge on Law of Treason*, 1 Story, 614; *People v. Lynch*, 11 Johns. 549.

<sup>6</sup> *Post*, § 194.

<sup>7</sup> *Ante*, § 155.

<sup>8</sup> *Ante*, § 176. See *Fox v. Ohio*, 5 How. U. S. 410; *Commonwealth v. Fuller*, 8 Met. 313; *The State v. Pitman*, 1 Brev. 32; *Commonwealth v. Barry*, 116 Mass. 1.

necessary implication excludes the State law, the latter is not superseded.<sup>1</sup> Therefore —

**Counterfeiting and the like.** — Indictments are maintainable in the State courts for the offence, against the State, of counterfeiting the coin or bills of the United States, or foreign coin made current by act of Congress ; while proceedings will also lie, under United States statutes, before the national tribunals, for doing the same thing as an offence against the United States.<sup>2</sup> Congress has not attempted to restrict the power of the States.<sup>3</sup>

**Other Crimes.** — And there are other cases of like concurrent jurisdiction.<sup>4</sup>

§ 179. **Whether both Governments prosecute.** — The question whether, on just principle, or on authority, both governments should prosecute the offender, where the laws of each are broken, is partly of another sort, — to be considered further on.<sup>5</sup>

§ 180. **Offices Exclusive.** — It seems to be a doctrine established in authority, while it is just in principle, and promotive of harmony in the workings of our complicated system, that the United States and the States are severally entitled to appropriate, each to itself, as many persons to carry on its governmental functions as it needs, — to exempt them from all conflicting duties to the other government, — and to make the appropriation so far exclusive as to prevent their rendering any service to the other government.<sup>6</sup> In such a case, however, a man in the employ of the United States, for instance, could not be permitted, further than

<sup>1</sup> Ante, § 172 et seq.; *Harlan v. People*, 1 Doug. Mich. 207; *Fox v. Ohio*, supra; *Moore v. Illinois*, 14 How. U. S. 13; *People v. Kelly*, 38 Cal. 145.

<sup>2</sup> *Fox v. Ohio*, 5 How. U. S. 410; *The State v. Antonio*, 3 Brev. 562, 2 Tread. 776; *The State v. Tutt*, 2 Bailey, 44; *Harlan v. People*, 1 Doug. Mich. 207; *Sutton v. The State*, 9 Ohio, 133; *Chess v. The State*, 1 Blackf. 198; *Commonwealth v. Fuller*, 8 Met. 313; *The State v. Pitman*, 1 Brev. 32; *Hendrick v. Commonwealth*, 5 Leigh, 707; *Jett v. Commonwealth*, 18 Grat. 933; *Sizemore v. The State*, 3 Head, 26. See *Rouse v. The State*, 4 Ga. 136; *Manley v. People*, 3 Seld. 295, 302, 303; *The State v. Brown*, 2 Oregon, 221. And see Vol. II. § 283-287.

<sup>3</sup> Vol. II. § 285 and note; *The State v. Adams*, 4 Blackf. 146; *Harlan v. People*, 1 Doug. Mich. 207; *Fox v. Ohio*, supra; *The State v. McPherson*, 9 Iowa, 53; *People v. White*, 34 Cal. 133.

<sup>4</sup> See *People v. Westchester*, 1 Parker C. C. 659. As to perjury in naturalization papers, see Vol. II. § 1023; *Rump v. Commonwealth*, 6 Casey, 475; *People v. Sweetman*, 3 Parker C. C. 358.

<sup>5</sup> Post, § 983-989. And see *Fox v. Ohio*, 5 How. U. S. 410, 432; *United States v. Marigold*, 9 How. U. S. 560; *Moore v. Illinois*, 14 How. U. S. 13, 20.

<sup>6</sup> *The State v. Martindale*, 1 Bailey, 163; *Kentucky v. Ohio*, 24 How. U. S. 66. And see *Commonwealth v. Knox*, 6 Mass. 76.

official duty required, to violate the law of a State ;<sup>1</sup> but what are all the limitations and the entire consequences of this doctrine we may not be able to say.

**Tax on Salaries.** — One proposition is, that neither the United States<sup>2</sup> nor a State<sup>3</sup> can tax the salaries of the officers of the other.

§ 181. **Consuls.** — Consuls are neither indictable nor pursuable civilly in the State courts, but only in those of the United States.<sup>4</sup> The doctrine appears to be, that the offence itself, or the civil wrong, for which the consul is called in question, may be in violation of the laws of a State ; the mere forum, in such a case, being the national tribunal.

<sup>1</sup> *United States v. Hart*, Pet. C. C. 390.

<sup>2</sup> *The Collector v. Day*, 11 Wal. 113.

<sup>3</sup> *Dobbins v. Erie*, 16 Pet. 435.

<sup>4</sup> Const. U. S. art. 3, § 2 ; *Mannhardt v. Soderstrom*, 1 Binn. 138 ; *Hall v. Young*, 3 Pick. 80 ; *Sartori v. Hamilton*,

1 Green, N. J. 107 ; *United States v. Lathrop*, 17 Johns. 4 ; *Valarino v. Thompson*, 3 Seld. 576 ; *Commonwealth v. Kosloff*, 5 S. & R. 545 ; *Griffin v. Dominguez*, 2 Duer, 656 ; *United States v. Ravara*, 2 Dall. 297. And see *United States v. Ortega*, 11 Wheat. 467 ; 1 Kent Com. 45.

## CHAPTER IX.

THE SOURCES AND NATURE OF THE JURISDICTIONAL POWER  
OF THE UNITED STATES OUTSIDE THE STATES.

§ 182. **Scope of this Chapter.** — In a previous chapter,<sup>1</sup> the jurisdiction which a nation is entitled to exercise outside her territorial limits was considered. The purpose of this chapter is to show, that, within the doctrines there stated, the United States is, under the Constitution, a nation.

§ 183. **Constitutional Provisions, grouped.** — The more important provisions, leading to this consequence, are the following: The President “shall have power, by and with the advice and consent of the Senate, to make treaties, . . . and he shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers, and consuls.”<sup>2</sup> “The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . . to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies; . . . to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces,” &c.<sup>3</sup> On the other hand, it is also provided, that “no State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal;” or, “without the consent of Congress, . . . keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded or in such imminent danger as will not admit of delay.”<sup>4</sup>

<sup>1</sup> Ante, § 109 et seq.

<sup>2</sup> Const. U. S. art. 2, § 2.

<sup>3</sup> Const. U. S. art. 1, § 8.

<sup>4</sup> Const. U. S. art. 1, § 10.

§ 184. **Other Provisions — Effect of All.** — These provisions are somewhat strengthened by others, conducting to the same result; namely, that, as laid down in a previous chapter,<sup>1</sup>—

**United States a Nation.** — The States are not known as powers outside their territorial limits; while, on the other hand, the United States is a complete government, having, outside the local bounds of the States, the full jurisdiction and functions of a nation, as recognized by the law of nations.

§ 185. **Powers Specific and Defined — Implied.** — It is indeed often said, particularly in political circles, that ours is a government of specified powers; having, therefore, it is added, none but those which, in terms, are enumerated in the Constitution. Not such, however, is the judicial interpretation, or the interpretation of reason. Judicially the Constitution is held to admit of *implied*<sup>2</sup> as well as of express powers; and it is known that when Congress was discussing the amendment quoted in our last chapter, that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,”<sup>3</sup> a proposition to insert the word “expressly” before delegated was rejected, it not being deemed wise thus to restrict the interpretation.<sup>4</sup> And, in reason, if no powers were implied in an instrument so brief, those expressly granted would be of no avail, for they could not be carried into effect.

§ 186. **United States a Nation, continued — (“Reserved” Powers).** — But the question of “reserved” powers is not important in this discussion. That question relates to the authority of the general government within State limits. Outside those limits, if the constitutional provisions above quoted and others give to the United States complete national jurisdiction, nothing remains to be “reserved.”

§ 187. **District of Columbia.** — From the foregoing views it results, that, without any express provision of the Constitution, the United States would have full jurisdiction over the District of Columbia; it not being within the limits of any State. But, to avoid all question, this instrument provides, that “the Con-

<sup>1</sup> Ante, § 145 et seq.

<sup>2</sup> *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1, 187;

*United States v. Fisher*, 2 Cranch, 358; Story Const. § 1287, 1256, 1258.

<sup>3</sup> Ante, § 156.

<sup>4</sup> Story Const. § 433, 1907.

gress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States.”<sup>1</sup>

§ 188. **Territories.** — In like manner, no special words are required to give the Nation jurisdiction over its Territories; being its possessions outside State limits. But the Constitution has the following, sometimes referred to as the basis of this jurisdiction: “The Congress shall have power to dispose of, and make all needful rules and regulations respecting, the territory or other property of the United States.”<sup>2</sup> It has been denied, particularly in political circles, that this clause refers to any thing legislative or judicial; but, in reason, there appears to be no sufficient ground why it should not be held, as it generally is, to embrace these powers among the rest. The question, it is seen, is not of practical consequence.

<sup>1</sup> Const. U. S. art. 1, § 8.

<sup>2</sup> Const. U. S. art. 4, § 3.



## CHAPTER X.

## THE COMMON LAW WITHIN UNITED STATES JURISDICTION.

§ 189. **Purpose of this Chapter.** — In this chapter, we shall endeavor to discover whether to any and what extent the common law confers on our national tribunals a jurisdiction over crime, or furnishes the rule for decision.

*General Views: —*

**Common Law in States.** — The rule is familiar, that colonists to an uninhabited country carry with them, to their new home, the laws of the mother country applicable to their altered situation and wants; which laws, in the new locality, are termed common law, whether in the old they were common or statutory. From this source is the common law of our States.<sup>1</sup>

§ 190. **Common Law as to United States.** — Before the organization of our general government, the several States were substantially independent nations: each had its system of jurisprudence; but, between them, there was no common law except the law of nations. Now, we have seen, that a mutation of governments neither creates nor annihilates law; but all laws existing before exist afterward, until repealed or modified by the new legislative power.<sup>2</sup> If, therefore, the State governments had been entirely superseded by the national, upon the formation of our Constitution, this would have brought into being no law, and destroyed none; but whatever was law in the several States would have remained such, in their particular localities. In other words, no national common law would have been introduced; but as many distinct systems of local law would have continued in force as there were States dissolved into the new nation. Then, *a fortiori*, as the sovereignty of the States was preserved, they only surren-

<sup>1</sup> See, also, for a discussion of this and, more fully, Bishop First Book, subject, 1 Bishop Mar. & Div. § 66-86; § 48-59.

<sup>2</sup> Ante, § 14.

dering certain powers which the general government assumed,<sup>1</sup> the partial change could not effect what a total would have failed to do. Therefore we can have no national common law, as a uniform system, prevailing within the territorial limits of the States; unless one has been introduced, either by the Constitution itself, or by acts of Congress made in pursuance of some constitutional authority.

§ 191. *Continued.* — In another form of words, before the Constitution of the United States was framed, there were laws in the several States; full, occupying all the space, and leaving no vacuum. Whatever mutation of government had then been made, the result must necessarily have been, that the space occupied by the prior laws would remain occupied by them, until and except as the new power should otherwise ordain. But no such complete thing was done by the establishment of the general government: it only assumed some authority which the States surrendered to it; consequently, not beyond the fair construction of their grant, could any other law become of force as a national system.

§ 192. *Continued — Exception.* — Yet, in reason, it is obvious that there are circumstances under which, not a national common law, but the somewhat varying local laws of each of the several States, constitute an unwritten rule for the tribunals of the United States. If, for example, jurisdiction over a particular subject arising within the States is transferred to the national government entire, leaving no authority over it in the States, then, as to that subject, the case is as though<sup>2</sup> the several governments of the States had been wholly superseded by the new national government. We have no authority on which to base this proposition; and the author does not propose to predict, whether or not the courts will adopt it.

§ 193. *Law and Courts distinguished.* — We should carry in our minds the distinction between law and courts to administer it. Thus, —

**Law without Courts.** — Colonists, we have seen,<sup>3</sup> carry to an uninhabited country the laws, but not the tribunals, of the coun-

<sup>1</sup> United States Constitution, amendm. art. 10; Woodbury, J., in *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, 416; ante, the last three chapters.

<sup>2</sup> Ante, § 190.

<sup>3</sup> Ante, § 14 and note.

try they leave. In the new locality, the laws remain in a practically torpid condition, yet still their existence as laws continues, until courts are established with jurisdiction to administer them. Even, in Massachusetts, down to 1857,<sup>1</sup> a part of the equity law which the colonists had brought from England had no tribunal to give it force ; yet the full jurisdiction in equity then conferred on the courts created no new law, but only a power to execute what already was. And the United States courts could always administer the whole, whenever the residence of the parties or other circumstance gave them authority in the premises.<sup>2</sup>

§ 194. **No National Common Law.**—Now, neither any clause in the United States Constitution, nor any act of Congress, adopts the common law as a national system. But—

**United States Courts enforce State Laws.**—An act of Congress has directed, — what would seem substantially to follow from general principles without it,<sup>3</sup> — that “the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.”<sup>4</sup> Therefore the established doctrine is, that we have no national common law ; but, in the language of McLean, J., “when a common-law right is asserted, we must look to the State in which the controversy originated.”<sup>5</sup> Yet it has been laid down that this provision does not apply to questions of a general nature, not based on any local statute or usage, or rule affecting title to land, or principle which has become a rule of property.<sup>6</sup>

**The Procedure.**—Neither does this provision extend to the procedure, which is regulated by other national laws.<sup>7</sup> So inflexible

<sup>1</sup> Stat. 1857, c. 214.

<sup>2</sup> 1 Bishop Mar. & Div. § 70.

<sup>3</sup> Ante, § 190-193.

<sup>4</sup> Act of 1789, c. 20, § 34 ; R. S. of U. S. § 721 ; *Elmendorf v. Taylor*, 10 Wheat. 152, 159 ; *McNiel v. Holbrook*, 12 Pet. 84 ; *Law on Jurisd.* 68-70.

<sup>5</sup> *Wheaton v. Peters*, 8 Pet. 591, 658 ; *Lorman v. Clarke*, 2 McLean, 568 ; *Dawson v. Shaver*, 1 Blackf. 204, 205 ; *People v. Folsom*, 5 Cal. 373.

<sup>6</sup> *Boyce v. Tabb*, 18 Wal. 546.

<sup>7</sup> *Wayman v. Southard*, 10 Wheat. 1,

24 ; *Thompson v. Phillips*, Bald. 246, 274 ; *Parsons v. Bedford*, 3 Pet. 433 ; *Story Const. § 1758* ; *Bains v. The James*, Bald. 544, 558 ; *United States v. Reid*, 12 How. U. S. 361 ; *The Independence*, 2 Curt. C. C. 350 ; *Matter of Freeman*, 2 Curt. C. C. 491 ; *Lanmon v. Clark*, 4 McLean, 18 ; *Snydam v. Beals*, 4 McLean, 12 ; *Mitchell v. Harmony*, 13 How. U. S. 115 ; *Parks v. Turner*, 12 How. U. S. 39 ; *Sears v. Eastburn*, 10 How. U. S. 187 ; *Bank of Hamilton v. Dudley*, 2 Pet. 492 ; *Parsons v. Bedford*, 3 Pet. 433 ; *Evans v. Eaton*,

are these, that, even in States where, as in Louisiana, equity is unknown as a system separate from law, or where, as formerly in Massachusetts, the State courts have only a limited equity jurisdiction, the national tribunals administer the local jurisprudence in their own equity forms.<sup>1</sup>

**The Criminal Laws of States.** — Moreover, it has been said,<sup>2</sup> and in respect of a particular interpretation held,<sup>3</sup> that the above act does not apply in criminal cases. And it is plain that it cannot, as a general rule, consistently with some other results which the courts have reached.<sup>4</sup> But the statutory terms would seem to include, in their proper meaning, criminal cases, the same as civil, being “trials at common law ;” and we may doubt whether there are not circumstances in which they may have this force without violating other established doctrines.<sup>5</sup>

§ 195. **Sources of National Judicial Powers.** — The judicial powers are derived, under the Constitution, from various sources. One is the subject-matter of the controversy. Under this head is the provision that “the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”<sup>6</sup> This source of jurisdiction does not give the courts permission to act in advance of a statute or treaty creating matter to act upon.<sup>7</sup> But —

**Laws of States.** — Even here, in questions reaching beyond the statute or treaty, the court looks for its common-law principles,

7 Wheat. 356; *Lane v. Townsend*, Ware, 286; *United States v. Douglass*, 2 Blatch. 207; *Téese v. Phelps*, 1 McAl. 17.

<sup>1</sup> *Gaines v. Relf*, 15 Pet. 9; *Lorman v. Clarke*, 2 McLean, 568; *United States v. Howland*, 4 Wheat. 108, 115; *Robinson v. Campbell*, 3 Wheat. 212, 222; *Bennett v. Butterworth*, 11 How. U. S. 669; 1 Bishop Mar. & Div. § 70. Story Const. § 1645, seems to state the doctrine otherwise; but without support from the authorities he cites.

<sup>2</sup> *United States v. Burr*, 1 Burr's Trial, 482; *Du Ponceau Jurisd.* 5; 1 Kent Com. 333.

<sup>3</sup> *United States v. Reid*, 12 How. U. S. 361.

<sup>4</sup> Post, § 199, 200.

<sup>5</sup> *Du Ponceau Jurisd.* 38 et seq.; *Law on Jurisd.* 68, note. And see post, § 195-200.

<sup>6</sup> Const. U. S. art. 3, § 2. And see *Home Insurance Co. v. Northwestern Packet Co.*, 32 Iowa, 223.

<sup>7</sup> “It has often been held, that, where by the Constitution a power is vested in the government of the United States over any particular subject or class of subjects, the Constitution does not, by its own force, confer a power on the courts of the United States.” Shaw, C. J., in *Commonwealth v. Peters*, 12 Met. 387, 392; s. r. *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, 485.

not to any national system of unwritten laws, but "to the State in which the controversy originated."<sup>1</sup>

§ 196. *Continued.* — There are various circumstances in which the national courts have a jurisdiction derived from the Constitution to administer, not the laws of the United States, but of a State, where not even the subject-matter is within the legislative power of Congress. It is so in most cases of "controversies between two or more States, between a State and a citizen of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."<sup>2</sup> And it is generally so in "cases affecting ambassadors or other public ministers and consuls,"<sup>3</sup> where the State courts have no jurisdiction.<sup>4</sup> But plainly, in these cases, if the person of the party is not altogether protected, but the national tribunals may entertain the suit, the laws of a State may still furnish the rule for decision.<sup>5</sup> And in none of the circumstances brought to view in this section is there either scope or need for a national common law.

§ 197. *Observation.* — The foregoing outline relates more to civil jurisprudence than to criminal, but it will help us to a better understanding of what particularly concerns the criminal law.

§ 198. *Specific Views as to the Criminal Law:* —

**Crime and Court to punish it, distinguished.** — There may be a crime, but no court authorized to punish it; or, an authorized tribunal, yet no law making the act a crime. Keeping this distinction in mind, — first, are there common-law offences against the United States? secondly, if there are, has jurisdiction over them been given to any judicial tribunal? Du Ponceau<sup>6</sup> does

<sup>1</sup> *Wheaton v. Peters*, 8 Pet. 591, 658, which was a question of copyright; ante, § 194.

<sup>2</sup> Const. U. S. art. 3, § 2; *Lorman v. Clarke*, 2 McLean, 568, 572; *United States v. Lancaster*, 2 McLean, 431, 433; *Cohens v. Virginia*, 6 Wheat. 264. This provision is partly restricted by amendm. art. 11.

<sup>3</sup> Const. U. S. art. 3, § 2; ante, § 181.

<sup>4</sup> *Mannhardt v. Soderstrom*, 1 Binn. 138; *United States v. Ravara*, 2 Dall. 297; *Commonwealth v. Kosloff*, 5 S. & R.

545; *Davis v. Packard*, 7 Pet. 276. Contra, the majority of the court in *The State v. De La Foret*, 2 Nott & McC. 217.

<sup>5</sup> See *Commonwealth v. Kosloff*, supra; *Du Ponceau Jurisd.* 34 et seq. See further as to consuls, *Griffin v. Dominguez*, 2 Duer, 656; *Taylor v. Best*, 14 C. B. 487, 18 Jur. 402, 25 Eng. L. & Eq. 383.

<sup>6</sup> "A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States." Philadelphia, 1824. This writer "has ably examined

not put the questions in these words, but he draws the distinction they indicate, and seems to answer the first in the affirmative, and the second in the negative. Now, —

**Whether Common-law Crimes against United States.** — If, by our Constitution, the governments of the States had been entirely absorbed into the general government, obviously all acts which before were offences against the several States, in their particular localities, would become such against the United States.<sup>1</sup> But what was done did not supersede State sovereignty entirely, and thus one ingredient, essential to this result, is wanting.

§ 199. **Continued — Jurisdiction.** — Contrary, therefore, to Du Ponceau, we answer the first question in the negative; and thus conclude, that common-law offences against the general government do not, in the broad sense of the proposition, exist within the local limits of the States, even if the tribunals have full criminal-law jurisdiction. Whether they have such full jurisdiction is the next question. Our judiciary acts have expressly given to the Circuit and District Courts together — we need not inquire how divided between them — exclusive cognizance of all crimes against the United States, committed either on land or sea;<sup>2</sup> and it is difficult to doubt that these words are broad enough to include common-law crimes, if such there are. But, whether the answer to the first or second or both of the above questions is in the negative, the conclusion is the same, supported by the decided cases, which have at last reached the result by a path of doubts, uncertainties, and contradictions, that the United States courts cannot punish offences against the general government until specified and defined by an act of Congress.<sup>3</sup> Still, —

§ 200. **Limits of the Doctrine.** — If our own course of reasoning, conducting to the same result through a different path, is correct, there must be, in some special instances, common-law

the subject, and shed strong light on this intricate and perplexed branch of the national jurisprudence." Chancellor Kent, 1 Kent Com. 339.

<sup>1</sup> Ante, § 9, 14, 190, 192.

<sup>2</sup> Act of Sept. 24, 1789, c. 20, § 9, 11; Stat. 1842, c. 188, § 3; R. S. of U. S. § 563, 629, 711, 4300-4305.

<sup>3</sup> United States v. Hudson, 7 Cranch, 32; United States v. Coolidge, 1 Wheat. 415, reversing the decision of Story, J.,

in 1 Gallis. 488; United States v. Lancaster, 2 McLean, 431, 433; United States v. Ravara, 2 Dall. 297; United States v. Worrall, 2 Dall. 384; United States v. New Bedford Bridge, 1 Woodb. & M. 401; United States v. Babcock, 4 McLean, 113, 115; United States v. Maurice, 2 Brock. 96; United States v. Scott, 4 Bis. 29; United States v. Taylor, 1 Hughes, 514. See also Anonymous, 1 Wash. C. C. 84.

offences against the United States, even within the territorial limits of the States.<sup>1</sup> And, aside from this, there is ground for the following qualification; namely, that, —

**Rule of Law — Procedure.** — Where an act of Congress has defined a crime, the courts in giving meaning to the act will look to the jurisprudence of the locality in which the offence was committed; while the procedure in bringing the offender to justice, including the rules of evidence, must be what is laid down by the national legislature.<sup>2</sup> Indeed, the procedure has been decided to be “the law of the State, as it was when the courts of the United States were established by the Judiciary Act of 1789.”<sup>3</sup>

§ 201. **Common-law Crimes beyond State Limits.** — When we pass beyond State bounds, the question is, in reason, entirely changed. We have seen, that there the States are unknown, and their power and jurisdiction together cease, while the United States is as completely a nation and its authority as perfect and full as if there were no States.<sup>4</sup> In just principle, therefore, the unwritten law of crime as applied in such localities by the English jurisprudence,<sup>5</sup> and the unwritten law of nations, must, in all places not within State limits, and not within some exceptional rule, constitute a common law of the United States. Accordingly, in reason, the United States tribunals would appear to have common-law cognizance of offences upon the high seas, not defined by statutes; and of all other offences within the proper cognizance of the criminal courts of a nation, committed beyond the jurisdiction of any particular State. This conclusion, however, does not as yet rest on a sufficient basis of judicial authority to be received as absolute law, and it is contrary to the dicta in some of the cases.<sup>6</sup> Yet it brings into harmony with the general doctrine several decisions which must otherwise be deemed unsound; and it is in direct conflict with perhaps but one case.<sup>7</sup> This case was decided without argument, and the court in effect

<sup>1</sup> See, particularly, ante, § 192.

<sup>2</sup> Ante, § 194; *United States v. Hawthorne*, 1 Dillon, 422; *United States v. Shepard*, 1 Abb. U. S. 431.

<sup>3</sup> *United States v. Reid*, 12 How. U. S. 361. See *United States v. Block*, 4 Saw. 211.

<sup>4</sup> Ante, § 145 et seq., 182 et seq. 192.

<sup>5</sup> See, however, *The State v. Sluby*, 2 Har. & McH. 480.

<sup>6</sup> See cases cited ante, § 198, 199, and particularly *United States v. New Bedford Bridge*, 1 Woodb. & M. 401, 438. And see *Ex parte Bollman*, 4 Cranch, 75.

<sup>7</sup> *United States v. Coolidge*, 1 Wheat. 415.

declared that it should not be a precedent for the future. We may deem, therefore, that the question is open for further discussion in our courts.<sup>1</sup>

§ 202. *Continued.* — If this doctrine were judicially established, it would give a completeness to our national government without impairing any one right ever claimed for the States. It would tend to harmony in our intercourse with foreign nations. And it would promote justice in cases not foreseen by the legislature. Evidently, too, it would carry into effect the meaning of the framers of our Constitution. To suppose, that, in the organization of our government, a whole system of laws was submerged in the depths of the ocean, beyond the reach alike of the national and State tribunals, is repugnant to reason, to the nature of law, to public policy, and not honorable to our country.<sup>2</sup>

§ 203. *District of Columbia.* — As to the District of Columbia, the question was by statute settled according to the principles just indicated, when it was acquired; the prior laws being there continued in force.<sup>3</sup> Therefore there are in this locality common-law crimes against the United States, the same, and to the same extent, as there are, in the several States, common-law crimes against the State.<sup>4</sup>

<sup>1</sup> "Whatever room there may be for doubt as to what common-law offences are offences against the United States, there can be none as to admiralty offences." Story, J., *United States v. Coolidge*, 1 Gallis. 488; *United States v. Ravara*, 2 Dall. 297; *Commonwealth v. Kosloff*, 5 S. & R. 545; *Du Ponceau Jurisd.* 9-14, 57-62. And see *Commonwealth v. Peters*, 12 Met. 387; *United States v. Bevans*, 3 Wheat. 336; *United States v. Wiltberger*, 5 Wheat. 76;

*United States v. Smith*, 5 Wheat. 153; *United States v. Shepherd*, 1 Hughes, 520; *United States v. Reese*, 4 Saw. 629.

<sup>2</sup> See ante, § 157, 192.

<sup>3</sup> *Du Ponceau Jurisd.* 69-73; *Kendall v. United States*, 12 Pet. 524, 613; *Bird v. Commonwealth*, 21 Grat. 800. And see *McKenna v. Fisk*, 1 How. U. S. 241, 249.

<sup>4</sup> *Bishop First Book*, § 109. As to the retrocession of Alexandria to Virginia, see *Phillips v. Payne*, 92 U. S. 130.



## BOOK III.

## THE SEVERAL ELEMENTS OF CRIME STATED AND ILLUSTRATED.

## CHAPTER XI.

## COMBINED ACT AND INTENT.

§ 204. **An Act is essential.** — We have seen,<sup>1</sup> that the tribunals take notice of wrongs only when the complaining party is entitled to complain. And he is so entitled only when, besides having an interest in the matter, he has suffered. Now the State, that complains in criminal causes,<sup>2</sup> does not suffer from the mere imaginings of men. To entitle her to complain, therefore, some act must have followed the unlawful thought. This doctrine is fundamental, and, in a general way, universal; but slight differences in its common-law applications appear in the books, and now and then a statute is enacted departing from judicial precedent. Thus, —

**Having a Thing in Possession — Procuring it — (Counterfeits — Tools — Obscene Libel).** — It is no offence at the common law to *have* in one's possession counterfeit coin, or forged paper, or bills of a non-existing bank, with the intent to pass them as good; or tools for forging, with the intent to use them; or an obscene libel, with the intent to publish it; because the bare possession is not an act.<sup>3</sup> But to *procure* such money or other things, with the criminal intent, is an offence; because the procuring or receiving is an act.<sup>4</sup> This is a nice distinction; yet the principles of the com-

<sup>1</sup> Ante, § 11.

<sup>2</sup> Ante, § 32.

<sup>3</sup> *Rex v. Stewart*, Russ. & Ry. 288; *s. c. nom. Rex v. Stuart*, 1 Russ. Crimes, 8d Eng. ed. 48; *Reg. v. Fulton*, Jebb, 48; *Rex v. Heath*, Russ. & Ry. 184; *Commonwealth v. Morse*, 2 Mass. 138; *Dugdale v. Reg.*, 16 Eng. L. & Eq. 380, 1 Ellis

& B. 435, *Dears.* 64, 22 Law J. N. S. M. C. 50, 17 Jur. 546; *The State v. Penny*, 1 Car. Law Repos. 517; *Rex v. Rosenstein*, 2 Car. & P. 414. But see *Reg. v. Willis*, Jebb, 48, note.

<sup>4</sup> *Rex v. Fuller*, Russ. & Ry. 308; *Dugdale v. Reg.*, 16 Eng. L. & Eq. 380, 1 Ellis & B. 435.

mon law clearly require it. There are, however, English and American statutes which make the bare possession, when accompanied with the intent, a sufficient act in the particular cases for which they provide; and possibly some of the older of these English statutes are common law in this country.<sup>1</sup>

"**Having,**" as **Evidence of "Procuring."**—So, at the common law, a possession may be shown in evidence against a prisoner on a charge of procuring.<sup>2</sup>

§ 205. **Evil Intent also essential.**—Prompting the act, there must be an evil intent,—to be explained further on.<sup>3</sup> For example, if a child is too young to have an evil intent,<sup>4</sup> or if a person of any age is insane and therefore incapable of having such intent,<sup>5</sup> or if one acts honestly under a misapprehension of facts,<sup>6</sup> there is no evil purpose, and consequently no crime.

§ 206. **Act and Intent to combine.**—From the foregoing views results the rule, established in the legal authorities, that an act and evil intent must combine to constitute in law a crime.<sup>7</sup>

<sup>1</sup> See *Rex v. Sutton*, Cas. temp. Hardw. 370, 378, 2 Stra. 1074. **Contrary Common-law Views.**—From the report of this case in *Strange* we should infer, that a possession is alone a sufficient act at the common-law; whence some modern writers have supposed that the rule was so anciently, and was changed by later decisions. But the more extended report in Cas. temp. Hardw. supra, seems to put this case on one of the English statutes. See also *Rex v. Lennard*, 2 W. Bl. 807, 1 Leach, 4th ed. 90, 1 East P. C. 170. The reporter's head-note to *Rex v. Parker*, 1 Leach, 4th ed. 41, is: "Having the possession of counterfeit money, with intention to pay it away as and for good money, is an indictable offence at common law." The date of this case is 1750. But the report shows, that no opinion was ever delivered in it by the judges. In a note, the reporter derives the doctrine from *Rex v. Sutton*, supra. And he adds: "The cases of *Rex v. Lee*, Old Bailey, 1698 [stated Cas. temp. Hardw. 371], for having in his custody divers picklock-keys with intent to break house and steal goods; *Rex v. Brandon*, Old Bailey, 1698 [stated Cas. temp. Hardw. 372], for having coining instruments with intent, &c.; *Rex v. Cox*, Old

Bailey, 1690 [stated Cas. temp. Hardw. 372], for buying counterfeit shillings, with intent, &c.,—were cited in support of the prosecution; for per Lee, J., 'all that is necessary in this case, is an act charged and a criminal intention joined to that act.'" p. 42. From this, the distinction between "procuring" and "having" would seem not to have occurred to the court or to Mr. Leach.

<sup>2</sup> *Rex v. Fuller*, Russ. & Ry. 308; *Brown's Case*, 1 Lewin, 42.

<sup>3</sup> Post, § 285 et seq.

<sup>4</sup> Post, § 367 et seq.

<sup>5</sup> Post, § 374 et seq.

<sup>6</sup> Post, § 301 et seq.

<sup>7</sup> *Rex v. Scofield*, Cald. 397, 403; 1 East P. C. 58, 225; 2 East P. C. 1028, 1030; *Commonwealth v. Morse*, 2 Mass. 138, 139; *Ross v. Commonwealth*, 2 B. Monr. 417; *Respublica v. Malin*, 1 Dall. 33; *The State v. Will*, 1 Dev. & Bat. 121, 170; *Rex v. Warne*, 1 Stra. 644; *Rex v. Heath*, Russ. & Ry. 184; *Rex v. Stewart*, Russ. & Ry. 288; *Yoes v. The State*, 4 Eng. 42; *Torrey v. Field*, 10 Vt. 353, 409; *United States v. Twenty-eight Packages*, Gilpin, 306; *Respublica v. Roberts*, 1 Dall. 39; *Gore's Case*, 9 Co. 81 a; *Dugdale v. Reg.*, 16 Eng. L. & Eq. 380, 1 Ellis & B. 435; *United States v.*

§ 207. **Whether simultaneous.** — And generally, perhaps always, the act and intent must, to constitute an offence, concur in point of time.<sup>1</sup> Therefore —

**Larceny.** — Larceny, composed of the act of trespass and the superadded intent to steal,<sup>2</sup> is not committed when this trespass and this intent do not exist at the precise moment together.<sup>3</sup> And, —

**Burglary.** — To constitute a burglary, the intent to commit the felony in the place broken must exist at the moment of the breaking and entering.<sup>4</sup>

**Possible Exceptions.** — It is difficult to say, that, by no possibility, can there be any exception to the rule which requires the act and evil intent to concur in point of time. If, for example, a man should send to a distant place an agent to do a criminal thing for him there,<sup>5</sup> then should repent, but before the countermand reached the agent the thing should be done, it would be a novel question, the decision of which could not be predicted, whether or not this ineffectual repentance and countermand would free the principal from criminal responsibility.

§ 208. **Permission abused — Trespasser ab initio.** — In civil jurisprudence, we have the rule, that, when a man does a thing by

Riddle, 5 Cranch, 311; *Gates v. Lounsbury*, 20 Johns. 427; *Rex v. Green*, 7 Car. & P. 156; *Reg. v. Chapman*, 1 Den. C. C. 432, Temp. & M. 90, 13 Jur. 885; *Case of Le Tigre*, 3 Wash. C. C. 567, 572; *Rex v. Sutton*, Cas. temp. Hardw. 370, 2 Stra. 1074; *Reg. v. Turvy*, Holt, 364.

<sup>1</sup> See the subsequent cases cited to this section; also *The State v. Will*, 1 Dev. & Bat. 121, 170; *Bullock v. Koon*, 4 Wend. 531; *Morse v. The State*, 6 Conn. 9; *Rex v. Hughes*, 2 Lewin, 229, 232, 1 Russ. Crimes, 3d Eng. ed. 21; *Rex v. Smith*, 5 Car. & P. 107, 1 Moody, 314; *Brooks v. Warwick*, 2 Stark. 389; *Reg. v. Sutton*, 2 Moody, 29.

<sup>2</sup> Post, § 342.

<sup>3</sup> *Reg. v. Preston*, 8 Eng. L. & Eq. 589, 2 Den. C. C. 353; *People v. Anderson*, 14 Johns. 294; *People v. Cogdell*, 1 Hill, N. Y. 94; *The State v. Ferguson*, 2 McMullan, 502; *The State v. Weston*, 9 Conn. 527; *Reg. v. Riley*, 14 Eng. L. & Eq. 544, Dears. 149, 17 Jur. 189; *Reg. v.*

*Glass*, 1 Den. C. C. 215, 2 Car. & K. 395; *People v. Reynolds*, 2 Mich. 422; *Long v. The State*, 12 Ga. 293; *Reg. v. Goodbody*, 8 Car. & P. 665; *The State v. Braden*, 2 Tenn. 68; *Rex v. Charlewood*, 1 Leach, 4th ed. 409, 2 East P. C. 689; *Reg. v. Brooks*, 8 Car. & P. 295; *Rex v. Leigh*, 2 East P. C. 694, 1 Leach, 4th ed. 411, note; *Reg. v. Evans*, Car. & M. 632; *The State v. Smith*, 2 Tyler, 272; *Reg. v. Peters*, 1 Car. & K. 245; *Rex v. Pope*, 6 Car. & P. 346; *The State v. Roper*, 3 Dev. 473; *Reg. v. Thistle*, 1 Den. C. C. 502, 2 Car. & K. 842; *Rex v. Pear*, 1 Leach, 4th ed. 212, 2 East P. C. 685, 697. And see *Norton v. The State*, 4 Misso. 461; *Ransom v. The State*, 22 Conn. 153; *The State v. Conway*, 18 Misso. 321; *Rex v. Holloway*, 5 Car. & P. 524. But see *The State v. Burk*, 4 Jones, N. C. 7.

<sup>4</sup> *Kelly v. Commonwealth*, 1 Grant, Pa. 484. Of course, the case supposed in the text is not one of breaking out; as to which, see Vol. II. § 99.

<sup>5</sup> See ante, § 110, 111.

permission of law, — not by license, but by permission of law, — and, after proceeding lawfully part way, abuses the liberty the law had given him, he shall be deemed a trespasser from the beginning, by reason of this subsequent abuse.<sup>1</sup> But this doctrine does not prevail in our criminal jurisprudence; for no man is punishable criminally for what was not criminal when done, even though he afterward adds either the act or the intent, yet not the two together.<sup>2</sup> On the other hand, —

§ 208 *a*. **Repentance after Act — Before.** — When a crime has been fully committed, repentance, however rapidly following, is too late to annul it.<sup>3</sup> But an abandonment of the evil intent at any time before so much of the act is done as constitutes a crime, takes from the doing its indictable quality.<sup>4</sup>

<sup>1</sup> Broom Leg. Max. 2d ed. 221; Allen v. Crofoot, 5 Wend. 506; Sackrider v. McDonald, 10 Johns. 253; Hopkins v. Hopkins, 10 Johns. 369; Gates v. Lounsbury, 20 Johns. 427. See Wheelock v. Archer, 26 Vt. 380; Bradley v. Davis, 14 Maine, 44; Jarrett v. Groathmey, 5 Blackf. 237; Wendell v. Johnson, 8 N. H. 220; Ferrin v. Symonds, 11 N. H. 363; Bond v. Wilder, 16 Vt. 393; Cushing v. Adams, 18 Pick. 110, 114; Smith v. Gates, 21 Pick. 55; Oxley v. Watts, 1 T. R. 12.

<sup>2</sup> The State v. Moore, 12 N. H. 42;

Commonwealth v. Tobin, 108 Mass. 426; United States v. Fox, 95 U. S. 670. And see the other cases cited to this section; also Vol. II. § 1028, 1122. "*Æstimatio præteriti delicti ex postremo facto nunquam crescit.*" The estimation of a crime committed never increases from a subsequent fact. Bac. Max. Reg. 8." Bouv. Law Dict.

<sup>3</sup> Post, § 732, 733; United States v. Fox, 95 U. S. 670.

<sup>4</sup> Post, § 733; Clements v. The State, 50 Ala. 117.

## CHAPTER XII.

## THE PUBLIC GOOD AND DESERT OF PUNISHMENT TO COMBINE.

§ 209. **Law aims at Practical Results.** — In the criminal department, the same as in the civil, the object of our system of legal doctrine and its judicial enforcement is to produce practical results, not to vindicate mere abstract theories of right. For example, in morals, the rule laid down by our Saviour in a case of adultery is, that the mere imagining or designing of evil is equivalent to the doing; but we have just seen,<sup>1</sup> that in our jurisprudence no such rule prevails, because neither the community nor a third person, but only the individual himself, is *harmed* by an evil imagining from which no act proceeds. And from this view we are conducted to another, which is, that, in determining whether or not a particular thing is, or should be made, cognizable by the criminal law, we are not simply to look at the morals of it, or even at the practical enormity of the evil to be remedied; but still more, and primarily, to the question, as one of sound governmental judgment, whether to punish the wrong-doer will as a judicial rule promote, on the whole, the public peace and good order.

§ 210. **Object of Punishment.** — The object of punishing criminals is often stated to be, to deter others from crime, and so protect the community; as well as, when the life is not taken, to reform the offender.<sup>2</sup> Some writers have objected to the first part of this proposition; suggesting, that the government has no right to impose suffering on one of its subjects for the good of the rest. This suggestion is clearly founded on a correct principle; yet it appears quite harmonious with the other branch of the proposition, when both branches are rightly viewed. The

<sup>1</sup> Ante, § 204.

Wayland Moral Science, 10; Paley

<sup>2</sup> Beccaria on Crimes, c. 12; Eden Moral Phil. b. 6, c. 9; Ruth. Inst. b. 1, Penal Law, 8d ed. 6; 4 Bl. Com. 16; c. 18, § 3, 16.

courts, as we have seen,<sup>1</sup> do not take cognizance of all crime. Therefore, —

**Offender's Desert and Public Good to combine.** — On the one hand, no man is to be punished unless he deserves punishment in pure retributive justice, aside from all extraneous considerations; while, on the other hand, though a penalty is merited, it will not be inflicted by the governmental powers, which do not assume the full corrective functions of the Deity, unless a public good may thereby be done.<sup>2</sup>

§ 211. **Criminal Law a Practical Science.** — The considerations thus brought to view are of wide influence. They teach us, that, while the criminal law is a science, it is for use, not speculation. Hence, also, —

**Technical Rules.** — Though, in the criminal law, there are and must be technical rules, no such rule is to be carried so far as to produce results plainly detrimental to the public repose, or to a sound administration of the judicial system. Again, —

**Justice to Defendants.** — No theories, however fine, should ever persuade a court to pronounce against a defendant a judgment to which the conscience of mankind will refuse to respond. When, as it once happened,<sup>3</sup> it is seen that the judgment will be of this sort, and the promptings of the understanding compel the court to continue the case expressly to give the defendant an opportunity to apply for a pardon, the further question should be carefully revolved, whether or not the decision itself is sound in law. Finally, —

**Practical Effect of Proposed Law.** — If the legislator would proceed wisely, he must consider as well how a proposed law will practically work, as how far it is intrinsically just. A measure of legislation may be just, while to adopt it will be an abomination.<sup>4</sup>

<sup>1</sup> Ante, § 10, 209.

<sup>2</sup> "State punishments are to be considered as founded on, and limited by, first, natural justice; secondly, public utility." Eden Penal Law, 8d ed. 6.

<sup>3</sup> Commonwealth v. Mash, 7 Met. 472; post, § 908; Stat. Crimes, § 356.

<sup>4</sup> And see the views of the late Prof. Mittermaier, ante, Introduction, note.

## CHAPTER XIII.

## THE CRIMINAL THING TO BE OF SUFFICIENT MAGNITUDE.

§ 212-215. Introduction.

216-222. The Intent.

223-229. The Act.

§ 212. **Maxims as to Small Things.**—There are in our law two maxims from which is derivable the doctrine, that jurisdiction will not be assumed by the courts over things trifling and small. One of these maxims is, *De minimis non curat lex*, the law does not concern itself about trifles;<sup>1</sup> the other is, *In jure non remota causa sed proxima spectatur*, “in law the immediate, and not the remote, cause of any event is regarded.”<sup>2</sup>

§ 213. **Whether applicable in Criminal Law.**—Each of these maxims is, it is admitted, of wide influence in the civil department of our law. Writers on the criminal law, in times past, have seldom or never mentioned either of them. But it does not follow, from this, that they are not equally applicable in the criminal department as in the civil; and an examination of the decisions shows, that, in point of actual doctrine, they are. Yet, in the language of Lord Stowell, as quoted in the Introduction,<sup>3</sup> “it would be difficult to find an English case,” or an American, in which “such a matter could force itself upon any recorded observation of a court;” consequently, though it is “deeply radicated” in our law of crimes that the tribunals will not assume jurisdiction over things trifling and small, this can hardly be deemed “directly decided” in words.<sup>4</sup>

<sup>1</sup> Broom Leg. Max. 2d ed. 105.<sup>2</sup> Broom Leg. Max. 2d ed. 165.<sup>3</sup> Ante, Introduction.<sup>4</sup> An excellent English writer, speaking of the latter of the two maxims quoted in the last section, says: “Neither does the above rule hold in criminal cases, because in them the intention is

matter of substance, and therefore the first motive, as showing the intention, must be principally regarded.” Broom Leg. Max. 2d ed. 170; referring to Bac. Max. vol. 4, p. 17. But we shall see, that the adjudged law as to the motive is directly the other way. Post, § 339-341. He illustrates his proposition thus:

§ 214. **Difficulties of the Subject.**—To so treat this subject, therefore, as to satisfy all readers is practically difficult. It would not be so but for the fact that many persons look upon legal doctrine and judicial *dictum* as identical, and fail to see how the decisions of the courts can establish a proposition otherwise than by the judges iterating and reiterating it in words. Doubtless, therefore, there are those who will even deny that any consideration is to be given to the magnitude of the act, or of the intent, or to the amount of evil it is calculated to produce, urging that the attention should be directed solely to its nature. But there is no man, lawyer, judge, or juror, whose conduct in the trial of a criminal cause will not show that truly his mind assents to the general doctrine, — to which, perhaps, he thus in form objects, — though he may be unconscious of the fact himself.

**How the Doctrine proved.**—The proof of this doctrine, like any other, consists in comparing it with the adjudged law. If the decisions are harmonized by it, and if without it they would appear in confusion and discord, it necessarily is the rule on which they proceeded. By thus comparing fact and assumed rule, man has learned every law of nature which he knows, and thus is ascertained every other law within human cognizance.

**What for this Chapter.**—It will be the purpose of this chapter to call to mind a few leading facts in the law of crime illustrating its doctrine; namely, that jurisdiction, in criminal causes, will not be assumed by the courts over things trifling and small. But the complete proof of the doctrine can, in the nature of things, appear only on a consideration of the entire system of rule and decision to be unfolded in these volumes.

§ 215. **How the Chapter divided.**—We shall pursue the inquiry as respects, I. The Intent; II. The Act.

“As, if A, of malice prepense, discharge a pistol at B, and miss him, whereupon he throws down his pistol and flies, and B pursues A to kill him, on which he turns and kills B with a dagger; in this case, if the law considered the immediate cause of the death, A would be justified as having acted in his own defence; but, looking back, as the law does, to the remote cause, the offence will amount to murder, because committed in pursuance and execution of the first murderous in-

tent.” Broom Leg. Max. 2d ed. 170, 171; referring to Bac. Max. reg. 1. What is thus said by way of illustration is doubtless sound in law, but it tends in no degree to support the proposition it would illustrate. If one kills another of malice, this is murder; and, in the case thus supposed, the fact that A, before he fled, discharged at B his pistol, shows malice to have still existed in him when he succeeded in accomplishing his intended work of killing.



I. *The Intent.*

§ 216. **Carelessness.** — Carelessness, we shall by and by see,<sup>1</sup> is, when certain evil results flow from it, criminal. But from the doctrine of this chapter it follows, that there may be a degree of carelessness so inconsiderable as not to be taken into account as criminal by the law. We may not find it easy, on principle, to show the exact line distinguishing the less and greater degrees; and, when we seek for it in authority, it there appears variable and uncertain. Thus, —

§ 217. **Medical Practitioner Careless — (Homicide).** — Not every degree of carelessness in a medical man will, if the death of the patient ensues, render him liable for manslaughter: it must be gross; <sup>2</sup> or, as more strongly expressed, the grossest ignorance or most criminal inattention.<sup>3</sup>

**Others causing Death.** — In respect to persons generally who cause death in pursuing their lawful business, the criterion is said to be, “to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct;”<sup>4</sup> yet we may doubt, on the authorities, whether this expression is not a little too strong against the accused.

**Omission — Distinguished from Commission — (Homicide).** — It appears to have been sometimes laid down, that merely omitting to do an act will not render one liable for homicide, though death follows.<sup>5</sup> And such is generally, perhaps universally, the just doctrine where the omission is not connected with a legal duty;<sup>6</sup> but not where it is.<sup>7</sup> The difference between omitting and doing is not so much in principle as in degree.<sup>8</sup> The delinquency must

<sup>1</sup> Post, § 313 et seq.

<sup>2</sup> Rex v. Long, 4 Car. & P. 398; Rex v. Van Butchell, 3 Car. & P. 629.

<sup>3</sup> Rex v. Williamson, 3 Car. & P. 635; Vol. II. § 664.

<sup>4</sup> 1 East P. C. 262. And see, as to what is sufficient carelessness, Reg. v. Conrahy, 2 Crawf. & Dix C. C. 86; Rex v. Waters, 6 Car. & P. 328; Rex v. Conner, 7 Car. & P. 488; The State v. Hildreth, 9 Ire. 440; Matheson's Case, 1 Swinton, 593. See also Vol. II. § 656 b, 681, 690.

<sup>5</sup> Rex v. Green, 7 Car. & P. 156.

<sup>6</sup> Rex v. Allen, 7 Car. & P. 153; Rex v. Smith, 2 Car. & P. 449; Reg. v. Barrett, 2 Car. & K. 343; Rex v. Squire, 1 Russ. Crimes, 8d Eng. ed. 19; Reg. v. Edwards, 8 Car. & P. 611; Rex v. Saunders, 7 Car. & P. 277; Reg. v. Vann, 8 Eng. L. & Eq. 596, 2 Den. C. C. 325, 6 Cox C. C. 379.

<sup>7</sup> Rex v. Friend, Russ. & Ry. 20; Reg. v. Lowe, 3 Car. & K. 123, 4 Cox C. C. 449, 7 Bost. Law Reporter, n. s. 375 and note, 1 Ben. & H. Lead. Cas. 49.

<sup>8</sup> On this topic a Scotch law writer observes: “The general principle,” says

be of a certain magnitude for the courts to take cognizance of it.

§ 218. **Carelessly selecting Agent — (Master and Servant — Sheriff and Deputy — Escape).** — We shall see in another connection,<sup>1</sup> that one may be so careless in employing a servant as to become liable criminally for the latter's acts in his service. And from some of the older books it appears, that a sheriff may be indicted for a mere negligent escape<sup>2</sup> suffered by a deputy, as his jailer; because he "ought to put in such a jailer as for whom he will be answerable."<sup>3</sup> But we may doubt whether the doctrine of the sheriff's liability would be carried so far now, in the absence of special circumstances; and it seems in a general way to be settled, that he cannot be held criminally for the conduct of his deputy;<sup>4</sup> though he may be liable in proceedings *quasi* criminal, for the enforcement of civil rights.<sup>5</sup>

§ 219. **Further of Principal and Agent.** — We shall see,<sup>6</sup> that the general doctrine of the criminal law is the one which exempts the master, or principal, from responsibility for a crime by the servant, or agent. Thus, —

Alison, "is, that, in acts either of duty or amusement, all persons are bound to take due care that no injury is done to any of the lieges; and that, if death ensue from the want of such care, they must be answerable for the consequences. Of course, the *degree* of care which the law requires varies with the degree of peril which the lieges sustain from its want. It is greatest where the peril is most serious, and diminishes with the decrease in the danger incurred by negligence or inattention. Thus the masters of steamboats, who are intrusted with the guidance of floating vessels of immense size, and moving with the greatest velocity, are bound to exercise the highest degree of vigilance: the drivers of stage-coaches are answerable for the next degree of diligence, then drivers of ordinary carriages and riders on horseback. This arises from the different degrees of peril which the lieges sustain from such negligence, and the greater degree of skill expected from those who are intrusted with the direction of the higher species of vehicles." 1 Alison Crim Law, 113, and see several of the

succeeding pages in this author. The Scotch law would seem to require rather less carelessness in degree to constitute what it terms culpable homicide, than the English, to constitute the corresponding offence of manslaughter. Mr. Bennett has discussed the distinction between negligent omission and commission, in a note to Reg. v. Lowe, 1 Ben. & H. Lead. Cas. 49, reported, as above mentioned.

<sup>1</sup> Post, § 316 et seq.

<sup>2</sup> See post, § 316, 321.

<sup>3</sup> Rex v. Fell, 1 Ld. Raym. 424, 5 Mod. 414, 416; 1 Hawk. P. C. Curw. ed. p. 198, § 29. But see the report of Rex v. Fell, in 1 Salk. 272. See also Rex v. Lenthal, 3 Mod. 143, 146; Reg. v. Belwood, 11 Mod. 80.

<sup>4</sup> Commonwealth v. Lewis, 4 Leigh, 364; The State v. Berkshire, 2 Ind. 207; Overholtzer v. McMichael, 10 Barr, 139; 1 East P. C. 331.

<sup>5</sup> Matter of Stephens, 1 Kelly, 584; Overholtzer v. McMichael, 10 Barr, 139. And see Miller v. Lockwood, 5 Harris, Pa. 248.

<sup>6</sup> Post, § 317.

**Servant selling Liquor, &c.** — Under the statutes forbidding the sale of intoxicating drinks without license, and the former enactments against selling goods to slaves without the consent of their masters, it is sufficient in defence that the sale was made by the defendant's clerk, unauthorized either absolutely or by implication.<sup>1</sup> Even where the statutory words were, "by an agent or otherwise," the Connecticut court held, two judges dissenting, that the servant's want of authority would excuse the master; and Ellsworth, J., in delivering the opinion of the majority, observed: —

**Continued — Distinctions as to Master's Liability — (Libel — Bookseller, &c.).** — "The master is never liable criminally for acts of his servant, done without his consent, and against his express orders. The liability of a bookseller to be indicted for a libel sold from his store by his clerk is nearest to it. But the character of these cases has not always been understood. If carefully examined, they will be found to contain no new doctrine. The leading case is *Rex v. Almon*.<sup>2</sup> Other cases followed, as may be seen.<sup>3</sup> But, having examined these cases, we speak with confidence that they contain no new doctrine. They make a sale in the master's store *high*, and, unexplained, decisive evidence of his assent and co-operation; but they will not bear out the claim that a bookseller is liable at all events for a sale by his general clerk. Lord Mansfield said, in *Rex v. Almon*, 'The master may avoid the effect of the sale, by showing that he was not privy nor assenting to it, nor encouraging it.' So in *Starkie* it is said, that the defendant in such cases may rebut the presumption by showing that the libel was sold contrary to his orders, or under circumstances negating all privity on his part."<sup>4</sup>

§ 220. **Principal's Liability, continued.** — But it is obvious that these are distinctions lying on the border line, between cases wherein the carelessness of the principal in employing the agent is so great as to render him criminally responsible, and those

<sup>1</sup> *Hipp v. The State*, 5 Blackf. 149; *The State v. Dawson*, 2 Bay, 360; *Barnes v. The State*, 19 Conn. 398. And see *Ewing v. Thompson*, 13 Misso. 132; *Caldwell v. Sacra*, Litt. Sel. Cas. 118.

<sup>2</sup> *Rex v. Almon*, 5 Bur. 2686.

<sup>3</sup> 2 Stark. Slander, 2d ed. 34; 2 Hawk. P. C. 7th ed. c. 73, § 10; *Rex v. Walter*,

3 Esp. 21; *Rex v. Gutch*, Moody & M. 433, 437; *Attorney-General v. Siddon*, 1 Cromp. & J. 229, 1 Tyrw. 41; *Attorney-General v. Riddle*, 2 Cromp. & J. 493; s. c. nom. *Attorney-General v. Riddell* 2 Tyrw. 523.

<sup>4</sup> *Barnes v. The State*, 19 Conn. 398.

wherein it is too small for the law's notice. In determining whether it is too small or not, we are to look at the particular sort of offence to which it relates, the specific act with which it is connected, and the policy of the law regarding the offence, as shown in previous adjudications.

§ 221. *Continued.* — Whatever be the doctrine in the law of libel, as to the employer's responsibility for the criminal acts of the employed, it is carried less far under most other titles of the criminal law. But, —

**As to Libel.** — Difficulties would attend the proof of participation in a libel published through an employee, were a particular consent required to be shown, sufficient to justify the very strong rule that the employer shall be *prima facie* held to have commanded the publication. So far, at least, the rule very properly extends on the authorities. And the doctrine, on the other hand, is wisely laid down, that cases may exist in which a proprietor of a newspaper will not be answerable criminally for what appears in his paper.<sup>1</sup> Still the authorities seem to go further, indeed to the extreme point, that such proprietor is generally answerable, though the paper is conducted by his servants, and he has no knowledge of the matter put into it, which, on its coming to his notice, he disapproves.<sup>2</sup>

**Nuisance — Quasi Civil.** — The case of a nuisance, to be considered further on,<sup>3</sup> perhaps occupies special ground; for, as to it, the public has a *quasi* civil right to establish; and in later pages we shall see<sup>4</sup> that, in some criminal things, what is complained of is a sort of public tort, rather than a pure crime.

§ 222. *Observations.* — The discussions under this sub-title are intended merely as suggestions to the reader, to be borne in mind through the remaining pages of these volumes. They will impress him with the general truth, that, in the criminal department as well as in the civil, our law, under proper circumstances, declines to take into its account things trivial and small. And

<sup>1</sup> *Rex v. Gutch*, Moody & M. 433; 3 Greenl. Ev. § 178. In *Rex v. Holt*, 5 T. R. 436, 444, Kenyon, C. J., observed: "If the defendant could have shown that he published the paper in question without knowing its contents, as that he could not read, and was not informed of its tendency until afterwards, that argu-

ment might have been pressed upon the jury."

<sup>2</sup> *Rex v. Williams*, Loft, 759; *Anonymous*, Loft, 544, 780; *Rex v. Gutch*, Moody & M. 433, 437; *Rex v. Walter*, 3 Esp. 21.

<sup>3</sup> Post, § 316.

<sup>4</sup> Post, § 1074–1076.

the illustrations under the next sub-title will serve the same end. Most of the minuter applications of the doctrine will appear, in subsequent pages, interspersed with the discussions under other titles.

## II. *The Act.*

§ 223. **Two Consequences — (General — Particular).** — Paley observes, that an act is followed by two classes of consequences, — particular and general. “The particular bad consequence of an action,” he adds, “is the mischief which that single action directly and immediately occasions. The general bad consequence is the violation of some necessary or useful *general* rule.”<sup>1</sup> Now, the criminal law looks more to general consequences than to particular. And out of this proposition grow some distinctions in the application of the doctrine that the thing done, to be indictable, must not be trivial and small. Thus, —

§ 224. **Larceny — (Value Small).** — If a man should steal, for example, a thing of small value, he would as essentially violate a rule necessary to the good order of society as if the value were great. It is therefore held, that an indictment for larceny may be maintained, however little the thing taken is worth, if it is of some value, even though less than the smallest coin or denomination of money known to the law.<sup>2</sup> Again, —

**Arson — (Trifle burned).** — In arson and other like criminal burnings, if any of the fibres of the wood are wasted by fire, it is immaterial how small is the quantity consumed.<sup>3</sup> Therefore, in cases of this kind, the doctrine under consideration does not apply.<sup>4</sup>

§ 225. **General and Particular ill Consequences.** — But where, taking into view both the general and special ill consequences of an act, the evil in each aspect appears small, it will not be adjudged a crime in law, though it is such as an enlightened conscience would notice and avoid, and the divine displeasure is pre-

<sup>1</sup> Paley Phil. b. 2, c. 6.

<sup>2</sup> Reg. v. Morris, 9 Car. & P. 349; Reg. v. Perry, 1 Car. & K. 725, 1 Den. C. C. 69; Rex v. Bingley, 5 Car. & P. 602; People v. Wiley, 3 Hill, N. Y. 194. See also The State v. Slack, 1 Bailey, 330; Payne v. People, 6 Johns. 103; People v. Loomis, 4 Denio, 380; Rex v. Vyse, 1

Moody, 218; Wilson v. The State, 1 Port. 118. And see Bishop First Book, § 177-181.

<sup>3</sup> The State v. Mitchell, 5 Ire. 350; Stat. Crimes, § 310.

<sup>4</sup> And see Seneca Road v. Auburn and Rochester Railroad, 5 Hill N. Y. 170.

sumed to follow. How intense the evil must be is one of the principal questions lying before us in these commentaries; and it could only be fully answered on an examination of all supposable circumstances of wrong-doing, in the light of the adjudications. And,—

**Statutes creating New Offences.**—Frequently, in the progress of society, the legislative body, deeming the courts to have gone not far enough, or deeming a wider judicial cognizance over particular wrongs to be required by changes in the public situation or wants, creates by statute what is called a new offence. And we have elsewhere seen that this new offence is to be deemed a mere added part of the general system of laws into which it is introduced, to be shaped into uniform proportions with the rest.<sup>1</sup>

§ 226. **Participation more remote as Crime heavier.**—It will be more fully shown in subsequent pages than here, that, when the law has defined an offence, an act of one to be criminal in respect of it must be greater or less in magnitude, or nearer or less near to the principal transaction, according as the offence is of greater or less enormity. Thus,—

**Treason and low Misdemeanor compared.**—Treason, for example, is the highest crime known to the law; and, when it is committed by a levying of war, those who perform very minute acts, and remote from the scene of operations, are guilty of the full offence.<sup>2</sup> And if a man takes no part, even remote, in a treason, but knows that it has been committed by another, and does not disclose the fact, he becomes by this omission of duty guilty of an inferior crime, called misprision of treason.<sup>3</sup> But, descending to the lower form of misdemeanors, he who does some remote action, or encourages another, toward its commission, or even stands by while another whom he urges on does it, is not punishable.<sup>4</sup> But these are extreme points, between which there are various shades and degrees.

§ 227. **Nuisance in Small Degree.**—So likewise, to present a somewhat different illustration, where the owners of the soil

<sup>1</sup> Stat. Crimes, § 86-90, 123, 124.

<sup>2</sup> Ex parte Bollinan, 4 Cranch, 75. And see Eden Penal Law, 8d ed. 117, 118; Vol. II. § 1232.

<sup>3</sup> 1 East P. C. 139, 140; Eden Penal Law, 8d ed. 202; post, § 717, 722.

<sup>4</sup> Commonwealth v. Willard, 22 Pick.

476; O'Blennis v. The State, 12 Misso. 311. And see The State v. Brady, 9 Humph. 74; Rex v. Soleguard, Andr. 231, 235; The State v. Clemons, 3 Dev. 472; The State v. Goode, 1 Hawks. 463; Anonymous, March, 83, pl. 136; post, § 657-659, 688, 706.

adjoining a harbor were indicted for a nuisance in erecting planks in it; and the jury found specially, that, "by the defendant's works, the harbor is in some extreme cases rendered less secure," — the court adjudged, that no offence was established; for "no person can be made criminally responsible for consequences so slight and uncertain and rare as are stated in this verdict to result from the works."<sup>1</sup>

**Slight Provocation in Homicide, &c.** — And, in felonious homicide, the provocation to the blow which results in death must, to reduce the killing to manslaughter, be sufficient in degree.<sup>2</sup> From these illustrations, which might be added to<sup>3</sup> indefinitely, the general scope of the doctrine will appear.

§ 228. **General View of the Doctrine.** — A general view of the doctrine of this sub-title is the following. Inasmuch as the tribunals neither take cognizance of all moral wrong, nor punish every remote injury to the community, the evil of each act must be measured in two ways, to determine whether it should be punishable or not. The one is by its nature, and the other is by its magnitude. And that the magnitude of the act, as well as its nature, should be considered, results from the plainest principles of reason and justice. For, if not, then would the courts undertake to exercise, in one direction, the full supervision of the Deity over men.<sup>4</sup> Indeed, the proposition is too obvious to render justifiable any extended elucidation of it, where, as here, we are considering the mere general doctrine of the criminal act. Its application, however, is in many circumstances attended with difficulty; yet with no difficulty comparable with what would follow its rejection. That would make impossible the administering of the law in multitudes of cases.

§ 229. **Conclusion.** — If any solid instruction could be imparted by multiplying illustrations, the importance of the subject would justify the extending of the chapter to much greater length. But the further views will best appear in connection with the several topics to be discussed as we proceed.

<sup>1</sup> *Rex v. Tindall*, 1 Nev. & P. 719, 6 A. & E. 143. To the like effect, see *People v. Horton*, 64 N. Y. 610; *Phillips v. The State*, 6 Baxter, 151, 153.

<sup>2</sup> 1 East P. C. 234; *Rex v. Lynch*, 5 Car. & P. 324. And see ante, § 216, 217.

<sup>3</sup> See *Reg. v. Phillpot*, 20 Eng. L. &

Eq. 591. **Small Blame in Homicide.** — In a Scotch case, a charge of culpable homicide was abandoned, under direction of the court, because of the small degree of blame attributable to the defendant. *Matheson's Case*, 1 Swinton, 593.

<sup>4</sup> See ante, § 209-211.

## CHAPTER XIV.

## THE WRONG AS A PUBLIC IN DISTINCTION FROM A PRIVATE INJURY.

§ 230-234. Introduction.

235-249. Indictable Public Wrongs.

250-254. Indictable Private Wrongs.

§ 230. **Public must suffer.** — In criminal prosecutions, the public, under the name of King, Queen, State, Commonwealth, People, or the like, is the party complaining;<sup>1</sup> consequently the public must suffer an injury, for the individual to be guilty of crime.

§ 231. **Injury to Individual viewed as Public Injury.** — It is plain, in philosophical speculation, that an act which injures any member of the body politic injures the body of which the individual constitutes a part; just as, when a man's hand is wounded, the man is wounded. The inference would be, that every such act, though it thus falls directly on an individual only, is of a nature to be indictable. But this philosophical view is limited, in its practical application, by the doctrine, that the law does not take cognizance of small things.<sup>2</sup> If an injury affects directly and primarily only a single person, though it may be great in magnitude as respects him, it is still, in general, a small thing as to the public. Therefore, —

**Injury to One.** — For an injury to one person alone, an indictment will not ordinarily lie.

§ 232. **Continued — Better Statement of Doctrine.** — Such is the general proposition; yet it has, in the law, so many exceptions as to become almost valueless as a rule for practical guidance. A better practical statement of the doctrine is, that, for the act to be indictable, either it must be in its nature injurious to the public at large in distinction from individuals, or it must be a wrong to individuals of a nature which the public takes notice of as

<sup>1</sup> Ante, § 32.  
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<sup>2</sup> Ante, § 212 et seq.



injurious to itself.<sup>1</sup> The books are full of expressions going further, to the effect, that, in all cases, the act must be a public wrong in distinction from a private. But clearly such expressions proceed from misapprehension; because, to illustrate the true view, —

**Larceny — Other Crimes against Individuals.** — Nothing can be more purely a tort to the individual alone than a simple larceny, where there is no breach of the peace; no public loss of property, since it only changes hands; no open immorality, corrupting the minds of the young; no person in any way affected but him who takes, and him who loses, the thing stolen. And, as in larceny, so it is in many other crimes; a public offence is committed, while only an individual directly suffers.

§ 233. **Wrongs to Individuals indictable.** — Whenever, therefore, the public deems that an act of private wrong is of a nature requiring the public protection for the individual, it makes the act punishable at its own suit; or, in other words, makes it a crime. What acts are deemed of this sort, and what are not, can be learned only by consulting the unwritten and statutory law in detail. Let us look at the whole doctrine a little further.

§ 234. **How the Chapter divided.** — We shall consider, I. Indictable Public Wrongs; II. Indictable Private Wrongs.

### I. *Indictable Public Wrongs.*

§ 235. **Individuals suffer from Wrongs to Public.** — As the public partakes of the sufferings of its individual members,<sup>2</sup> so does each individual suffer when the public does. Therefore every injury to the public is an injury to each individual.<sup>3</sup> Yet, —

**When Private Action not maintainable.** — When the suffering of one member of the community is no more than that of every other member, it is small; and, small or great, if the injury is common to the whole community, affecting no one person specially, the law would be unreasonable to allow each to bring his separate suit, where all could alike complain, and overwhelm the transgressor with litigation.<sup>4</sup> Therefore the rule of the law is, that, under such circumstances, no one can have his private action.<sup>5</sup>

<sup>1</sup> See ante, § 32, 210.

<sup>2</sup> Ante, § 231.

<sup>3</sup> See 4 Bl. Com. 5.

<sup>4</sup> 4 Bl. Com. 167.

<sup>5</sup> Broom Leg. Max. 2d ed. 157.

**When Indictment maintainable.** — But if there were no public remedy, the wrong would go unredressed. When, therefore, a thing is done to the injury of the whole community, and sufficient in magnitude for the tribunals to notice,<sup>1</sup> it is cognizable criminally. It need not be more intensely evil than torts for which, being directed merely against an individual, only a civil remedy is provided.<sup>2</sup> Thus, —

§ 236. **Nuisance Public or Private — Injury to one, or Community.** — If a man goes on his neighbor's land and deadens a tree there growing, he exposes himself to a civil suit; if, on public land, to a criminal.<sup>3</sup> Or, if a nuisance affects the public, it is indictable, while actionable if it affects only individuals.<sup>4</sup> But it would be difficult to show the act to be more evil in nature or degree in the latter cases than in the former ones.

§ 237. **What a Statute prohibits, indictable or not.** — It is obvious that whatever is made the subject of statutory prohibition is thus brought to the notice of the tribunals. So we see, carrying in our minds the principles stated in the last section, how it is, that, as observed in another connection, when a statute forbids a thing affecting the public, but is silent as to any penalty, the doing of it is indictable at the common law.<sup>5</sup> If it were a special injury to an individual, he would have his common-law action;<sup>6</sup> and an

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> See *Rex v. Gaul*, Holt, 363; *Crouther's Case*, Cro. Eliz. 654; *Anonymous*, Lofft, 185; *Pennsylvania v. Gillespie*, Addison, 267; *Rex v. Lesingham*, T. Raym. 205; *Anonymous*, Comb. 46; *Rex v. Ford*, 2 Stra. 1130; *Commonwealth v. Webb*, 6 Rand. 726.

<sup>3</sup> *Commonwealth v. Eckert*, 2 Browne, Pa. 249.

<sup>4</sup> *Rex v. Trafford*, 1 B. & Ad. 874, where Tenterden, C. J., said: "We think there can be no doubt, that, if the wrong [a nuisance] would have entitled an individual owner of land to maintain an action for it, it is properly the subject of an indictment like the present for a public nuisance." p. 886.

<sup>5</sup> Stat. Crimes, § 138; and, besides the cases there cited, *Rex v. Jones*, 7 Mod. 410, 2 Stra. 1146; *Rex v. Vaughan*, Skin. 11; *Rex v. Gregory*, 2 Nev. & M. 478, 5 B. & Ad. 555; *Rex v. Smith*, 2 Doug. 441; *W.'s Case*, Lofft, 44; *Rex v. Com-*

*mings*, 5 Mod. 179; *Rex v. Hemmings*, 3 Salk. 187; *Crofton's Case*, 1 Vent. 63, 1 Mod. 34; *Reg. v. Nott*, 4 Q. B. 768, Dav. & M. 1; *Griffith v. Wells*, 3 Denio, 226; *Colburn v. Swett*, 1 Met. 232; *The State v. Thompson*, 2 Strob. 12; *Rex v. Howard*, 7 Mod. 307; *Commonwealth v. Shattuck*, 4 Cush. 141, 146; *Tate v. The State*, 5 Blackf. 73; *People v. Norton*, 7 Barb. 477; *Rex v. Rogers*, 2 Keny. 373; *The State v. Lenoir Justices*, 4 Hawks, 194; *The State v. Williams*, 12 Ire. 172; *Pennsylvania v. Gillespie*, Addison, 267; *Rex v. Sparkes*, 2 Show. 447; *Smith v. Langham*, Skin. 60, 61; *Rex v. Wright*, 1 Bur. 543, 545; *Waterford and Whitehall Turnpike v. People*, 9 Barb. 161; *Keller v. The State*, 11 Md. 525; *Phillips v. The State*, 19 Texas, 158. Contra, *The State v. Ashley*, Dudley, Ga. 188. And see the *State v. McEntyre*, 3 Ire. 171.

<sup>6</sup> *Beckford v. Hood*, 7 T. R. 620; *Barden v. Crocker*, 10 Pick. 383; *Colburn v. Swett*, 1 Met. 232; *Jenner v. Joliffe*, 9

indictment would not lie, unless it were also injurious to the public.<sup>1</sup> And, for the same reason, —

**Attempt to violate Statute.** — When an act is by legislation made criminal, an unsuccessful attempt to do it, carried far enough to attract the law's notice, is an indictable misdemeanor, not under the statute, but at the common law.<sup>2</sup>

§ 238. **Prohibition without Penalty, continued.** — It is sometimes an embarrassing question, whether a particular prohibition is open to the construction of laying the foundation for a common-law indictment, by reason of its being accompanied in the same statute with a disconnected penalty, — it is elsewhere discussed.<sup>3</sup> Again; the difficulty may arise, whether the thing prohibited is of the peculiar nature which the common law makes indictable; because evidently, if it is not, no common-law indictment lies on the prohibition, — the remedy being either a civil suit to be prosecuted by the party aggrieved, or some special proceeding de-

Johns. 381; Broom Leg. Max. 2d ed. 64; *Ferguson v. Kinnoull*, 9 Cl. & F. 251. **Right to Advertise Post-Office Letters.**

— According to a New York case, however, no action will lie by the publisher of a newspaper against a postmaster for refusing to receive proofs that his paper is, by reason of its larger circulation, entitled to advertise letters remaining in the post-office, under an act of Congress and instructions from the Postmaster-General; the reason being, that the law was intended for the public good only. Johnson, J., observed: "To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action. In this I apprehend all the authorities will be found to agree. *Martin v. Brooklyn*, 1 Hill, N. Y. 545; *Bank of Rome v. Mott*, 17 Wend. 554; 19 Vin. Abr. 518, 520;

*Ashby v. White*, 6 Mod. 45, 51, 1 Salk. 19. In the latter case, Holt, Chief Justice, laid down the rule, that it must be shown that the party had a right *vested* in him, in order to maintain the action. And this, I apprehend, is the true rule." *Strong v. Campbell*, 11 Barb. 135, 138. It is not within the plan of these volumes to discuss questions of mere civil right; but there is reason for the opinion that the decision in this case might have been put on a firmer ground of principle. If a statute was passed for the exclusive benefit of a particular person, no doubt another could not claim a right under it. But where it is for the public, and an individual suffers under it an injury not common to other members of the public, the doctrine to be discussed, post, § 264, seems to give him the right of action. Yet such injury may be too remote from its cause, may be too vague and uncertain, and so on, for the law's notice; in which circumstances his remedy fails through the operation of other principles. Into this latter class the case under consideration seems to fall; though perhaps it falls into the former also.

<sup>1</sup> *Rex v. Leginham*, 1 Mod. 71. And see *Crumpton v. Newman*, 12 Ala. 199; *Rex v. Watson*, 2 T. R. 199.

<sup>2</sup> Stat. Crimes, § 138.

<sup>3</sup> Stat. Crimes, § 249-253.

manded by the particular case. In considering these statutes, therefore, the mind must sometimes traverse the entire field of our jurisprudence. Thus is beautifully illustrated the general truth, that no one can understand well the doctrines of any given title in the law without some knowledge of the entire law.

§ 239. **Breach of Common-law Duty indictable.** — The principles which govern these statutes are not peculiar to the statutory law, but they pervade the common law as well. For the doctrine is general, that, whenever the law, statutory or common, casts on one a duty<sup>1</sup> of a public nature, any neglect of it, or act done in violation of it, is indictable.<sup>2</sup> Still, —

**Limits of Doctrine.** — As said many times in these pages,<sup>3</sup> there are duties, clear and well defined in morals, of magnitude so small, or even otherwise of such a nature, as not to be taken into account in the law. Such duties are not included in our rule. In this particular, as in others, we must be guided by the landmarks which adjudication has laid down.<sup>4</sup>

§ 240. **Breach of Magistrates' Order.** — The English books furnish illustrations of our rule in cases where magistrates, in sessions or otherwise, pass an order of a nature affecting the public, — as, to support poor persons,<sup>5</sup> or a woman and her bastard child,<sup>6</sup> or to pay the costs of an appeal to the poor's rate,<sup>7</sup> or to admit an individual to membership in a friendly or benefit society,<sup>8</sup> and other like orders<sup>9</sup> within the jurisdiction of the magistrates, — the doctrine being, that disobedience to the order is indictable at the common law. In principle, the like doctrine must prevail in our country.<sup>10</sup> But most of these orders are unknown in our practice, or they are founded on a statute which itself provides a

<sup>1</sup> That the duty must be a legal one, see *Reg. v. Vann*, 8 Eng. L. & Eq. 596, 2 Den. C. C. 325, 5 Cox C. C. 379; *The State v. Bailey*, 1 Fost. N. H. 185; *Reg. v. Everett*, 8 B. & C. 114.

<sup>2</sup> See *People v. Norton*, 7 Barb. 477; post, § 313 et seq.

<sup>3</sup> See ante, § 212 et seq.

<sup>4</sup> And see the observations of Dade, J., in *Anderson v. Commonwealth*, 5 Rand. 627, 631.

<sup>5</sup> *Reg. v. Turner*, 5 Mod. 329.

<sup>6</sup> *Reg. v. Moorhouse*, Cald. 554, 4 Doug. 388; *Reg. v. Brisby*, 3 New Sess. Cas. 591, Temp. & M. 109, 1 Den. C. C. 416, 13 Jur. 520.

<sup>7</sup> *Rex v. Boys*, Say. 143.

<sup>8</sup> *Rex v. Gilkes*, 3 Car. & P. 52; *Rex v. Wade*, 1 B. & Ad. 861; *Rex v. Byce*, Bott, P. L. 324.

<sup>9</sup> *Rex v. Gash*, 1 Stark. 441; *Rex v. Mytton*, Cald. 536, 1 Bott P. L. 439, note, 4 Doug. 333; *Rex v. Robinson*, 2 Bur. 799, 2 Keny. 513; *Rex v. Boyall*, 2 Bur. 832, 2 Keny. 549; *Reg. v. Wood Ditton*, 18 Law J. n. s. M. C. 218; *Rex v. Wiggot*, Comb. 205; *Reg. v. Crossley*, 2 Per. & D. 319, 10 A. & E. 132, 3 Jur. 675.

<sup>10</sup> And see, under this title, "Contempt of Court." Vol. II. § 264-266.

remedy, or practically it is more convenient to proceed by process for contempt. Again, —

**Order of Quarantine.** — In England, disobedience to a lawful order of the privy council, concerning the performance of quarantine, is indictable.<sup>1</sup>

**Officer disobeying Magistrate.** — So an officer<sup>2</sup> commits a criminal misdemeanor who refuses to serve<sup>3</sup> or return<sup>4</sup> a magistrate's warrant in a criminal case; or, having served it, disobeys the magistrate's mandate to take the arrested person to prison during an adjournment of the examination; and it is no defence to have him otherwise in custody, and produce him at the adjourned hearing.<sup>5</sup> This sort of ill conduct is, in most of our States, cognizable by the magistrate as a contempt;<sup>6</sup> and, in practice, the summary process is usually resorted to, but undoubtedly an indictment is equally maintainable where common-law offences are known.

§ 241. **Neglect to repair Way, &c.** — Moreover, as we shall see in another place,<sup>7</sup> if the law casts upon an individual or corporation the duty of repairing a public way, a neglect of this duty is consequently indictable at the common law. We might add numerous other illustrations of the doctrine; but we should thereby only anticipate, with small compensatory advantage, a large part of the particular discussions of these volumes.

§ 242. **Doctrine Epitomized.** — The foregoing views may be condensed, thus: The law has its bounds of duty, drawn with reference to practical ends, and it seeks to keep people within them, not to compel a compliance with the entire rule of ethics; and, whenever one steps over these bounds, it pursues him according to the method appropriate to the case. If the transgression is in a thing affecting the public directly, in distinction from a mere wrong to an individual, then an indictment is the appropriate method.<sup>8</sup>

<sup>1</sup> *Rex v. Harris*, 2 Leach, 4th éd. 549, 4 T. R. 202.

<sup>2</sup> See *The State v. Berkshire*, 2 Ind. 207.

<sup>3</sup> *Rex v. Mills*, 2 Show. 181.

<sup>4</sup> *Reg. v. Wyatt*, 1 Salk. 380; s. c. nom. *Reg. v. Wyatt*, 2 Ld. Raym. 1189.

<sup>5</sup> *Reg. v. Johnson*, 11 Mod. 62.

<sup>6</sup> Vol. II. § 244, 263.

<sup>7</sup> Vol. II. § 1281.

<sup>8</sup> **How in the Scotch Law.** — Upon this general subject, some views from

high Scotch authority may be interesting. Says Erskine: "Acts, though not of their own nature immoral, if they had been done in breach of an express law to which no penalty was annexed, and which, by the Roman law got the name of *crimina extraordinaria*, having been by them deemed criminal, were punished as proper crimes; and indeed it seems to be a rule founded in the nature of laws, that every act forbidden by law, though the prohibition should not be guarded

§ 243. *How many must an Act injure to be deemed injurious to the Public:—*

**Adapted for General Injury.**—For an act to be injurious to the public, within the foregoing doctrines, there is no need it should, in fact, injure every one. But it must be of a nature to produce injury to all; and, when carried fully out, must in fact injure all who are in the particular locality, or otherwise within the influence of the act. Thus,—

**Nuisance.**—An indictment for nuisance must allege that the thing done was to the common nuisance of *all* the citizens in the place, not merely of *divers* citizens.<sup>1</sup>

§ 244. Continued — (**Remote or Populous — “Three Houses”**).—Yet many things are indictable nuisances when done in populous places, being therefore actually detrimental to many, while innocent in a retired locality, to which, at the same time, many might, if they chose, resort.<sup>2</sup> And if what is done affects only a small

by a sanction, is punishable by the judge according to its demerit, as a transgression of law and a contempt of authority; otherwise all such prohibitory statutes might be transgressed with impunity. Lawyers, however, are generally of opinion, that the transgression in that case, though it ought not to escape all censure, is not punishable as a proper crime, unless the act be in itself criminal, i.e., contrary to the law of nature, though there had been no such prohibition. If the law forbid any act to be done, or deed to be granted, under any special penalty of a civil kind, the transgression of it cannot be tried criminally, though the act done in breach of the prohibition should be in its nature criminal; because the law, by annexing a special civil penalty to the transgression of it, appears to have excluded all other punishment.” Erskine Inst. 4, 4, 4. Plainly the “censure,” which, according to the Scotch lawyers as explained in this paragraph, should be visited upon the violator in cases not amounting to “proper crime,” cannot, according to the rules of our common-law practice, be visited otherwise than by proceeding against the wrong-doer as for a criminal misdemeanor. And I do not understand that the Scotch “censure” is less than what

we should call a punishment, to be inflicted pursuant to the sentence of the judge. Agreeing substantially with Erskine, that older, but highly esteemed Scotch writer, Mackenzie, says: “Lawyers assert, that such as disobey and transgress any prohibiting law may be punished arbitrarily as contemners of the law, suitably to the degree of their contempt, though they cannot be punished criminally as guilty of a crime. The transgressing any municipal law, which prohibits that which either the law of God or the civil law punishes criminally by corporal punishment or a pecuniary mulct, is a crime; and thus the poinding oxen in time of laboring was declared a crime in the former decision; because, though it was prohibited by an express statute, which did bear no punishment, yet it ought to have been punished according to the civil law, whereby it is declared to be a crime.” Mackenzie Crim. Law, 1, 1, 3.

<sup>1</sup> Commonwealth v. Smith, 6 Cush. 80; Commonwealth v. Faris, 5 Rand. 691; Rex v. Medley, 6 Car. & P. 292; Reg. v. Webb, 1 Den. C. C. 338, 2 Car. & K. 933, Temp. & M. 23, 13 Jur. 42. And see Crim. Proced. II. § 862-864.

<sup>2</sup> See Ellis v. The State, 7 Blackf. 534; Rex v. Pierce, 2 Show. 327; Rex v. Cross,

number of persons, — in one case, it was said, the inhabitants of three houses,<sup>1</sup> — it is not indictable.<sup>2</sup> So —

**Exposure of Person to One.** — To indecently expose the person to one, even in a place in some sense public, yet not within public view, is not an indictable nuisance; while, if the exposure were to several, or if many could have seen it, being public, had they looked, the offence would be committed.<sup>3</sup> This is a distinction sometimes made on a question not well settled in authorities which are perhaps not uniform.<sup>4</sup>

**Public Way.** — In such a nuisance as the obstruction of a way, actual damage to any particular individual need not be shown, it being sufficient that the obstruction is calculated to injure all who may choose to travel the way.<sup>5</sup>

§ 245. **Continued.** — But in cases of the last-mentioned class, the way, for instance, must be one over which all the inhabitants of the country are privileged to travel.<sup>6</sup>

**Way for less than Entire Public.** — If it belongs merely to a town, whose inhabitants only are entitled to use it,<sup>7</sup> and, *a fortiori*, if it is simply the private way of an individual,<sup>8</sup> an obstruction of it will not be indictable.<sup>9</sup>

**Immaterial who repair.** — Yet whether it is called a town or a

2 Car. & P. 483; *Rex v. Watts*, Moody & M. 281; *Reg. v. Wigg*, 2 Salk. 460, 2 Ld. Raym. 1163; *Beatty v. Gilmore*, 4 Harris, Pa. 463, 469; *Ray v. Lynes*, 10 Ala. 63; *Rex v. Carlile*, 6 Car. & P. 636; *Rex v. Neville*, Peake, 91.

<sup>1</sup> *Rex v. Lloyd*, 4 Esp. 200.

<sup>2</sup> *Rex v. Hornsey*, 1 Rol. 406.

<sup>3</sup> *Reg. v. Webb*, 1 Den. C. C. 338, Temp. & M. 23, 13 Jur. 42, 2 Car. & K. 933, and the cases there cited; *Fowler v. The State*, 5 Day, 81, 84; *Commonwealth v. Caillin*, 1 Mass. 8; *Reg. v. Holmes*, 20 Eng. L. & Eq. 597; *Reg. v. Orchard*, 20 Eng. L. & Eq. 598, 3 Cox C. C. 248; *Reg. v. Watson*, 20 Eng. L. & Eq. 599, 2 Cox C. C. 376. See, however, *The State v. Millard*, 18 Vt. 574.

<sup>4</sup> Post, § 1125 et seq.

<sup>5</sup> See Vol. II. § 1272-1277.

<sup>6</sup> And see, as illustrative, *People v. Jackson*, 7 Mich. 432; *The State v. Rye*, 85 N. H. 368.

<sup>7</sup> *Commonwealth v. Low*, 3 Pick. 408; *The State v. Strong*, 25 Maine, 297.

**Way for Nine Parishes.** — The case of *Rex v. Richards*, 8 T. R. 634, decides, that, if commissioners under an enclosure act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment lies for the non-repair. The court said, "that those matters only which concerned the public were the subject of an indictment. That the road in question, being described to be a *private road*, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it. That the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of it; that each party injured might bring his action against those on whom the duty was thrown."

<sup>8</sup> *The State v. Randall*, 1 Strob. 110.

<sup>9</sup> And see *Reg. v. Saintiff*, Holt, 129; *Commonwealth v. Webb*, 6 Rand. 726.

county way, or, like a turnpike road, the way of a particular private person or corporation, in respect of the person bound by law to keep it in repair, is immaterial; provided all the people have a right to its use, on conforming to the terms required by law.<sup>1</sup>

§ 246. **Refusal to accept Local Office.** — A refusal to accept office of a public nature being indictable,<sup>2</sup> in reason it need not be one giving the incumbent sway over the whole country; as a public road is not required to span the entire land, to render its obstruction a crime. Therefore the refusal is held to be sufficient, though the office is one of a mere local nature; as that of common-councilman or the like in a municipal corporation; or overseer of the poor, constable, sheriff, or any town officer.<sup>3</sup> Still there are circumstances in which a court, acting under a discretion, will not interfere by information, while yet an indictment will lie;<sup>4</sup> and possibly instances in which a public corporation has power to provide a remedy superseding even the indictment.<sup>5</sup> And, among things special to exceptional cases, the local character of an office may doubtless be numbered.

**Bribery as to Local Office.** — In like manner, bribery may be committed by promising one money to vote at the election of members of a corporation “created for the sake of public government.”<sup>6</sup>

<sup>1</sup> *Commonwealth v. Gowen*, 7 Mass. 378; *Commonwealth v. Wilkinson*, 16 Pick. 175; *The State v. Sturdivant*, 18 Maine, 66; *The State v. Atkinson*, 24 Vt. 448; *The State v. Commissioners*, Riley, 146; *Rung v. Shoneberger*, 2 Watts, 23; *The State v. Commissioners*, 3 Hill, S. C. 149; *Perrine v. Farr*, 2 Zab. 356.

<sup>2</sup> Post, § 458.

<sup>3</sup> *Rex v. Denison*, 2 Keny. 259; *Rex v. Bernard*, Holt, 152; s. c. nom. *Rex v. Barnard*, Comb. 416; *Rex v. Bettsworth*, 2 Show. 75; *Rex v. Lone*, 2 Stra. 920; *Attorney-General v. Read*, 2 Mod. 299; *Rex v. Woodrow*, 2 T. R. 731; *Rex v. Jones*, 7 Mod. 410, 2 Stra. 1146; *Rex v. Prigg*, Aleyn, 78; *Reg. v. Soley*, 11 Mod. 115; *Rex v. Cripland*, 11 Mod. 387; *Rex v. Jolliffe*, 1 East, 154, note; *Rex v. Commings*, 5 Mod. 179; *Rex v. Hemmings*, 3 Salk. 187; *Rex v. Corry*, 5 East, 372; *Commonwealth v. Silsbee*, 9 Mass.

417; *The State v. Hoit*, 3 Fost. N. H. 355, there being, however, in New Hampshire, a statute. But see *The State v. McEntyre*, 3 Ire. 171; *The State v. Liston*, 9 Humph. 603. Libel. — In an old case, it was doubted whether the words, “The mayor and aldermen of Hertford are a pack of as great villains as any that rob on the highway,” — were indictable; for “what is it to the government that the mayor, &c., are a pack of rogues?” *Rex v. Granfield*, 12 Mod. 98.

<sup>4</sup> *Rex v. Grosvenor*, 1 Wils. 18, 2 Stra. 1193; *Rex v. Denison*, 2 Keny. 259; *Anonymous*, 11 Mod. 132; *Reg. v. Hungerford*, 11 Mod. 142.

<sup>5</sup> See *Anonymous*, 11 Mod. 132; *Reg. v. Hungerford*, 11 Mod. 142; *The State v. McEntyre*, 3 Ire. 171; *Rex v. Grosvenor*, 2 Stra. 1193.

<sup>6</sup> *Rex v. Plympton*, 2 Ld. Raym. 1377, 1379; Vol. II. § 88, note.



§ 247. *How Intense the Evil* :—

**Varying.**—A wrong to the public need not, we have seen,<sup>1</sup> be more blameworthy to be indictable than a mere private tort, for which a civil action only will lie. And, on the other hand, there are public wrongs of the greatest magnitude.

**Subject to Rules varying with Enormity.**—The law, as we have partly seen,<sup>2</sup> treats offences in many respects differently, according to their differing degrees of blameworthiness. The lowest, for example, approximate closely to civil torts; while the highest receive an opposite consideration. It seems often to be regarded<sup>3</sup> as a legal virtue to forbear prosecuting the lowest; but he who knows that the highest has been committed is even indictable if he does not lay the facts before the authorities to procure a prosecution.<sup>4</sup> Yet the lowest come fully within other distinctive principles of the criminal law. For illustration, they must, in nearly and perhaps all cases, be committed, like the highest, with the criminal intent to be explained in our chapters on that subject; because this doctrine flows from considerations which concern alike all grades of public wrong-doing. It does not so largely apply to civil suits; since these are brought to enforce a compensation in damages for a loss or injury, where both parties may be innocent of intended wrong, yet one of them must necessarily suffer. But criminal prosecutions are not for the recovery of private damages; they are ordained to correct public wrongs, and prevent their repetition.<sup>5</sup>

§ 248. **Another Form of the Doctrine.**—Perhaps the better expression is, that, in consequence of the complications of human affairs, any exact division of wrongful acts into civil and criminal is impossible; while yet there is a complete gradation in wrongs, beginning with those most purely against the individual, and

<sup>1</sup> Ante, § 235.

<sup>2</sup> Ante, § 221, 226, 235.

<sup>3</sup> Cases like the following, for example, can hardly be upheld unless we recognize the doctrine of the text: *Reg. v. Lawson*, 1 Q. B. 486, 1 Gale & D. 15, 5 Jur. 387; *Ex parte* —, 4 A. & E. 576, note; *Rex v. Dodd*, 9 East, 516; *Rex v. Harries*, 13 East, 270; *Rex v. Bishop*, 5 B. & Ald. 612; *Ex parte Lee*, 7 Jur. 441; *Rex v. Smith*, 7 T. R. 80; *Rex v. Marshall*, 13 East, 322; *Rex v. Fielding*, 2

*Bur.* 654, 2 *Keny.* 386; *Rex v. Phillips*, *Cas. Temp. Hardw.* 241; *Reg. v. Harris*, 8 Jur. 516; *Ex parte Beauclerk*, 7 Jur. 373; *Anonymous*, Lofft, 272; *Reg. v. Jollie*, 1 Nev. & M. 483, 4 B. & Ad. 867; *Reg. v. Saunders*, 10 Q. B. 484; *Rex v. Murray*, 1 Jur. 37; *Reg. v. Hext*, 4 Jur. 339.

<sup>4</sup> Ante, § 226; post, § 604, 716–722.

<sup>5</sup> See ante, § 210, 218–221; post, § 287, 288, 301, 306, 330.

ascending all the way to those which are most purely against the State. But every proceeding in the courts must wear either the civil or the criminal form. Yet the form of the proceeding does not change the essence of the thing proceeded against.

§ 249. **Observation.** — Thus are brought to view some of the leading doctrines by which to determine what is a crime against the entire community. And let it be borne in mind, that they concern only this sort of crime, not the wrong which, committed primarily to the injury of the individual, is pursued by the public because of its generally dangerous character. To some considerations relating to the latter the reader's attention is now invited.

## II. *Indictable Private Wrongs.*

§ 250. **Good from Evil.** — In all ages and countries, the path of human improvement is macadamized with bones and wet with blood. The strong tread down and trample out the feeble; and, by ending them, diminish the average weakness of the race; while the conflict which goes on among those who survive, strengthens their bodies and minds, and the acquired vigor passes to succeeding generations. When one party, tribe, or nation has so prevailed as to preclude further contest, a decay commences, progressing until they who were strong become weak, and are themselves overthrown. True, indeed, Christianity has opened a way bloodless and bright, by which our race could perfect itself if it would, but "few there be that find it."<sup>1</sup> This view does not justify men in preying on one another; yet it shows how, in fact, good comes from the antagonisms of evil. Our Saviour expressed the idea, in words brief and weighty, thus: "*It must needs be that offences come; but woe unto that man by whom the offence cometh.*"<sup>2</sup>

§ 251. **The Doctrine how in Law.** — This doctrine, that permitted evil brings forth good, is one of the forces which have given shape to our law. While the individuals are contending with one another, they are ordinarily adding to the general sum of power, and the community is not injured in a way justifying a criminal prosecution; or, should this be otherwise, the evil inflicted on the community is too small for the law's notice, as already explained.<sup>3</sup>

<sup>1</sup> Matt. vii. 14.

<sup>2</sup> Matt. xviii. 7.

<sup>3</sup> Ante, § 212 et seq.

The law, therefore, merely allows a civil suit for the redress of the private wrong ; not in vindication of public justice, but as an instrument in the hands of the party to obtain what is his due.

§ 252. **Limit of Doctrine.** — But in the conflicts of men there is a point beyond which, if they proceed, they injure the community in a way requiring a criminal prosecution for what is done. When two or more, engaged in any of the contests of life, occupy toward one another fair ground, they do not interfere with any public interest, however far they proceed ; because, though one should press unduly on another, yet only good comes to the public from this. But when they cease to maintain this fair relation toward one another, the contest ceases to be strengthening, and becomes rather one of destruction. Therefore, —

**Unfair Advantage indictable.** — If two or more are engaged in any of the contests of life, and one of them assumes toward another or the rest what the law deems to be unfair ground, the community interferes and punishes the wrong by a criminal prosecution. What, in a just estimate, is unfair ground, may be a question of difficulty. We are simply to inquire how the law regards it. The old common law, originating in an age of unpolished minds, iron sinews, and semi-barbarous manners, demanded less to fairness than is required by the superior culture and finer moral sentiment of modern times. And the demand increases as we progress in civilization. The consequence is, that the common law itself has expanded by slow and insensible gradations ; and a more rapid expansion is carried on by legislation, which both adds to the number of crimes, and enlarges the boundaries of the old ones. Thence it has resulted, that crimes against the individual, now being considered, have been more multiplied by statutes than those against the entire community ; and, although they do not embrace so many distinct offences, they give occasion for more criminal prosecutions, and encumber the reports with more decisions.

§ 253. **Explanation.** — For the benefit of the student not yet familiar with criminal-law books, it becomes necessary here to state that the subject is treated of in this chapter in some degree differently from what it is in the works of preceding authors, and generally in the opinions of the judges. In legal substance, there is no difference ; for this chapter states the law as actually adjudged. But most tell us, in words, that nothing is punishable

except what is to the injury of the public ; yet their explanations show the same things to be punishable which are found to be so when tested by the standards of this chapter. It is embarrassing to a learner in any science to see a doctrine laid down in terms, followed by an explanation contradicting the doctrine.<sup>1</sup> And it has been a leading object with the author, in all his legal works, to avoid as much as possible this sort of clashing and contradiction.

§ 254. **Conclusion.** — But it is better to defer the particular illustrations of the doctrine of this sub-title, till we come to consider the various propositions of the criminal law which are illustrated by it: for, if we should enter upon illustrations here, they would need to be repeated elsewhere, and thus space would be consumed with no compensating benefit to the reader.

<sup>1</sup> And see Bishop First Book, § 353-356.

## CHAPTER XV.

## THE INJURED PERSON IN THE WRONG OR CONSENTING.

§ 255. **Scope of this Chapter.** — It is the purpose of this chapter to inquire, whether, or in what circumstances and to what extent, the wrong of one person, or his consent, will excuse an act of apparent crime committed by another to his injury.

§ 256. **Merit in Person injured.** — In civil jurisprudence, a plaintiff to prevail must come into court with no just imputation on him of wrong in the particular matter about which he complains.<sup>1</sup> But there is little scope for the operation of this principle in the criminal law; because the plaintiff is, not an individual, but the State, that, in theory of law, can commit no wrong. Therefore, for example, —

**Contributory Negligence.** — The doctrine of contributory negligence, familiar in civil jurisprudence, does not prevail in criminal.<sup>2</sup> But, —

**Favor asked — Information.** — Even in criminal cases, if one asks of the court as a favor the privilege of wielding its processes for his own advantage, the rule will be applied to him. Therefore he cannot ordinarily have a criminal information<sup>3</sup> against another who has injured him, unless free himself from blame in the transaction complained of, and prompt in the pursuit of his remedy.<sup>4</sup>

<sup>1</sup> Post, § 267, 268.

<sup>2</sup> Reg. v. Hutchinson, 9 Cox C. C. 555, 557; Vol. II. § 662 a.

<sup>3</sup> Crim. Proced. I. § 145.

<sup>4</sup> Anonymous, Lofft, 314; Rex v. Haswell, 1 Doug. 387; Rex v. Miles, 1 Doug. 284; Rex v. Jollie, 1 Nev. & M. 483, 4 B. & Ad. 867; Rex v. Dummer, Holt, 364; Reg. v. Saunders, 10 Q. B. 484; Rex v. Eden, Lofft, 72; Rex v. Hankey, 1 Bur. 316; Rex v. Draper, 3 Smith, 390; Reg. v. Harris, 8 Jur. 516; Rex v. Murray, 1

Jur. 37; Rex v. Symonds, Cas. temp. Hardw. 240; Rex v. Webster, 3 T. R. 388; Anonymous, Lofft, 272; Rex v. Larrieu, 7 A. & E. 277; Reg. v. Lawson, 1 Q. B. 486, 1 Gale & D. 15, 5 Jur. 387; Ex parte Beauclerk, 7 Jur. 373; Rex v. Dennison, Lofft, 148; Rex v. Wright, 2 Chit. 162; Rex v. Marshall, 13 East, 322; Rex v. Smith, 7 T. R. 80; Rex v. Bickerton, 1 Stra. 498. And see Rex v. Burn, 7 A. & E. 190, 1 Jur. 657.

But this rule is to some extent relaxed when the injury is one of a more general and public nature.<sup>1</sup>

§ 257. **One's Wrong or Neglect not excuse Another's.** — It is, therefore, in criminal jurisprudence, ordinarily no defence for a man who has done a wrong, that the person injured has done a wrong also, or been negligent or careless regarding the same thing.<sup>2</sup> But —

**Limit of Doctrine — (Self-defence — False Pretences — Larceny).** — This principle does not exclude, in every case, all consideration of the conduct of the injured person; because such conduct sometimes justifies in law the other's act. For example, since a man may defend himself by blows, if, in such defence, in which he goes no further than the law allows, he maims the assailant, he is not guilty of mayhem.<sup>3</sup> And in false pretences the New York court held, that an indictment will not lie where the complainant parted with his money under circumstances to have made the transaction criminal in him if the pretences had been true,<sup>4</sup> — a doctrine, however, not everywhere accepted.<sup>5</sup> In larceny, it is no defence that the person from whom the goods are stolen, himself stole them, or procured them by other wrong.<sup>6</sup>

**Unauthorized Consent.** — Obviously a consent from one having no legal right to give it avails nothing.<sup>7</sup>

§ 258. **Continued — Civil and Criminal, distinguished.** — What would defeat a civil action will not necessarily an indictment. If, as in a few exceptional cases, a consent to an act ordinarily criminal changes its nature, it may not be a crime; but no man, and no power short of the legislature, can license crime. A private license, therefore, will not justify him who commits it neither is it an excuse for A, that B has also broken the law.

§ 259. **Consent Unlawful.** — There are injuries which no man

<sup>1</sup> *Rex v. Williams*, 1 D. & R. 197, 5 B. & Ald. 595; *Rex v. Haswell*, 1 Doug. 387; *Reg. v. Gregory*, 1 Per. & D. 110, 8 A. & E. 907.

<sup>2</sup> *Rex v. Beacall*, 1 Car. & P. 810, 454; *Rex v. Wellings*, 1 Car. & P. 454; *Reg. v. Longbottom*, 8 Cox C. C. 489, 17 Law Reporter, 379, and note on p. 381; *Reg. v. Swindall*, 2 Car. & K. 230; *Reg. v. Williamson*, 1 Cox C. C. 97; *Reg. v. Holland*, 2 Moody & R. 351; *Reg. v. Rew*, J.

Kel. 26; *Hutton's Case*, 1 Swinton, 497.

<sup>3</sup> *Hayden v. The State*, 4 Blackf. 546.

<sup>4</sup> *People v. Stetson*, 4 Barb. 151; Vol. II. § 469. See *Rex v. Beacall*, 1 Car. & P. 454.

<sup>5</sup> Vol. II. § 468, 469. And see *Reg. v. Hudson*, Bell C. C. 268, 8 Cox C. C. 305; *Reg. v. —*, 1 Cox C. C. 250.

<sup>6</sup> Vol. II. § 781, 789.

<sup>7</sup> *Riley v. The State*, 16 Conn. 47.

may lawfully inflict even on himself; and, to these, consent is of no avail. Thus—

**Homicide.**—A man may not take away his own life; consequently another, who takes it at his request, incurs the same guilt as if not requested.<sup>1</sup> It is thus where death is inflicted in a duel.<sup>2</sup> So likewise,—

**Mayhem.**—It being the gist of the crime in mayhem that the injured person is rendered less able in fighting,<sup>3</sup> one may not innocently maim himself; and, if at his request another maims him, both are guilty.<sup>4</sup> But—

**Crimes incompatible with Consent.**—There are crimes which, from their special nature, cannot exist where there is consent. Among these is—

**Rape.**—If a man has carnal intercourse with a consenting woman not his wife, his offence is not rape; because, although her consent, being unlawful, does not justify his act, yet rape is constituted only by a connection to which the woman does not yield her will.<sup>5</sup>

§ 260. **Crimes incompatible with consent, continued.**—Any injury which one has the right to inflict on himself he may inflict by the hand of another, who will therefore not be answerable to the criminal law. Thus,—

**Larceny.**—A man may give away his property; therefore another, who takes it by his permission, does not commit larceny.<sup>6</sup>

**Battery.**—He may inflict self-torture, at least to a limited degree, though, as we have seen,<sup>7</sup> he must neither maim nor kill himself; consequently another who in good faith whips him at his request,<sup>8</sup> or with his consent does any other act which under

<sup>1</sup> *Rex v. Hughes*, 5 Car. & P. 126. And see *Reg. v. Alison*, 8 Car. & P. 418; *Rex v. Russell*, 1 Moody, 356; *Reg. v. Fretwell*, Leigh & C. 161, 9 Cox C. C. 152; post, § 510.

<sup>2</sup> *Rex v. Taverner*, 1 Rol. 360, 3 Bulst. 171; *Rex v. Rice*, 3 East, 581; *Reg. v. Young*, 8 Car. & P. 644; ante, § 10. And see *McAfee v. The State*, 81 Ga. 411.

<sup>3</sup> Stat. Crimes, § 316; Vol. II. § 1001.

<sup>4</sup> *Rex v. Wright*, 1 East P. C. 396, Co.

Lit. 127 a; *People v. Clough*, 17 Wend. 351, 352.

<sup>5</sup> *Wright v. The State*, 4 Humph. 194; *The State v. Murphy*, 6 Ala. 765; Vol. II. § 1115, 1122–1126.

<sup>6</sup> *Dodge v. Brittain*, Meigs, 84; *Dodd v. Hamilton*, N. C. Term R. 81; *The State v. Jernagan*, N. C. Term R. 44. And see *The State v. Chambers*, 6 Ala. 855.

<sup>7</sup> Ante, § 259.

<sup>8</sup> *The State v. Beck*, 1 Hill, S. C. 363.

ordinary circumstances would amount to an indictable battery,<sup>1</sup> commits no crime.

§ 261. **Consent obtained by Fraud, Force, &c.** — But if in these cases the consent is obtained by fraud;<sup>2</sup> or if the person from tender years<sup>3</sup> or other cause is incapable of consenting; or if, without absolute fraud or actual incapacity, the will is overpowered,<sup>4</sup> as by an array of force,<sup>5</sup> or by the false pretence, the accused being a physician, that the act done is necessary in a course of medical treatment;<sup>6</sup> the law deems that there was no consent. For it is a doctrine extending through all the departments of the law, that whatever is procured by fraud is to be deemed as though it did not exist.<sup>7</sup> Still —

**Rape — Assault — Adultery.** — The peculiar offence of rape is not committed where a fraud procures the consent,<sup>8</sup> as where the man personates the husband of the woman;<sup>9</sup> though the act is in law an assault.<sup>10</sup> Such act is also adultery in him, in those

<sup>1</sup> *Smith v. The State*, 12 Ohio State, 466; *Reg. v. Martin*, 9 Car. & P. 213, 215, 2 Moody, 123; *Reg. v. Meredith*, 8 Car. & P. 589; *Wright v. The State*, 4 Humph. 194; *Commonwealth v. Parker*, 9 Met. 263; *The State v. Cooper*, 2 Zab. 52; *Reg. v. Banks*, 8 Car. & P. 574; *Duncan v. Commonwealth*, 6 Dana, 295; *Reg. v. Johnson*, Leigh & C. 632. **Assault and Battery.** — In an English jury case the judge observed, that, if two go out to strike each other, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow. *Reg. v. Lewis*, 1 Car. & K. 419. This is doubtless so in some circumstances; as where the parties are in anger, and each intends to beat the other, allowing himself to be beaten as little as possible. Here neither can be said to consent to the blows he receives. See Vol. II. § 35. **Prize-fight.** — So if they engage in a prize-fight there is a breach of the peace to which they cannot consent. *Rex v. Perkins*, 4 Car. & P. 537; Vol. II. § 35. But ordinarily, if two persons fight together with the fist, by agreement, though they may under some circumstances commit an offence, it is not the offence of assault and battery. *Champer v. The State*, 14 Ohio State, 487. See further as to prize-fights,

*Reg. v. Hunt*, 1 Cox C. C. 177; *Commonwealth v. Welsh*, 7 Gray, 324; *Commonwealth v. Barrett*, 108 Mass. 302; *Reg. v. Young*, 10 Cox C. C. 371; post, § 535.

<sup>2</sup> *Reg. v. Saunders*, 8 Car. & P. 265; *Reg. v. Williams*, 8 Car. & P. 286.

<sup>3</sup> *Reg. v. Read*, 1 Den. C. C. 377, Temp. & M. 52, 3 New Sess. Cas. 405, 13 Jur. 68, 2 Car. & K. 957; *Hays v. People*, 1 Hill, N. Y. 351; *The State v. Handy*, 4 Harring. Del. 566; *Reg. v. March*, 1 Car. & K. 496; *Davenport v. Commonwealth*, 1 Leigh, 588. And see *Reg. v. Banks*, 8 Car. & P. 574; *Reg. v. Martin*, 9 Car. & P. 213.

<sup>4</sup> *Hays v. People*, 1 Hill, N. Y. 351; *Reg. v. Day*, 9 Car. & P. 722; *Rex v. Nichol*, Russ. & Ry. 130.

<sup>5</sup> *Reg. v. Hallett*, 9 Car. & P. 748.

<sup>6</sup> *Reg. v. Ellis*, 2 Car. & K. 470; *Reg. v. Case*, 1 Eng. L. & Eq. 544, 1 Den. C. C. 580, Temp. & M. 318. And see *Rex v. Rosinski*, 1 Moody, 19.

<sup>7</sup> *Bishop First Book*, § 66-99, 125; Vol. II. § 36, 751, 752, 811, 1122-1126.

<sup>8</sup> So also in Alabama, *The State v. Murphy*, 6 Ala. 765.

<sup>9</sup> Vol. II. § 1122.

<sup>10</sup> *Rex v. Jackson*, Russ & Ry. 487; *Reg. v. Saunders*, 8 Car. & P. 265; *Reg. v. Williams*, 8 Car. & P. 286. And see



localities where the latter offence is indictable. And it is rape when committed on a woman laboring under delirium so deep as to be insensible to what is done.<sup>1</sup>

§ 262. **Plans to entrap — (Larceny — Burglary).** — If a man suspects that an offence is to be committed, and, instead of taking precautions against it, sets a watch and detects and arrests the offenders, he does not thereby consent to their conduct, or furnish them any excuse.<sup>2</sup> And, in general terms, exposing property, or neglecting to watch it, under the expectation that a thief will take it,<sup>3</sup> or furnishing any other facilities or temptations to such or any other wrong-doer,<sup>4</sup> is not a consent in law. A common case is where burglars, intending to break into a house and steal, tempt the occupant's servant to assist them; and, after communicating the facts to his master, he is authorized to join them in appearance. For what the burglars personally do under such an arrangement they are, by all opinions, responsible; but the English doctrine seems to be, that, if the servant opens the door while they enter, they are not guilty of a breaking.<sup>5</sup> In principle, probably they are not, if the servant is to be deemed the master's agent, not theirs, in opening the door. But, as they had requested him to join them, and the master's consent was merely for their detection, the better view would appear to be to consider him their agent in the breaking, and hold them responsible for it.<sup>6</sup> An Irish case even decides, that, where persons intending to commit burglary knock at the door of the house of one, who, apprised of their purpose and prepared for them, himself opens it, and, on their rushing in and locking the door, seizes and secures them, the offence is committed.<sup>7</sup>

*Reg. v. Stanton*, 1 Car. & K. 415; *Reg. v. Camplin*, 1 Car. & K. 746.

<sup>1</sup> *Rex v. Chater*, 13 Shaw's J. P. 766, Archb. New Crim. Proced. 306; Vol. II. § 1121, 1123.

<sup>2</sup> *Thompson v. The State*, 18 Ind. 386.

<sup>3</sup> *Rex v. Egginton*, 2 Leach, 4th ed. 913, 2 B. & P. 508; s. c. nom. *Rex v. Egginton*, 2 East P. C. 494, 666; *Reg. v. Williams*, 1 Car. & K. 195; *The State v. Covington*, 2 Bailey, 569; *Reg. v. Rathbone*, 2 Moody, 242, Car. & M. 220; *Reg. v. Gardner*, 1 Car. & K. 628; *Reg. v. Johnson*, Car. & M. 218; *United States v. Foye*, 1 Curt. C. C. 364.

<sup>4</sup> *Rex v. Dannelly*, Russ. & Ry. 310;

*Rex v. Hedge*, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; *Rex v. Whittingham*, 2 Leach, 4th ed. 912; *Reg. v. Lyons*, Car. & M. 217; *Rex v. Ady*, 7 Car. & P. 140.

<sup>5</sup> *Reg. v. Johnson*, Car. & M. 218; *Rex v. Egginton*, 2 B. & P. 508, 2 Leach, 4th ed. 913, 2 East P. C. 494, 666; *Rex v. Dannelly*, 2 Marshall, 471, Russ. & Ry. 310; *Reg. v. Johnson*, Car. & M. 218. And see *Reg. v. Williams*, 1 Car. & K. 195.

<sup>6</sup> And see *Alexander v. The State*, 12 Texas, 540.

<sup>7</sup> *Rex v. Bigley*, 1 Crawf. & Dix C. C. 202.

**Force or Fraud.** — And the doctrine as to the breaking seems to be, that a consent to it obtained by fraud<sup>1</sup> or by force<sup>2</sup> will not protect the wrong-doer.

§ 263. **Illegal Trading.** — It was held in North Carolina during slavery, that, if one delivers an article to his slave, and then stands by to detect a person trading for it with the slave, contrary to a statute, this does not make the trading lawful.<sup>3</sup> But, —

**Larceny not contemplated.** — Where the master goes further, and, instead of merely attempting to detect a crime already contemplated, directs his servant to deliver property to a supposed thief, who had not formed the design to steal it, the latter, taking it with felonious intent from the servant, does not commit a larceny.<sup>4</sup>

<sup>1</sup> *Rex v. Cassey*, J. Kel. 62, 69; *Rex v. Hawkins*, 2 East P. C. 485. See *Denton's Case*, cited Foster, 108. **Enticing Occupant to open Door, &c.** — Where the burglar enticed out of the house its occupant, who left the door open, and fifteen minutes afterward entered through the open door, he was held to be guilty; though, had the entry been instantaneous, the case would have been otherwise. *The State v. Henry*, 9 Ire. 463, Ruffin, C. J., dissenting. See ante, § 261; Stat. Crimes, § 312.

<sup>2</sup> *Rex v. Swallow*, 1 Russ. Crimes, 3d Eng. ed. 792; Stat. Crimes, § 312.

<sup>3</sup> *The State v. Anone*, 2 Nott & McC. 27; *The State v. Sonnerkalb*, 2 Nott & McC. 280.

<sup>4</sup> *Dodge v. Brittain*, Meigs, 84; *Kemp v. The State*, 11 Humph. 320; *Dodd v. Hamilton*, N. C. Term R. 31; *The State v. Barna*, N. C. Term R. 44. Compare, with these cases, *Alexander v. The State*, 12 Texas, 540. And see Vol. II. § 811-822.

## CHAPTER XVI.

## LIABILITIES CIVIL AND CRIMINAL FROM ONE TRANSACTION.

§ 264. **Both may exist together.**—From the foregoing discussions it appears, that civil and criminal suits are diverse in their natures and objects. Therefore, as general doctrine, subject to qualifications and exceptions, a private person and the State may severally carry on, the one a civil suit and the other a criminal prosecution, simultaneously, for the same act of wrong, if both have suffered from it; or the one proceeding may go in advance of the other, or there may be but the one, and the one will have no effect on the other.<sup>1</sup> Thus,—

§ 265. **Assault and Battery — Nuisance — Way.**—An action for assault and battery,<sup>2</sup> or for the recovery of damage done by a common nuisance,<sup>3</sup> may proceed at the same time with the indictment for the same thing. As a question of law, in the case of the common nuisance, the plaintiff to recover must have suffered some special injury, not merely have partaken with the public in what equally affects all.<sup>4</sup> Therefore, “if A dig a trench across

<sup>1</sup> 12 Co. 128; *Blassingame v. Glaves*, 6 B. Monr. 88; *Harrison v. Chiles*, 3 Litt. 194; *Wheatley v. Thorn*, 23 Missis. 62; *Kennedy v. McArthur*, 5 Ala. 151; *The State v. Stein*, 1 Rich. 189; *Drake v. Lowell*, 13 Met. 292; *Rex v. Spiller*, 2 Show. 207; *Reg. v. Best*, 6 Mod. 137; *Rex v. Stanton*, 2 Show. 30; *Foster v. Commonwealth*, 8 Watts & S. 77; *Simpson v. The State*, 10 Yerg. 525; *Thayer v. Boyle*, 30 Maine, 475; *The State v. Rowley*, 12 Conn. 101; *Shields v. Yonge*, 15 Ga. 349; *Hedges v. Price*, 2 W. Va. 192; *Commonwealth v. Elliott*, 2 Mass. 372; *Commonwealth v. Bliss*, 1 Mass. 32; *Phillips v. Kelly*, 29 Ala. 628; *Gordon v. Hostetter*, 37 N. Y. 99. See *Bostwick v. Lewis*, 2 Day, 447; *Hyatt v. Wood*, 4 Johns. 150; *Phelps v. Stearns*, 4 Gray, 105. “Where a thing that is an

injury to a particular person is prohibited by act of Parliament, the party may have his action, but yet 'tis indictable also.” *Holt, C. J.*, in *Rex v. Hummings*, Comb. 374. And see ante, § 237-239; *Chiles v. Drake*, 2 Met. Ky. 146.

<sup>2</sup> *Jones v. Clay*, 1 B. & P. 191.

<sup>3</sup> *Burrows v. Pixley*, 1 Root, 362; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401; *Allen v. Lyon*, 2 Root, 213; *Abbott v. Mills*, 3 Vt. 521, 529; *Franklin v. White Water Valley Canal*, 2 Ind. 162; *Francis v. Schoellkopf*, 53 N. Y. 152; *Harvard College v. Stearns*, 15 Gray, 1. And see *Nichols v. Pixly*, 1 Root, 129.

<sup>4</sup> *Low v. Knowlton*, 26 Maine, 128; *Baxter v. Winooski Turnpike*, 22 Vt. 114; *Carey v. Brooks*, 1 Hill, S. C. 365; *Stetson v. Faxon*, 19 Pick, 147; *Barden*

the highway, this is the subject of an indictment; but, if B fall into it, and sustain a damage, then the particular damage thus sustained will support an action."<sup>1</sup> And, in general terms, if one makes an excavation in a public way, or places in it an indictable obstruction, he will be civilly responsible also for whatever may be suffered by individuals during its continuance.<sup>2</sup> But the damage must be special to the individual, not merely such as all sustain.<sup>3</sup> Yet, according to the better opinion, it need not be direct; it is sufficient, if consequential, though, as just observed, it must accrue specially to the individual.<sup>4</sup>

§ 266. **Judicial Discretion — (Information).** — Yet courts, when called upon for a favor, as to grant a criminal information<sup>5</sup> to one injured by an assault and battery, will usually, not always, refuse, if the applicant has pending for the same thing a civil suit, unless he will waive it.<sup>6</sup> But —

**As of Right — (Indictment).** — A prosecution by indictment, which is a matter of right, and a civil suit, may go on, as before observed, simultaneously.<sup>7</sup> And a defendant who has borne the

*v. Crocker*, 10 Pick. 383; *Harrison v. Sterrett*, 4 Har. & McH. 540; *Hart v. Basset*, T. Jones, 156; *Chichester v. Lethbridge*, Willes, 71, 73; *Rose v. Miles*, 4 M. & S. 101; *Cole v. Sprowl*, 35 Maine, 161; *McLaughlin v. Charlotte and South Carolina Railroad*, 5 Rich. 583; *Yolo v. Sacramento*, 36 Cal. 193; *Brown v. Watson*, 47 Maine, 161; *Ingram v. The C. D. and M. R. R. Co.*, 38 Iowa, 609. And see *Weightman v. Washington*, 1 Black, 39; *Herron v. Hughes*, 25 Cal. 555; *Ayres v. Lawrence*, 63 Barb. 454.

<sup>1</sup> *Broom Leg. Max.* 2d ed. 156; *Ashby v. White*, 2 Ld. Raym. 938, 955.

<sup>2</sup> *Portland v. Richardson*, 54 Maine, 46; *Osborn v. Union Ferry*, 53 Barb. 629; *Brown v. Watson*, *supra*; *Benjamin v. Storr*, Law Rep. 9 C. P. 400.

<sup>3</sup> *Lamphier v. Railroad*, 33 N. H. 495; *Johnson v. Stayton*, 5 Harring. Del. 362.

<sup>4</sup> *Baxter v. Winooski Turnpike*, 22 Vt. 114; *Lansing v. Smith*, 4 Wend. 9; *Stetson v. Faxon*, 19 Pick. 147; *Wilkes v. Hungerford Market*, 2 Bing. N. C. 281, 293; *Rose v. Groves*, 6 Scott N. R. 645, 654. And see *Cook v. Bath*, Law Rep. 6 Eq. 177; *Willard v. Cambridge*, 3 Allen, 574; *Allen v. Monmouth*, 2 Beasley, 68.

<sup>5</sup> See *Crim. Proced. I.* § 143.

<sup>6</sup> *Rex v. Phillips*, Cas. temp. Hardw. 241; *Rex v. Fielding*, 2 Bur. 654, 2 Keny. 386; *Rex v. Sparrow*, 2 T. R. 198; *Ex parte —*, 4 A. & E. 576, note; *Rex v. Mahon*, 4 A. & E. 575. See, as illustrating the principle, *Reg. v. Marshall*, 4 Ellis & B. 475, 24 Law J. n. s. Q. B. 242, 30 Eng. L. & Eq. 204.

<sup>7</sup> *Jones v. Clay*, 1 B. & P. 191; *The State v. Frost*, 1 Brev. 385. Contra, *The State v. Blyth*, 1 Bay, 166; *Rex v. Rhodes*, 1 Stra. 703. Continuing one till other disposed of. — Whether the court, as matter of discretion, will continue one of the cases, and which one, until the other is disposed of, depends on the special circumstances, on the usage of the tribunal, and on what the individual judge may deem best adapted to promote justice. See *Commonwealth v. Elliott*, 2 Mass. 372; *Commonwealth v. Bliss*, 1 Mass. 32; *People v. The Judges*, 13 Johns. 85; *Anonymous*, 1 Sid. 69; *Rex v. Ashburn*, 8 Car. & P. 50; *Peddell v. Rutter*, 8 Car. & P. 337, 340; *Wakley v. Cook*, 11 Jur. 377; s. c. nom. *Wakley v. Cooke*, 16 Law J. n. s. Exch. 225; *Buckner v. Beck*, Dudley, S. C. 168

full penalty criminally, cannot in a civil proceeding show this fact either in bar or in mitigation of damages.<sup>1</sup> In an English case, however, it appearing that the plaintiff, besides procuring a criminal conviction of the defendant, had received on the certificate of the judge a portion of the fine, Lord Tenterden directed that he recover no more than the nominal damage of one farthing, and reprimanded the attorney for undertaking the cause.<sup>2</sup>

**Statutes abridging Double Prosecution.** — Likewise statutes have in some localities abridged the right of double prosecution.<sup>3</sup>

§ 267. *In Felonies* : —

**Conflicting Views.** — The foregoing doctrines do not, in England and a considerable part of our States, fully apply to the higher offences known as felonies. Upon this subject judicial views are very conflicting; the question being, not one of two sides, but of many. The following statement is deemed by the author to present the subject in its true light.

**Worthiness of Plaintiffs.** — A man who carries on a civil suit must himself be worthy. The expression sometimes is, that he must come into court with *clean hands*; in other words, he must be free from blame in the thing about which he complains;<sup>4</sup> or, says Lord Kenyon, “must show that he stands on a fair ground when he calls on a court of justice to administer relief to him.”<sup>5</sup> Now —

**Duty to prosecute Felons** — (**Compounding — Misprision of Felony**). — The law deems it in some sense incumbent on all to prosecute crimes, especially the more aggravated; consequently, makes it indictable to compound them, whether treason, felony, or misdemeanor,<sup>6</sup> as will be more fully explained in a subsequent chapter.<sup>7</sup> A mere neglect to prosecute is a dereliction of the like sort, but further removed from the principal offence, therefore less repre-

Mathison v. Hanks, 2 Hill, S. C. 625; Reg. v. Willmer, 15 Q. B. 50.

<sup>1</sup> Jefferson v. Adams, 4 Harring. Del. 321; Wheatley v. Thorn, 23 Missis. 62; Story v. Hammond, 4 Ohio, 376; Wilson v. Middleton, 2 Cal. 54.

<sup>2</sup> Jacks v. Bell, 3 Car. & P. 316. And see Porter v. Seiler, 11 Harris, Pa. 424.

<sup>3</sup> The State v. Stein, 1 Rich. 189; The State v. Arnold, 8 Rich. 39. As to England, see Harding v. King, 6 Car. & P. 427; Skuse v. Davis, 2 Per. & D. 550, 10

A. & E. 635, 7 Dowl. P. C. 774; Hartley v. Hindmarsh, Law Rep. 1 C. P. 553.

<sup>4</sup> Ante, § 11.

<sup>5</sup> Booth v. Hodgson, 6 T. R. 405, 409.

<sup>6</sup> Commonwealth v. Pease, 16 Mass. 91; Jones v. Rice, 18 Pick. 440; Bell v. Wood, 1 Bay, 249; Mattocks v. Owen, 5 Vt. 42; Plumer v. Smith, 5 N. H. 553; Cameron v. McFarland, 2 Car. Law Repos. 415; Corley v. Williams, 1 Bailey, 588; Hinesburgh v. Sumner, 9 Vt. 28.

<sup>7</sup> Post, § 709 et seq.

hensible. Where the principal offence is only a misdemeanor, the law, following the rule of not regarding small things,<sup>1</sup> takes no notice of the simple neglect. But where it is felony, the neglect to prosecute the felon or discover his offence to the magistrate becomes an indictable misdemeanor, known as misprision of felony.<sup>2</sup> Therefore, —

**No Civil Suit while neglecting to prosecute.** — If a plaintiff in a civil cause alleges that the defendant has committed a felony to his injury, he shows himself guilty, though in a less degree, in the very thing about which he complains, unless he has exerted himself to bring the felon to justice. Even if the law did not hold this neglect indictable, — still such a plaintiff would not stand in court “on a fair ground,” with “clean hands;” and the defendant, in availing himself of the objection, would take advantage, not of his own wrong, but of the plaintiff’s. Therefore, when one has suffered from a felony, he cannot maintain against the felon a civil action for the injury, until he has discharged his duty to the public by carrying on, or at least by setting on foot, a criminal prosecution for the public wrong. If the felon is either convicted, or, without the plaintiff’s fault or collusion, acquitted, — or if the plaintiff has presented to the grand jury a bill which was thrown out, — this is sufficient, and he may then maintain the action.<sup>3</sup>

**But after any Discharge from Duty to prosecute.** — When the duty to prosecute no longer rests on a party, he may then carry on his civil suit; as, if another has prosecuted the felon to conviction;<sup>4</sup>

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> 3 Inst. 139 et seq.; 1 Hale P. C. 372, 374; 1 Russ. Crimes, 3d Eng. ed. 45, 131; Anonymous, Sir F. Moore, 8; 1 Hawk. P. C. 6th ed. c. 59; 4 Bl. Com. 121; post, § 716 et seq.

<sup>3</sup> Higgins v. Butcher, Yelv. Met. ed. 89 and note; 1 Hale P. C. 546; Crosby v. Leng, 12 East, 409, and the cases there cited; Golightly v. Reynolds, Lofft, 88, 90; White v. Fort, 3 Hawks, 251; Belknap v. Milliken, 23 Maine, 381; Foster v. Tucker, 3 Greenl. 458; Morgan v. Rhodes, 1 Stew. 70; McGrew v. Cato, Minor, 8; Grafton Bank v. Flanders, 4 N. H. 239; Crowell v. Merrick, 19 Maine, 392; Broom Leg. Max. 2d ed. 159, 160; Patton v. Freeman, Cox, 113, and the reporter’s note; Morton v. Bradley, 27

Ala. 640; Middleton v. Holmes, 3 Port. 424. It is also said in Coke’s Reports: “The law has imposed this penalty on the owner [of stolen goods] that, if the thief by his industry and fresh suit be not attainted at his suit (*scil.* in appeal of the same felony), he shall for his default lose all his goods which the thief at the time of his flight waived. But if the thief has them not with him when he flies, having perhaps hid them (as it is said), there no default can be in the party; and therefore they shall not be forfeited, for if he make fresh suit after notice of the felony it is sufficient.” Foxley’s Case, 5 Co. 109 a. See also Rex v. Paul, 6 Car. & P. 323.

<sup>4</sup> Chowne v. Baylis, 31 Beav. 851.

or, if the judge ordered the indictment not to be brought on for trial, deeming that the ends of justice were satisfied by a sentence pronounced on another indictment to which the prisoner had pleaded guilty.<sup>1</sup>

§ 268. **Suit against Receiver — (Guilty — Innocent).** — In like manner, one cannot maintain his suit against a guilty receiver of stolen goods, whom he has neglected to prosecute; for such receiver, too, is a felon.<sup>2</sup> But against an innocent third person, in whose hands the goods may be, his suit is maintainable; because, although he has not prosecuted the thief, his neglect does not attach to the thing about which he complains; namely, that the defendant wrongfully detains property to which the purchase from the thief gave him no title.<sup>3</sup>

§ 269. **How take Advantage of Neglect to prosecute.** — According to some cases, the court, on the disabling fact appearing in evidence at the trial, will nonsuit the plaintiff;<sup>4</sup> though Park, J., once submitted the question to the jury.<sup>5</sup> But in a later case before the Queen's Bench in England, doctrines were maintained which seem almost to abrogate the law itself. One brought an action in two counts to recover the value of a gold brooch; the one count in trover and the other in trespass, to which the defendant pleaded not guilty and not possessed. After a verdict at *nisi prius* for the plaintiff, the defendant applied for a new trial on the ground that, if the evidence proved the allegation against him, the facts established a larceny (which, at the same time, he denied), and he had not been prosecuted for the larceny. The

<sup>1</sup> *Dudley and West Bromwich Banking Co. v. Spittle*, 1 Johns. & H. 14; Sir W. Page Wood, V. C., observing: "Until the cases which arose out of Fauntleroy's forgeries, there seems to have been a floating impression that the debt was absolutely gone where it was connected with a felony committed by the debtor. But it was then settled that the debt remains good, though the right of recovering it is suspended until the creditor takes those steps which the purposes of justice and public policy require, to bring the offender to justice. The object of this rule is to prevent attempts to compromise a felony by compensating the person injured on the terms of allowing the criminal to escape prosecution."

p. 16. **Security for the Civil Indebtedness.** — If, after a theft, but in advance of a criminal prosecution, the thief secures to the injured party the return of what he stole, the security is good after his conviction. *Chowne v. Baylis*, supra.

<sup>2</sup> *Gimson v. Woodfull*, 2 Car. & P. 41, 43; *Pease v. McAloon*, 1 Kerr, 111.

<sup>3</sup> *White v. Spettigue*, 13 M. & W. 603; *Broom Leg. Max.* 2d ed. 160; *Dame v. Baldwin*, 8 Mass. 518. But see *Pease v. McAloon*, supra. See, as illustrative, *Buck v. Albee*, 27 Vt. 190.

<sup>4</sup> *Gimson v. Woodfull*, 2 Car. & P. 41; *Pease v. McAloon*, 1 Kerr, 111.

<sup>5</sup> *Prosser v. Rowe*, 2 Car. & P. 421.

court refused the new trial, and the judges were of opinion, that a judge at *nisi prius* can try only the record sent down to him, and, if matter of this sort is not pleaded, he can neither nonsuit the plaintiff nor direct a verdict for the defendant. Neither can a defendant set up his own crime and plead the felony in defence. So that, unless the plaintiff alleges the felony, or the court itself interposes to postpone the trial, as it may do, there would seem to be no way in which this sort of matter can be made available in defence.<sup>1</sup>

§ 270. *Whether the foregoing Doctrines, as to Felony, are applicable in our States :—*

**How in Principle—(Our Procedure and English, distinguished).—** In this country, criminal prosecutions are not carried on, as in England, almost exclusively by private individuals; but we have local public attorneys, with other officers and their assistants, to represent the government in them. Still we have no substitutes for the individuals in the duty of making disclosures of crimes to the authorities, or ordinarily in taking other incipient steps; but they are perhaps not required to go as far here as in England. Yet we should not forget,<sup>2</sup> that a statute in affirmative words is merely cumulative, and does not take away the prior law unless repugnant to it; so that there may be doubt to what extent affirmative statutory provisions, directing official persons to aid in the prosecution of offenders, relieve individuals of any duty before recognized in the law. In other words, perhaps, on principle, persons who in this country have suffered from the felonious acts of others need not do more than take the initiatory steps against the offenders, before carrying on, even to final judgment, their civil suit; yet this proposition is by no means clear even on principle, while hitherto the tribunals seem not to have recognized the distinction by any direct decision. But though, in consequence of our different procedure, qualifications of the doctrine may be required here, not permissible in England, the main doctrine itself would seem to be as applicable here as there.

§ 271. **How in Adjudication.**—Plain as this question appears, thus stated, it has received from our tribunals almost every sort

<sup>1</sup> Wells v. Abrahams, Law Rep. 7 13 M. & W. 603. And see Ex parte Ball, Q. B. 554. It is observed in this case, 10 Ch. D. 667.

that Gimson v. Woodfull, supra, was expressly overruled in White v. Spettigue, <sup>2</sup> Stat. Crimes, § 154 et seq.



of diverse solution. In some States, as Alabama,<sup>1</sup> and perhaps New Hampshire (where it is doubtful),<sup>2</sup> the full English doctrine is held. The Maine tribunal,<sup>3</sup> apparently sustained by some early Massachusetts authorities,<sup>4</sup> restricted the rule to robberies and larcenies; but a subsequent statute altogether removed the disability.<sup>5</sup> In South Carolina,<sup>6</sup> Massachusetts,<sup>7</sup> Mississippi,<sup>8</sup> and apparently Tennessee,<sup>9</sup> the English doctrine has been utterly discarded. The Connecticut court seems to have limited it to such felonies as are punishable capitally;<sup>10</sup> and the Georgia, to felonies at common law, in exclusion of those created by statute.<sup>11</sup> In New Jersey,<sup>12</sup> Virginia,<sup>13</sup> North Carolina,<sup>14</sup> Missouri,<sup>15</sup> Michigan,<sup>16</sup> and Texas,<sup>17</sup> the question appears to be in doubt, with perhaps a tendency against the English doctrine.<sup>18</sup> In Arkansas the civil suit is authorized by statute.<sup>19</sup> It is so also in New York.<sup>20</sup>

§ 272. Continued. — The New Hampshire court has held, that one suffering from a felony need not wait till the criminal cause is disposed of before bringing his action; it is sufficient to delay till then the trial.<sup>21</sup> This distinction appears to harmonize the

<sup>1</sup> *Morgan v. Rhodes*, 1 Stew. 70; *McGrew v. Cato*, Minor, 8; *Morton v. Bradley*, 27 Ala. 640; *Martin v. Martin*, 25 Ala. 201; *Bell v. Troy*, 35 Ala. 184; ante, § 267. For a partial qualification created by the construction of a statute, see *Lankford v. Barrett*, 29 Ala. 700.

<sup>2</sup> *Grafton Bank v. Flanders*, 4 N. H. 239; *Pettingill v. Rideout*, 6 N. H. 454.

<sup>3</sup> *Crowell v. Merrick*, 19 Maine, 392; *Belknap v. Milliken*, 23 Maine, 381; *Foster v. Tucker*, 3 Greenl. 458; *Boody v. Keating*, 4 Greenl. 164.

<sup>4</sup> *Boardman v. Gore*, 15 Mass. 331.

<sup>5</sup> See reporter's note to *Belknap v. Milliken*, 23 Maine, 381.

<sup>6</sup> *Cannon v. Burris*, 1 Hill, S. C. 372; *Robinson v. Culp*, 1 Tread. 231, 3 Brev. 302.

<sup>7</sup> *Boston and Worcester Railroad v. Dana*, 1 Gray, 83.

<sup>8</sup> *Newell v. Cowan*, 30 Missis. 492.

<sup>9</sup> *Ballew v. Alexander*, 6 Humph. 433. And see post, § 272, note.

<sup>10</sup> *Cross v. Guthery*, 2 Root, 90.

<sup>11</sup> *Adams v. Barrett*, 5 Ga. 404; *Neal v. Farmer*, 9 Ga. 555; *Dacy v. Gay*, 16 Ga. 203.

<sup>12</sup> *Patton v. Freeman*, Coxe, 113.

<sup>13</sup> *Allison v. Farmers' Bank*, 6 Rand. 204; *Cook v. Darby*, 4 Munf. 444.

<sup>14</sup> *White v. Fort*, 3 Hawks, 251; *Smith v. Weaver*, Taylor, 58, 2 Hayw. 108.

<sup>15</sup> *Nash v. Primm*, 1 Misso. 178; *Mann v. Trabue*, 1 Misso. 709.

<sup>16</sup> In *Hyatt v. Adams*, 16 Mich. 180, 189, 202, the question arose incidentally, and in a dictum *Christiancy, J.*, discarded the English doctrine, and *Campbell, J.*, declined expressing any opinion upon it, because not essential to the decision of the case.

<sup>17</sup> *Mitchell v. Mims*, 8 Texas, 6.

<sup>18</sup> See also *Piscataqua Bank v. Turnley*, 1 Miles, 312; *Plummer v. Webb*, Ware, 75; *Dunlop v. Munroe*, 1 Cranch C. C. 536.

<sup>19</sup> *Brunson v. Martin*, 17 Ark. 270.

<sup>20</sup> *Van Duzer v. Howe*, 21 N. Y. 531, 538; *Koenig v. Nott*, 2 Hilton, 323. And see *Fassett v. Smith*, 23 N. Y. 252, and the cases there cited; *Franklin v. Low*, 1 Johns. 396; *Pease v. Smith*, 5 Lans. 519.

<sup>21</sup> *Pettingill v. Rideout*, 6 N. H. 454. And see *Smith v. Weaver*, Taylor, 58, 2 Hayw. 108, as sustaining the same view. See also *Ballew v. Alexander*, 6 Humph.

common-law authorities, with none of which it is directly in conflict. The plaintiff is in no fault while he is doing all he can, and as fast as he can, to bring the offender to justice; and, in reason, he should be permitted to pursue at the same time his civil remedy, only not hastening its steps in advance of public duty.

§ 273. *Some Discussion of Reasons*:—

**Rule ceasing with its Reason.**—It is believed that the leading cause for the rejection, in some of our States, of the doctrine of the English common law on this subject, as being inapplicable to what are assumed to be our altered circumstances, is a misapprehension of the true legal reason on which it is founded. It has been assumed to rest on the English law of forfeiture of life and property in cases of felony; and to stand thus, that, as the goods are for the crown, and the body is for the gallows, no benefit could result to the plaintiff from a judgment in the civil suit. And the American argument has been, that, since the goods in this country are not forfeited, and the felon's life is not ordinarily taken, the consequence of this removal of the foundation must be the fall of the superstructure, in obedience to the maxim, *Cessante ratione legis, cessat ipsa lex*,<sup>1</sup> the rule of law ceases with its reason.

§ 274. **Continued — (Nature of a Legal Reason).**—Now, a reason of the law is a thing adhering in the law itself, constituting of it the soul, and is not a formula of words uttered by a judge. Some of the law's reasons are exactly what the judges have stated them to be, others are partly such, and still others are not such to any degree.

**True Reason of Present Doctrine.**—In the instance now before us, the reason just mentioned cannot be the true one; because, if it were, the felon could no more be sued on a claim separate from the felony, and by one not the sufferer, than by the latter for the precise thing; and because he could no more be sued after a conviction than before. But as the law does not contain these effects, neither consequently does it their cause. Hence if every judge, English and American, and every text-writer, had laid down this reason, we should see that all had erred. Then let us

183, which may really rest on this ground, though the judge who delivered the opinion stated, as the reason, that the English doctrine is not applicable in this

country. See also *Deakin v. Præd*, 4 Taunt 825.

<sup>1</sup> Broom Leg. Max. 2d ed. 118.

inquire whether the reason assigned a few sections back is the true one. We perceive that, by all the authorities,<sup>1</sup> the only impediment to carrying on the civil suit is the neglect to prosecute for the crime; and that the right to proceed civilly keeps even pace with the removal of this neglect. Hence the reason why the sufferer cannot maintain his civil proceeding, in those cases in which the law refuses him, is because he has not prosecuted. The proposition may assume either the precise form given it in these pages, or the similar form it wears in most of the English cases; namely, that the policy of the law requires this stimulant to induce men to bring felons to justice. The result is the same.

§ 275. *Law ceasing with Reason, again.* — While the maxim, that a rule of the law fails with its reason,<sup>2</sup> is just and is important, it is particularly liable to be misapplied. Often, after some reason has created a rule, the reason gradually crumbles away, and the rule in the same gradual manner becomes crystallized and solidified; so that it remains a mere technical doctrine, resting simply on the judicial authority of ages. We recur to the reason whence it originally sprang, only to learn its quality, extent, and force.

*Reason of this Rule not changed* — (Compounding — Misprision). — Whether the rule now under examination should be regarded as one of these crystallized rules<sup>3</sup> it might be well to inquire, had we not found<sup>4</sup> that the reason has not materially changed in this country, but it remains substantially what it was in England when our forefathers brought hither the body of the common law. Besides, if the reason had ceased, and if on this account the rule must cease also, then it would seem to follow, that the criminal offence of compounding crimes must no longer be recognized; for it comes from exactly the same reason,<sup>5</sup> and *Cessante ratione legis, cessat ipsa lex*. But the compounding of crimes is regarded as a common-law offence in all the States where common-law offences are known.<sup>6</sup> It is the same, also, with misprision of felony.

§ 276. *Another Line of Argument.* — One method of argument

<sup>1</sup> Ante, § 267, 268.

<sup>2</sup> Ante, § 273.

<sup>3</sup> And see *Crowell v. Merrick*, 19 Maine, 392.

<sup>4</sup> Ante, § 270.

<sup>5</sup> "What is the gist of the offence [of

compounding felony]? It is the concealing of the crime, and abstaining from prosecution, to the detriment of the public." *Commonwealth v. Pease*, 16 Mass. 91, 93.

<sup>6</sup> See ante, § 267.

on this question, by which to reach a conclusion different from that here indicated, suggests itself. It is to consider, that misprision of felony, which stands a step further from the principal offence than compounding, has ceased to be indictable because of the small degree of guilt it involves ; and that also the policy of the law no longer requires individuals to communicate to the officers of justice information of the existence of felonies. True we have no legal authority for either, much less for both, of these propositions ; and it would be difficult to sustain either by arguments weighty in the law. But, if both were admitted, they might lead to the result of overturning the English doctrine.

§ 277. **Why this Discussion — Legal Reasoning illustrated.** — This discussion, so extensive, is a departure from the general plan of this work. It is indulged in here, not so much on account of the importance of the subject, as because it exhibits some principles of legal reasoning, and shows the difference between it and reasoning addressed to a legislator, — the difference, in other words, between the processes by which we ascertain what the law is, and those whereby we form our judgments as to what it should be. If a man were in discussion before a legislator on this question, he might say to him, what (discarding the method intimated in the last section) would hardly be relevant if spoken to a court, — that the officers can do all the prosecuting ; that there is no danger but felons will be sufficiently pursued ; that the rule is favored in England because a judgment against a dead felon whose goods are forfeited can do no good, which reason does not exist in the United States ; and he might add any other like considerations. And the person addressed, sitting as a legislator, might deem the considerations presented conclusive ; but, sitting as a judge, quite too light to be taken into the balance.

§ 278. **Caution to the Reader.** — This discussion, moreover, enables the author to address to the reader a caution in language which will be understood. Those who, throughout these volumes, examine the decisions cited in the notes in connection with their perusal of the text, will sometimes observe reasons given in the text differing from those which the judges have assigned in the decisions. It would occupy too much space, and serve but slightly any useful purpose, to pause and explain these differences in every instance in which they occur. They proceed, in some instances, from the author's not thinking the reasons stated

in the cases to be the true legal ones ; and, in others, from his thinking, that, while they are good, those which the peculiar aspect of the discussion rendered it important to state in the text are good also.<sup>1</sup> Not unfrequently a doctrine of the law rests on more reasons than one, each one of which would alone sustain it ; and some doctrines repose thus on many reasons, distinct, or even differing in their natures. Where, however, the subject is particularly important, or there is a wide difference in reasoning between the author and judges, and the explanation is deemed helpful to the reader, it is given.

<sup>1</sup> And see ante, Introduction.

## CHAPTER XVII.

THE NULLITY OF EX POST FACTO LAWS.<sup>1</sup>

§ 279. **Retrospective, distinguished.** — Retrospective laws may be just or unjust according to the circumstances and the subject to which they are applied. Such as undertake to divest vested rights of property are generally void under our constitutions. Various other forms of retrospective legislation are valid.<sup>2</sup> But criminal jurisprudence knows little of vested rights, so that this is a doctrine chiefly of the civil department. Yet —

**Ex post Facto — Constitutional Inhibition.** — It would be unjust to inflict a punishment for what was not punishable when done. This principle of natural equity has found expression in two clauses of the Constitution of the United States, — the one, in restraint of national legislation, providing, that “no . . . *ex post facto* law shall be passed,” the other, that “no State shall . . . pass any . . . *ex post facto* law.”<sup>3</sup>

**Restrains Criminal Legislation, not Civil.** — This provision relates

<sup>1</sup> See, for matter on the subject of this chapter, Stat. Crimes, § 29, 85, 180, 185, 265-267.

<sup>2</sup> 1 Bishop Mar. & Div. § 670 et seq.; *Snydam v. Receivers of New Brunswick Bank*, 2 Green Ch. 114; *New Orleans v. Cordeviollé*, 13 La. An. 268; *Albee v. May*, 2 Paine, 74; *Watson v. Mercer*, 8 Pet. 88; *Thompson v. Lee*, 3 Wal. 327; *Satterlee v. Matthewson*, 2 Pet. 380; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Locke v. New Orleans*, 4 Wal. 172; *Blanchard v. Sprague*, 3 Sumner, 535; *Grinder v. Nelson*, 9 Gill, 299; *Bank of Hamilton v. Dudley*, 2 Pet. 492; *Kearney v. Taylor*, 15 How. U. S. 494; *Milne v. Huber*, 3 McLean, 212.

<sup>3</sup> Const. U. S. art. 1, § 9, 10; Stat. Crimes, § 180, 185, 285; *Calder v. Bull*,

3 Dall. 386, 390; *United States v. Hall*, 2 Wash. C. C. 366; *Ex parte Garland*, 4 Wal. 333; *Woodruff v. The State*, 3 Pike, 285; *Dupy v. Wickwire*, 1 D. Chip. 237; *Charleston v. Feckman*, 3 Rich. 385; *Grinder v. Nelson*, 9 Gill, 299; *Perry v. Commonwealth*, 3 Grat. 632; *Commonwealth v. Phillips*, 11 Pick. 28; *Commonwealth v. Edwards*, 9 Dana, 447; *The State v. Dunkley*, 3 Ire. 116; *Woart v. Winnick*, 3 N. H. 473, 475; *Fisher v. Cockerill*, 5 T. B. Monr. 129, 133; *Dash v. Van Kleeck*, 7 Johns. 477, 488; *Strong v. The State*, 1 Blackf. 193, 196; *Commonwealth v. Lewis*, 6 Binn. 266, 271; *Davis v. Ballard*, 1 J. J. Mar. 563, 570; *Locke v. Dane*, 9 Mass. 360, 363; *Watson v. Mercer*, 8 Pet. 88, 110; *Ross's Case*, 2 Pick. 165, 170.

to the criminal department of our laws, not to the civil.<sup>1</sup> Still it reaches somewhat beyond the domain of pure crime, as defined<sup>2</sup> in a previous chapter. Thus, —

**Forfeitures — Penalties.** — The imposing of a forfeiture or any form of penalty for what was lawful when done is *ex post facto*;<sup>3</sup> as, for example, requiring a clergyman or lawyer to take a test oath concerning his past conduct as the condition on which he shall be permitted to exercise his professional functions.<sup>4</sup> But a statute is not *ex post facto* which provides that, on a divorce for a cause which has already occurred, the guilty party may be forbidden to remarry.<sup>5</sup>

**Waiver by State.** — This constitutional provision and various others of the like sort are made for the protection of the citizen, and the State may waive any real or supposed rights of its own under them.<sup>6</sup> Hence —

**Diminishing Punishment — Increasing.** — Statutes diminishing the punishment of offences already committed are valid; while, on the other hand, those increasing it are *ex post facto* and void.<sup>7</sup> Again, —

§ 280. **The Court.** — A statute may authorize the punishment to be inflicted by a court which had no jurisdiction over the offence at the time of its commission.<sup>8</sup> And —

**Place.** — It may change the rules as to the venue or place of trial of such offence.<sup>9</sup> So also —

**Procedure.** — The procedure whereby offenders are brought to punishment may, as to offences already perpetrated, equally as

<sup>1</sup> Story Const. § 1345; *Carpenter v. Commonwealth*, 17 How. U. S. 456; *Byrne v. Stewart*, 3 Des. 466.

<sup>2</sup> Ante, § 32.

<sup>3</sup> *United States v. Hughes*, 8 Ben. 29, 30, 31; *Falconer v. Campbell*, 2 McLean, 195; *Cummings v. Missouri*, 4 Wal. 277; *Suydam v. Receivers of Bank of New Brunswick*, 2 Green Ch. 114; *Pierce v. Carskadon*, 16 Wal. 234.

<sup>4</sup> *Ex parte Garland*, 4 Wal. 333; *Cummings v. Missouri*, supra.

<sup>5</sup> *Elliott v. Elliott*, 38 Md. 357.

<sup>6</sup> Post, § 995 et seq.; *Crim. Proced. I.* § 117 et seq.; *Lewis v. Turner*, 40 Ga. 416.

<sup>7</sup> *Stat. Crimes*, § 185; *Turner v. The State*, 40 Ala. 21; *Commonwealth v. Wyman*, 12 Cush. 237, 239; *The State v. Anlin*, 39 N. H. 179; *The State v. Williams*, 2 Rich. 418; *Commonwealth v. McDon-*

*ough*, 13 Allen, 581; *Shepherd v. People*, 25 N. Y. 406; *Story Const.* § 1345. And see *Commonwealth v. Grover*, 16 Gray, 602.

<sup>8</sup> *Stat. Crimes*, § 180; *The State v. Sullivan*, 14 Rich. 281, 286, *Glover, J.*, observing: "It was argued, 'that the creation of a tribunal to try, after the offence is committed, is an *ex post facto* law, to the same extent as the passage of an act punishing past offences.' It has been expressly held that a statute creating a new Court, or conferring a new jurisdiction, or enlarging or diminishing the powers of an existing Court, is not an *ex post facto* law. *Wales v. Belcher*, 3 Pick. 508; *Commonwealth v. Phillips*, 11 Pick. 28."

<sup>9</sup> *The State v. Gut*, 13 Minn. 341; *Gut v. The State*, 9 Wal. 35; *Crim. Proced. I.* § 76.

to future ones, be varied from time to time at the pleasure of the legislature. Such regulations are not *ex post facto* laws.<sup>1</sup>

§ 281. **How defined.** — There is just enough of vagueness and uncertainty in the judicial holdings on this subject to induce caution regarding the definition. Looking at the natural signification of the constitutional words *ex post facto*, after the fact, and in the main at the actual adjudications, the meaning is abundantly plain and certain. According to which, an *ex post facto* law is one making punishable what was innocent when done, or subjecting the doer to a heavier penalty than was then provided. And, on the whole, this, it is submitted, is the true definition.<sup>2</sup>

**Expositions of Definition.** — In the leading case, Chase, J., sitting in our National Supreme Court, said: "I will state what I consider *ex post facto* laws within the words and the intent of the prohibition. 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, and makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed." It is perceived that the second and third of these heads are in effect one; because the measure of every crime is its punishment.<sup>3</sup> And the three heads together embrace simply what is comprehended in the foregoing shorter definition. But —

**Rules of Evidence.** — The learned judge adds: "4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender."<sup>4</sup> This branch of the supposed doctrine requires a more particular consideration.

§ 281 a. **Further as to Rules of Evidence.** — There are differences in the several natures of the rules of evidence. For the

<sup>1</sup> Cooley Const. Lim. 272; *People v. Mortimer*, 46 Cal. 114; *Ex parte Bethurum*, 66 Misso. 545; *Andrews v. Worcester County Mut. Fire Ins. Co.* 5 Allen, 65; *The State v. Ryan*, 13 Minn. 370; *Crim. Proc.* I. § 115; *Stat. Crimes*, § 176-179.

<sup>2</sup> *Stat. Crimes*, § 266.

<sup>3</sup> *Crim. Proc.* I. § 77 et seq.

<sup>4</sup> *Calder v. Bull*, 3 Dall. 386, 390. And see further as to the several branches of this definition, *Minge v. Gilmour*, 1 Car.

*Law Repos.* 34; *Evans v. Robinson*, 1 Car. *Law Repos.* 209, 214; *Watson v. Mercer*, 8 Pet. 88; *Carpenter v. Commonwealth*, 17 How. U. S. 456; *United States v. Hall*, 2 Wash. C. C. 366; *Locke v. New Orleans*, 4 Wal. 172; *Cummings v. Missouri*, 4 Wal. 277; *Hannahan v. The State*, 7 Texas Ap. 664. **Costs.** — Even a statute increasing the costs on conviction cannot be applied to an offence previously committed. *Caldwell v. The State*, 55 Ala. 133.



most part they pertain to the remedy or procedure;<sup>1</sup> and it is within established doctrine that the legislature may change this class of them from time to time at pleasure, even with respect to offences already committed.<sup>2</sup> In reason, moreover, this provision protects parties from being dealt harder with than the law prescribed when the fact transpired; but, it is submitted, has nothing to do with — has no relation to — the means by which the truth of an alleged fact may be made to appear. Yet in numerous cases we find the doctrine stated in general terms to be, that a statute authorizing a conviction on less or different evidence from what was required when the transaction occurred is *ex post facto* and void.<sup>3</sup> And doubtless the decisions in some of these cases, wherein the attention of the judges was not called to the distinction between the different classes of the rules of evidence, are not in accord with sound principle; while, in other of the cases, the conclusion reached accords with just reason. The partition line may not at all points be plain. But it would be plain that, for example, if a statute should dispense with the evidence of asportation in larceny, it could not be applied to a past act; for so might one be made guilty who was not guilty before. On the other hand, a statute removing some mere technical disqualification of a witness could, on no sound principle, be deemed an *ex post facto* law, so as to leave him incompetent as to what he saw before its enactment. It would not make a man guilty who was not guilty before, or increase existing guilt or its punishment. It could no more add to the consequences of the fact than does a statute facilitating arrest, whereby one to whom the law imputes guilt is prevented from escaping.

§ 282. **Not declaring the Thing Criminal.** — A statute, to be *ex post facto*, need not in terms declare the thing which was innocent when done<sup>4</sup> to be criminal. It is equally so “if,” in the words of Cooley,<sup>5</sup> “it deprives a party of any valuable right (like the right to follow a lawful calling) for acts which were innocent, or, at least, not punishable by law, when committed.”<sup>6</sup>

<sup>1</sup> Ante, § 280.

<sup>2</sup> Crim. Proc. I. § 1089, 1090.

<sup>3</sup> Valesco v. The State, 9 Texas Ap. 76;

Calloway v. The State, 7 Texas Ap. 585;

Strong v. The State, 1 Blackf. 193; Cum-

mings v. Missouri, 4 Wal. 277, 325; United

States v. Hughes, 8 Ben 29; Story Const.

§ 1345; Cooley Const. Lim. 265 et seq.

<sup>4</sup> Falconer v. Campbell, 2 McLean, 195, 212.

<sup>5</sup> Cooley Const. Lim. 266.

<sup>6</sup> Ante, § 279; Cummings v. Missouri, 4 Wal. 277; Ex parte Garland, 4 Wal. 333.

§ 283. **Second Commission of Offence.** — It follows, from the foregoing views, that a statute providing a heavier punishment for the second commission of an offence than for the first, is not *ex post facto*, even though the first took place before its passage;<sup>1</sup> yet, where both were before, the consequence is otherwise.<sup>2</sup>

§ 284. **Conclusion.** — More might be said on the subject of this chapter; but these elucidations, in connection with those in “Statutory Crimes,” will be sufficient guides to the practitioner.

<sup>1</sup> Ross's Case, 2 Pick. 165; Rand v. Commonwealth, 9 Grat. 738; Ex parte Gutierrez, 45 Cal. 429.

<sup>2</sup> Riley's Case, 2 Pick. 172; Ross's Case, supra.

## BOOK IV.

### THE DOCTRINE REQUIRING AN EVIL INTENT AS AN ELEMENT OF CRIME.

#### CHAPTER XVIII.

##### GENERAL VIEW OF THE DOCTRINE OF THE INTENT.

§ 285. **What for these Chapters.** — We have seen,<sup>1</sup> in a general way, that, to constitute a crime, an evil intent must combine with an act. In the series of chapters comprising the present Book, we shall take a variety of views of the Intent, and thus bring under our survey some of the most important doctrines of the criminal law.

§ 286. **Criminal Law distinguished from Civil as to Intent.** — In no one thing does criminal jurisprudence differ more from civil than in the rule as to the intent. In controversies between private parties, the *quo animo* with which a thing was done is sometimes important, not always;<sup>2</sup> but crime proceeds only from a criminal mind.

§ 287. **No Crime without Evil Intent.** — The doctrine which requires an evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime. And neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow, that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.<sup>3</sup>

<sup>1</sup> Ante, § 204 et seq.

<sup>2</sup> Hart v. Tallmadge, 2 Day, 381; Moran v. Rennard, 3 Brews. 601; Campbell v. Phelps, 17 Mass. 244; Congdon v.

Cooper, 15 Mass. 10; United States v. Thomasson, 4 Bis. 99; post, § 288, 301.

<sup>3</sup> The William Gray, 1 Paine, 16; United States v. Pearce, 2 McLean, 14,

§ 288. **Continued — (Maxims — Moral Science).** — We find this doctrine laid down, not only in the adjudged cases, but in various ancient maxims; such as, — *Actus non facit reum nisi mens sit rea*, “the act itself does not make a man guilty unless his intention were so;”<sup>1</sup> *Actus me invito factus non est meus actus*, “an act done by me against my will is not my act;”<sup>2</sup> and the like. In this particular, criminal jurisprudence differs, as just said, from civil.<sup>3</sup> So, in moral science: “By reference to the intention, we inculcate or exculpate others or ourselves, without any respect to the happiness or misery actually produced. Let the result of an action be what it may, we hold a man guilty, simply on the ground of intention; or, on the same ground, we hold him innocent.”<sup>4</sup>

§ 289. **Moral Science, continued.** — The calm judgment of mankind keeps this doctrine among its jewels. In times of excitement, when vengeance takes the place of justice, every guard around the innocent is cast down. But with the return of reason comes the public voice, that, where the mind is pure, he who differs in act from his neighbors does not offend.

§ 290. **Further Confirmations.** — The justness of the law’s doctrine of the intent appears from many things. One is, that no man really deems another to merit punishment, unless he intended evil, or was careless in what he did. Another is, that, whenever a person is made to suffer a punishment which the community does not consider he deserves, so far from its placing the mark of contempt on him, it elevates him to the seat of the martyr.

19; *Weaver v. Ward*, Hob. 134; *Ex parte Rodgers*, Amb. 307; *Rex v. Fell*, 1 Salk. 272; *Rex v. Martin*, Russ. & Ry. 196; *Lancaster’s Case*, 1 Leon. 208, 209; *The State v. Nicholas*, 2 Strob. 278; *Rex v. Holden*, Russ. & Ry. 154, 2 Leach, 4th ed. 1019, 2 Taunt. 334; *Rex v. Harris*, 7 Car. & P. 428; *Rex v. Dannelly*, Russ. & Ry. 310; *Reg. v. Allday*, 8 Car. & P. 136; *Reg. v. Thurborn*, 1 Den. C. C. 387; *Rex v. Friar*, 1 Chit. 702; *Riley v. The State*, 16 Conn. 47; *Rex v. Gascoigne*, 1 Leach, 4th ed. 280, 284; *The State v. Berkshire*, 2 Ind. 207; *The State v. Bartlett*, 30 Maine, 132; *Commonwealth v. Ridgway*, 2 Ashm. 247; *The State v. Bohles*, Rice, 145, 147; *United States v. Fourteen Packages*, Gilpin, 285, 244; *Rex v. O’Brien*, 7 Mod. 378; *Stur-*

*ges v. Maitland*, Anthon, 153; *Cummins v. Spruance*, 4 Harring. Del. 315; *Reg. v. Phillips*, 2 Moody, 252; *The State v. Carland*, 3 Dev. 114; *Case of Le Tigre*, 8 Wash. C. C. 567, 572; *The State v. Hawkins*, 8 Port. 461; *Rex v. Heath*, Russ. & Ry. 184; *Commonwealth v. Sheriff*, 1 Leg. Gaz. Rep. 340; *The State v. Gardner*, 5 Nev. 377. And see *Smith v. Kinne*, 19 Vt. 564.

<sup>1</sup> *Broom Leg. Max.* 2d ed. 226, 232, 239, 275, 633, note; *Burrill Law Dict.*

<sup>2</sup> *Bouv. Law Dict.*; *Burrill Law Dict.*

<sup>3</sup> *Rex v. Fell*, 1 Salk. 272; *Weaver v. Ward*, Hob. 134; *James v. Campbell*, 5 Car. & P. 372; *Miller v. Lockwood*, 5 Harris, Pa. 248; ante, § 286.

<sup>4</sup> *Wayland Moral Science*, 12.

Another is, that even infancy itself spontaneously pleads the want of evil intent in justification of what has the appearance of wrong, with the utmost confidence that the plea, if its truth is credited, will be accepted as good. Now these facts are only the voice of Nature uttering one of her immutable truths. It is, then, the doctrine of the law, superior to all other doctrines, because first in nature from which the law itself proceeds, that no man is to be punished as a criminal unless his intent is wrong. To establish this doctrine requires not judicial authority; to overthrow it can never be the work of any right-minded power.

§ 291. **The Doctrine Universal.**— The nature of the law's doctrine of the intent renders it universal in criminal jurisprudence. If a case is really criminal, if the end sought is punishment and not the redress of a private wrong, no circumstances can render it just, or consistent with a sound jurisprudence, for the court or a jury to pronounce against the defendant unless he was guilty in his mind. As the laws of the material world act uniformly, never varying through any disturbing influences of exceptions, so also do those of the moral world. It is never just to punish a man for walking cautiously and uprightly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false. And for the government, whether by legislative act or by judicial decree, to inflict injustice on a subject, is to injure itself more than its victim. And a court should, in all circumstances, so interpret both the common law and the statutes as to avoid this wrong.

**Conclusion.**— This general view of the doctrine of the intent would be inadequate, should we not carry it out into detail. We shall do this in subsequent chapters. But even those chapters will not preclude the necessity of recurring to the doctrine in connection with some of the other specific subjects.

## CHAPTER XIX.

## IGNORANCE AND MISTAKE OF LAW AND FACT.

§ 292, 293. Introduction.

294-300. Ignorance of Law.

301-310. Mistake of Fact.

311, 312. Both of Law and Fact.

§ 292. **Importance and Difficulties of Subject.** — There is no subject in the entire field of the criminal law of importance exceeding this, or on which judicial decision is more apt to go blind or stumble. The doctrines relating to it are simple of themselves; but they connect and combine with multitudes of other doctrines, and, at the points of union, complications are created embarrassing and sometimes misleading to minds accustomed merely to narrow ranges of vision. The writer hopes to be pardoned, therefore, if he enters more minutely into explanations in this chapter, particularly in the parts of it which relate to mistake of fact, than he deems necessary on most other of the topics of these volumes.

§ 293. **How Chapter divided.** — We shall consider, I. Ignorance of Law; II. Mistake of Fact; III. Ignorance and Mistake both of Law and Fact.

*I. Ignorance of Law.*

§ 294. **Arbitrary.** — Under this sub-title, unlike the next, the rule is arbitrary. It is compelled by necessity, the great master of all things.<sup>1</sup> Without it, justice could not be administered in our tribunals. It is, that, —

**Knowledge of Law conclusively presumed.** — In general, every person is presumed to know the laws of the country in which he

<sup>1</sup> Crim. Proced. I. § 7, 493-498; post, § 346 et seq.

dwells;<sup>1</sup> or in which, if residing abroad, he transacts business.<sup>2</sup> And, within limits not well defined, this presumption is conclusive. Its conclusive character rests on necessity, as just said; or, as it is sometimes laid down, on considerations of public policy, beyond which it cannot extend, though the authorities do not show precisely how broad is the foundation of policy.<sup>3</sup> Yet we may safely state, that —

**Ignorance of Law no Defence.** — In no case can one enter a court of justice to which he has been summoned in either a civil or a criminal proceeding, with the sole and naked defence, that, when he did the thing complained of, he did not know of the existence of the law which he violated.<sup>4</sup> Not even, in general, is the excuse valid that he endeavored to ascertain the law and was misled by advising counsel.<sup>5</sup> *Ignorantia juris non excusat* is, therefore, a rule in our jurisprudence, as in the Roman, whence it is derived.<sup>6</sup>

§ 295. **How far this Rule severe** — (**Malum in Se — Malum Prohibitum**). — This rule, thus essential to the orderly administration of justice, is practically harsh when applied to what is only *malum prohibitum*. But generally in the criminal law it is not specially so; because most indictable wrongs are *mala in se*, so that if offenders do not know that the law of the land forbids

<sup>1</sup> Broom Leg. Max. 2d ed. 190 et seq.; Kent, Ch. in *Lyon v. Richmond*, 2 Johns. Ch. 51, 60. A foreigner in this country is held to know our laws, the same as if he were a native subject. *Reg. v. Baronet*, Dears. 51.

<sup>2</sup> *Cambioso v. Maffet*, 2 Wash. C. C. 98. But ignorance of the laws of a foreign country is, with the exception stated in the text, ignorance of fact, within the rule that men are not conclusively presumed to know facts. *Haven v. Foster*, 9 Pick. 112; 1 Story Eq. Jurisp. § 140.

<sup>3</sup> See 1 Story Eq. Jurisp. § 110 et seq.; also an article in 23 Am. Jur. 146, 371.

<sup>4</sup> 1 Hale P. C. 42; 1 Russ. Crimes, 3d Eng. ed. 25; *Wilson v. The Mary, Gilpin*, 31; *Reg. v. Price*, 3 Per. & D. 421, 11 A. & E. 727; *Rex v. Esop*, 7 Car. & P. 456; *Commonwealth v. Bagley*, 7 Pick. 279; *Reg. v. Good*, 1 Car. & K. 186; *Rex v. Sologuard*, Andr. 231; *Rex v. Thomas*, 1 Russ. Crimes, 3d Eng. ed. 614; *Rex v. Collier*, 5 Car. & P. 160; *Shattuck v.*

*Woods*, 1 Pick. 171; *Lincoln v. Shaw*, 17 Mass. 410; *The Joseph*, 8 Cranch, 451; *Hurt v. The State*, 19 Ala. 19; *Reg. v. Hoatson*, 2 Car. & K. 777; *Walker v. The State*, 2 Swan, Tenn. 287; *Whitton v. The State*, 37 Missis. 379; *Winehart v. The State*, 6 Ind. 30; *McConico v. The State*, 49 Ala. 6, 8; *Derixson v. The State*, 65 Ind. 385; *United States v. Cargo of Sugar*, 3 Saw. 46; *Davis v. Commonwealth*, 13 Bush, 318; *The State v. Bryson*, 81 N. C. 595; *People v. Cook*, 39 Mich. 236. And see *Webster v. Sanborn*, 47 Maine, 471.

<sup>5</sup> *Forwood v. The State*, 49 Md. 531; *Hoover v. The State*, 59 Ala. 57; *Green v. The State*, 59 Ala. 68. See Stat. Crimes, § 805, 820-825; post, § 298; *Chaplin v. The State*, 7 Texas Ap. 87; *Schuster v. The State*, 48 Ala. 199; *The State v. Goodenow*, 65 Maine, 80.

<sup>6</sup> Broom Leg. Max. 2d ed. 190; 4 Bl. Com. 27; 1 Spence Eq. Jurisp. 632, 633.

their acts, they are still conscious of violating the "law written in their hearts."<sup>1</sup> And they have little ground to complain when unexpectedly called to receive, in this world, some of the merited punishment which they hoped only to postpone to the next.<sup>2</sup>

§ 296. **Statutes which could not be known.** — One illustration of the rule is, that, when statutes take effect, they are immediately operative throughout the country, even in localities so remote as to render any knowledge of their existence impossible.<sup>3</sup> Thus, a vessel having sailed, in disobedience of an embargo act, so soon after its passage that the master could not have been informed of it, he was still held to have violated it without legal excuse.<sup>4</sup> This is a strong case; because the thing done was not *malum in se*, but only *malum prohibitum*. In another case, where the court considered the transaction to be *malum in se*, it decided that a newly imposed penalty for a breach of prior laws of impost may be recovered, though the party had no knowledge of the statute when he committed the wrong.<sup>5</sup> Yet —

**Mitigation of Punishment.** — The courts in passing sentence on the prisoner sometimes make it less by reason of his ignorance of the law.<sup>6</sup> And, —

**Pardon.** — In England, where one was convicted of a malicious

<sup>1</sup> Rom. ii. 15. And see ante, § 10, 11, 210, 287, 288.

<sup>2</sup> And see observations in *The State v. Boyett*, 10 Ire. 336, 343, 344; and *United States v. Fourteen Packages*, Gilpin, 235, 249, 250.

<sup>3</sup> *The Ann*, 1 Gallis. 62; *Branch Bank of Mobile v. Murphy*, 8 Ala. 119; *Heard v. Heard*, 8 Ga. 380. And see *Oakland v. Carpenter*, 21 Cal. 642.

<sup>4</sup> *The Ann*, 1 Gallis. 62. Contra, *Ship Cotton Planter*, 1 Paine, 23. In this case, decided by Livingston, J., it is admitted that ignorance of the law does not excuse a wrong-doer. **When Statutes take effect.** — But he deems that statutes should not be held to go into operation until time has been given for their promulgation. (As to which see *Stat. Crimes*, § 28-32.) Concerning the case in controversy he says: "As it regards laws of trade, . . . the court thinks it cannot greatly err in saying, that such laws should begin to operate in the different districts only

from the times they are respectively received, from the proper department, by the collector of customs, unless notice of them be brought home in some other way to the person charged with their violation." p. 27. Upon such a question, opinions will and do differ. By accident this case was omitted from the early editions of this work; and an eminent judicial person, calling my attention to it, observes that he has "always regarded it as a very sensible decision." On the other hand, the hardships resulting from the more common doctrine are not greater than occur in many other instances of actual ignorance of the law; and it is not quite plain how a judge, who expounds the laws and does not make them, can bend the strict rule in these cases when he cannot in the others.

<sup>5</sup> *United States v. Fourteen Packages*, Gilpin, 235, 249.

<sup>6</sup> *Rex v. Lynn*, 2 T. R. 733.



shooting on the high seas, under a statute the existence of which could not have come to his knowledge, the judges recommended a pardon; but it does not appear that this was done from any doubt as to the correctness of the conviction in matter of law.<sup>1</sup>

× § 297. *Apparent Exceptions* : —

**Condition of Mind.** — There are various crimes which cannot be committed of general malevolence, but a particular evil condition of the mind, having an existence in actual fact, is required. And if by reason of ignorance of the law, the same as from any other cause, the special state of the mind cannot and does not transpire, there is no offence. Thus, —

**Larceny.** — To constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken does not belong to the taker; yet, if all the facts concerning the title are known to him, and so the question is simply one of law whether the property is his or not, still he may show, and the showing will be adequate in defence, that he honestly believed it his, through a misapprehension of law.<sup>2</sup> And —

§ 298. **Malicious Mischief.** — The like doctrine prevails in malicious mischief.<sup>3</sup> For example, —

**Pulling down House.** — On a trial under the English statute punishing those who, in a riot, “pull down, &c., any house,” it was ruled that the conduct of the defendants was not within the statute if they truly believed, though erroneously, — understanding the facts, but not the law in its application to them, — that the house belonged to one of them.<sup>4</sup> And, —

“**Maliciously,**” &c. — In Tennessee, under a statute making it punishable “wilfully or maliciously” to “throw down any fence,” it was held, that, if a man in good faith throws down his neighbor’s, believing it to be his own, — where the title under which he claims is really not sufficient in law, — an indictment will not lie against him.<sup>5</sup> So, —

<sup>1</sup> *Rex v. Bailey*, Russ. & Ry. 1. See *Rex v. Thomas*, 1 Russ. Crimes, 3d Eng. ed. 614.

<sup>2</sup> *Rex v. Hall*, 3 Car. & P. 409; *Reg. v. Reed*, Car. & M. 306; *Commonwealth v. Doane*, 1 Cush. 5; *The State v. Homes*, 17 Misso. 379; *People v. Husband*, 36 Mich. 306; Vol. II. § 851. A mere pretence of claim set up by one who does not himself believe it to be valid does

not prevent the act of taking from being a larceny. *The State v. Bond*, 8 Iowa, 540.

<sup>3</sup> Vol. II. § 998.

<sup>4</sup> Stat. 7 & 8 Geo. 4, c. 30, § 8; *Reg. v. Langford*, Car. & M. 602, 605.

<sup>5</sup> *Goforth v. The State*, 8 Humph. 37; to the same effect, *Dye v. Commonwealth*, 7 Grat. 662.

**Perjury — (Swearing falsely under Advice).** — Under the earlier United States bankrupt act it was held, that, if a bankrupt submits the facts concerning his property fairly and honestly to counsel, through whose advice he withholds from his schedule items which truly in law ought to be on it, still, in swearing to the schedule, he does not commit perjury.<sup>1</sup>

§ 299. **Corruption in Magistrate, &c.** — Likewise in proceedings against magistrates and other *quasi* judicial and sometimes ministerial officers, for acting corruptly in their office,<sup>2</sup> their misapprehensions of the law may be set up in answer to the charge of corruption; <sup>3</sup> unless, perhaps, the mistake were induced by gross carelessness or ignorance, partaking of the criminal quality.<sup>4</sup>

§ 300. **Further of the Reason and Doctrine.** — From all this it appears, that the technical rule, whereby men are conclusively presumed, even in criminal things, to know the law, is not a real departure from the law's doctrine that crime exists only where there is a criminal mind. The intent required is, not to break the law, but to do the wrong. And any ignorance of the law which prevents one from intending to do a wrong will excuse him, but not an ignorance that the law punishes the wrong.

## II. *Mistake of Fact.*

§ 301. **Distinguished from Ignorance of Law.** — According to all our books, mistake of fact is quite different in its consequences,

<sup>1</sup> United States *v.* Conner, 3 McLean, 573. And see Vol. II. § 1047. **Further Points.** — For further matter relating to the subject of this section, see Hendricks *v.* Andrews, 7 Wend. 152; Commonwealth *v.* Weld, Thacher Crim. Cas. 157. But see Reg. *v.* Hoatson, 2 Car. & K. 777. And see Reg. *v.* Good, 1 Car. & K. 185. Contra, and query, as to illegal voting, McGuire *v.* The State, 7 Humph. 54; and on which see The State *v.* Boyett, 10 Ire. 386; Commonwealth *v.* Bradford, 9 Met. 268; Reg. *v.* Lucy, Car. & M. 511; The State *v.* McDonald, 4 Harring. Del. 555; and The State *v.* Hart, 6 Jones, N. C. 389.

<sup>2</sup> Vol. II. § 972, 976.

<sup>3</sup> Rex *v.* Jackson, 1 T. R. 653; Rex *v.* Barrat, 2 Doug. 465; Rex *v.* Cope, 7 Car. & P. 720; Rex *v.* Corbett, Say, 267; Lin-

ford *v.* Fitzroy, 13 Q. B. 240; Reg. *v.* Badger, 6 Jur. 994; Rex *v.* Fielding, 2 Bur. 719; Commonwealth *v.* Jacobs, 2 Leigh, 709; The State *v.* McDonald, 4 Harring. Del. 555; The State *v.* Porter, 4 Harring. Del. 556; Hoggatt *v.* Bigley, 6 Humph. 236; Lining *v.* Bentham, 2 Bay, 1; The State *v.* Johnson, 2 Bay, 385; Commonwealth *v.* Shedd, 1 Mass. 227; The State *v.* Porter, 2 Tread. 694; The State *v.* Johnson, 1 Brev. 155; In re —, 14 Eng. L. & Eq. 151; People *v.* Powell, 63 N. Y. 88; Green *v.* Talbot, 86 Iowa, 499; The State *v.* Powers, 75 N. C. 281. See The State *v.* McDonald, 3 Dev. 468; Mungeam *v.* Wheatley, 1 Eng. L. & Eq. 516; People *v.* Calhoun, 3 Wend. 420; Cutter *v.* The State, 7 Vroom, 125.

<sup>4</sup> Rex *v.* Stukely, 12 Mod. 498; post, § 313 et seq.

both civil and criminal, from ignorance of law. There is no necessity, or technical rule of any sort, requiring it to be dealt with in any way other than is demanded by pure and abstract justice. Hence, —

**Always excuses.** — In the law of crime, the maxim is *Ignorantia facti excusat*.<sup>1</sup> As expressed by Gould, J.:<sup>2</sup> “Ignorance or mistake in point of fact is, in all cases of supposed offence, a sufficient excuse.”<sup>3</sup>

**Why?** — To punish a man who has acted from a pure mind, in accordance with the best lights he possessed, because, misled while he was cautious, he honestly supposed the facts to be the reverse of what they were, would restrain neither him nor any other man from doing a wrong in the future; it would inflict on him a grievous injustice, would shock the moral sense of the community, would harden men’s hearts, and promote vice instead of virtue.

**In Civil Jurisprudence, distinguished.** — On questions of mere private right, — that is, in civil causes, — this rule is not universal. For here, as observed by the same authority, “the end proposed by the law is, not the *punishment* of an offender, but the mere reparation of a private loss or injury, to which the plaintiff has been subjected by the act of the defendant; and it is deemed just and reasonable, independently of any question of intent, that he by whose act a civil injury has been occasioned should ultimately sustain the loss which has accrued, rather than another.”<sup>4</sup> To illustrate, —

**Assault on Passenger.** — A passenger on a public conveyance who has paid his fare is entitled to be carried according to the contract,<sup>5</sup> and plainly no mistake of fact will in a civil suit excuse the proprietor.<sup>6</sup> But a conductor who, honestly and not incautiously believing one not to have paid, ejects him, is not liable criminally for the assault.<sup>7</sup> Still, —

§ 302. **Limit in Criminal Law.** — Even in the criminal law, a

<sup>1</sup> Broom Leg. Max. 2d ed. 190; 1 Story Eq. Jurisp. § 140.

<sup>2</sup> Myers v. The State, 1 Conn. 502.

<sup>3</sup> See 4 Bl. Com. 27; 1 Hawk. P. C. Curw. ed. p. 5, § 14, note; Commonwealth v. Drew, 19 Pick. 179, 184.

<sup>4</sup> Myers v. The State, 1 Conn. 502. And see ante, § 286, 288; post, § 306, 307; Orne v. Roberts, 51 N. H. 110.

<sup>5</sup> Long v. Horne, 1 Car. & P. 610; Ker v. Mountain, 1 Esp. 27.

<sup>6</sup> See, as illustrative, Jennings v. Great Northern Railway, Law Rep. 1 Q. B. 7; Sharp v. Grey, 9 Bing. 457; Bremner v. Williams, 1 Car. & P. 414.

<sup>7</sup> The State v. McDonald, 7 Misso. Ap. 510.

mistake of fact does not absolve from guilt in those circumstances in which it does not take away the guilty mind. If, for example, one contrary to his duty closes his eyes and refuses to see, he cannot excuse his conduct by showing that he did not discover that for which he would not look. And, short of this extreme case, if one through such carelessness or negligence as the next chapter explains,<sup>1</sup> or through any other wrong which produces this result unintended as elucidated in the chapter still next subsequent,<sup>2</sup> is misled as to fact, he cannot justify his conduct on the ground of the mistake for which he is himself thus responsible.<sup>3</sup> To illustrate, —

**Selling Liquor to Minor or Drunkard.** — If a statute makes indictable the selling of intoxicating drinks to minors and drunkards, it by implication casts on the dealers in such drinks the duty to inquire carefully into the ages and habits of their customers. Then if, without making due inquiry, a vendor is misled as to the fact, his mistake will be to him no protection;<sup>4</sup> while, by the better opinion, it will protect him where his inquiry is duly thorough and honest.<sup>5</sup> And —

**Burden of Proof.** — The burden of proof is on the party relying on the mistake to show it and its innocence; the presumption in the absence of controlling evidence being, that what one does he does knowing the facts and intentionally, — propositions, however, to which the forms of statutes, and otherwise the law and evidence in various cases, furnish exceptions.<sup>6</sup> Hence, —

**Alleging Knowledge.** — In general, and subject to exceptions in special cases, the indictment need not allege the defendant's knowledge.<sup>7</sup> Now, after these preliminaries, —

<sup>1</sup> Post, § 313 et seq.

<sup>2</sup> Post, § 325 et seq.

<sup>3</sup> Withers v. Steamboat El Paso, 24 Misso. 204; Reg. v. Prince, Law Rep. 2 C. C. 154, 13 Cox C. C. 138; Dotson v. The State, 62 Ala. 141; Brown v. The State, 43 Texas, 478; Bonker v. People, 37 Mich. 4; The State v. Newton, 44 Iowa, 45; Parker v. The State, 55 Missis. 414; Kendrick v. The State, 55 Missis. 436; The State v. Hays, 67 Misso. 692; Castleberry v. The State, 62 Ga. 442; Darling v. Williams, 35 Ohio State, 58.

<sup>4</sup> Reich v. The State, 63 Ga. 616, 620, 621; Goetz v. The State, 41 Ind. 162.

<sup>5</sup> Crabtree v. The State, 30 Ohio State,

382; Adler v. The State, 55 Ala. 16; Robinus v. The State, 63 Ind. 235; Faulks v. People, 39 Mich. 200; Moore v. The State, 65 Ind. 382; Williams v. The State, 48 Ind. 306.

<sup>6</sup> Marshall v. The State, 49 Ala. 21; Squire v. The State, 46 Ind. 459; Goetz v. The State, 41 Ind. 162; Bain v. The State, 61 Ala. 75, 79, 80. Yet, more exactly, as to the burden of proof in criminal cases, see Crim. Proced. I. § 1048-1051, 1096-1101.

<sup>7</sup> Crim. Proced. I. § 521-525, where the doctrine, with its exceptions, is stated in detail; Ward v. The State, 48 Ind. 289; Werneke v. The State, 50 Ind. 22.

§ 303. **Doctrine defined.**—The doctrine of this sub-title may be defined to be, that, since an evil intent is an indispensable element in every crime, any such mistake of facts as, happening to one honestly endeavoring to discharge all legal and social duties, shows the complained-of act to have proceeded from no sort of evil in the mind, takes from it its indictable quality. A briefer expression of the same thing is, that a mistake of fact, neither induced nor accompanied by any fault or omission of duty, excuses the otherwise criminal act which it prompts. Further to explain and partly to repeat, —

**Acting from Appearances.** — What is absolute truth no man ordinarily knows. All act from what appears; not from what is. If persons were to delay their steps until made sure, beyond every possibility of mistake, that they were right, earthly affairs would cease to move; and stagnation, death, and universal decay would follow. All, therefore, must, and constantly do, perform what else they would not, through mistake of facts. If their minds are pure, if they carefully inquire after the truth but are misled, no just law will punish them, however criminal their acts would have been if prompted by an evil motive, and executed with the real facts in view.

**Effect, as to Crime, of Mistaking Facts.** — In the law, therefore, the wrongful intent being the essence of every crime,<sup>1</sup> it necessarily follows, that, whenever one is misled, without fault or carelessness,<sup>2</sup> concerning facts; and, while so misled, acts as he would be justified in doing were they what he believes them to be; he is legally innocent,<sup>3</sup> the same as he is innocent morally.<sup>4</sup> The rule in morals is stated by Wayland to be, that, if a man

<sup>1</sup> Ante, § 287, 288.

<sup>2</sup> Post, § 313 et seq. "The belief must be honest and real, not feigned, and whether it is honest or feigned the jury must determine." Brickell, C. J., in *Dotson v. The State*, 62 Ala. 141, 144.

<sup>3</sup> *Myers v. The State*, 1 Conn. 502; *Reg. v. Allday*, 8 Car. & P. 136; *McNaghten's Case*, 10 Cl. & F. 200; *Anonymous*, Foster, 265; *Rex v. Levett*, cited Cro. Car. 538; *Commonwealth v. Rogers*, 7 Met. 500; *Tom v. The State*, 8 Humph. 86; 1 East P. C. 334; *Reg. v. Parish*, 8 Car. & P. 94; *Rex v. Forbes*, 7 Car. & P. 224; *Reg. v. Leggett*, 8 Car. & P. 191; *Commonwealth v. Power*, 7 Met. 596;

*Rex v. Ricketts*, 3 Camp. 68; *Reg. v. James*, 8 Car. & P. 292; *Commonwealth v. Kirby*, 2 Cush. 577; *United States v. Pearce*, 2 McLean, 14; *Yates v. People*, 32 N. Y. 509; *Farbach v. The State*, 24 Ind. 77; *Rineman v. The State*, 24 Ind. 80; *Core v. James*, Law Rep. 7 Q. B. 135, 138; *Steinmeyer v. People*, 95 Ill. 383; *The State v. Barrackmore*, 47 Iowa, 684; *Marts v. The State*, 26 Ohio State, 162; *Gregory v. The State*, 26 Ohio State, 510; *Parmelee v. People*, 8 Hun, 623; *Carter v. The State*, 55 Ala. 181; *Gordon v. The State*, 52 Ala. 308; *Reg. v. Twose*, 14 Cox C. C. 327.

<sup>4</sup> *Isham v. The State*, 38 Ala. 213, 218.

“know not the relations in which he stands to others, and have not the means of knowing them, he is guiltless. If he know them, or have the means of knowing them and have not improved these means, he is guilty.”<sup>1</sup> The legal rule is neatly enunciated by Baron Parke thus: “The guilt of the accused must depend on the circumstances as they appear to him.”<sup>2</sup> This doctrine prevails likewise in the Scotch law,<sup>3</sup> as it necessarily must in every system of Christian and cultivated law.

§ 303 a. **Misapprehensions.** — If legal gentlemen, on and off the bench, always extended their survey over the whole legal field before coming to a conclusion on a particular question, this subtitle might close here. But by reason of shortness of vision, leading the decisions in some of the cases especially in modern times, we have, from a few of the courts, enough of denials of the universality of the doctrine, and attempts to engraft on it uncertain and conflicting exceptions, to create in the books a confusion which it is the duty of a text-writer to put forth his efforts to remove.<sup>4</sup> One of the misapprehensions, which has had a strange effect on some of the tribunals, relates to the —

<sup>1</sup> Wayland Moral Science, 81.

<sup>2</sup> Reg. v. Thurborn, 1 Den. C. C. 387; People v. Anderson, 44 Cal. 65; People v. Lamb, 54 Barb. 342; Yates v. People, 32 N. Y. 509; Patterson v. People, 46 Barb. 625; Reg. v. Cohen, 8 Cox C. C. 41; People v. Miles, 55 Cal. 207, 209.

<sup>3</sup> 1 Alison Crim. Law, 565; 1 Hume Crim. Law, 2d ed. 449; McDonald's Case, 1 Broun, 238.

<sup>4</sup> Not long since, I endeavored, through a magazine article, to correct some of the obscurities and misapprehensions; and I have heard, from several sources, that, to the extent to which it was read, it was not altogether unsuccessful. I shall here insert the substance of the article, though thereby I purposely repeat some things which are said in the text. For convenience of reference, the paragraphs are here numbered.

1. There are a few legal questions on which the entire profession seem sworn to ignorance. Prominent among them are those relating to the interpretation of statutes. The rules on this subject are as completely within the domain of reason, as permanent, and as little

changing, as those on any of the topics which all admit to be of the most stable in the law. Yet few take pains to understand them, or especially to carry them constantly in their thoughts, while considering the various statutory questions which every day demand the attention of the legal practitioner and judge. Some illustration of this, as well as of other forms of blundering, will be seen in the expositions which follow.

2. The division of our jurisprudence into its two departments of civil and criminal reveals some marked contrasts. For example, in the civil the object is to establish what is just and expedient between private persons; hence, in various situations, one who is personally without fault is compellable to pay damages to another. On the other hand, the criminal law is for the punishment of those in fault, as a means of restraining them, and deterring others from evil-doing. And the universal doctrine of this department is, that one whose mind is free from wrong is not to be punished. To punish him would be unjust, and no state can, with impunity, commit injustice.

§ 303 b. **Pardoning Power.** — In answer to the argument of injustice, should the law be held not to excuse men on the ground

But, further than this, the proposition is, I believe, accepted among all who have reasoned on the subject, that even just punishment should not be inflicted except where it may have a restraining power. Paley goes even further, without, it seems, contravening general doctrine, observing: "Punishment is an evil to which the magistrate resorts only from its being necessary to the prevention of a greater. This necessity does not exist when the end may be attained — that is, when the public may be defended from the effects of the crime — *by any other expedient.*" Paley Moral Phil. b. 6, c. 9, par. I. This is not mere speculative reasoning, it is the doctrine of our criminal law. In the words of Lord Kenyon, "It is a principle of natural justice, and of our law, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime." *Fowler v. Padgett*, 7 T. R. 505, 510. The doctrine is as familiar as it is fundamental, and authorities to it might be piled up to any extent. The precise act, to be punished, need not in all cases have been specifically meant; but in all it must have been the product of some sort of evil in the mind. For example, a mere indifference or carelessness, where carefulness is a duty, or an intent to do one particular wrong when another follows unintended, or a voluntary incapacitating or maddening of one's self by strong drink, will, in many cases, stand in the stead of the specific criminal intent. But without some sort of mental culpability there is no crime. If there was, another of the foregoing principles would still forbid its being punished. All that any man can do is to intend well, and to employ his best faculties, and put forth his full exertions, to prevent evil. If, in spite of all, evil unmeant comes from his act, it can restrain neither him nor any other person to punish him. Hence, the state, whose will the courts expound, ought not to punish him. To illustrate: —

3. In cities and villages where the people do not keep cows, they need pure milk as much as they do in the country.

Without it many an infant, and perhaps occasionally an adult, who now live with it, would die. Moreover, it is an important article of food for all classes; and he who supplies it is a benefactor. So that, in some of our States, the selling of adulterated milk is made an indictable offence. And a dealer ought to be held to a high degree of caution as to the milk he sells. But in a particular instance there may be an adulteration which it is impossible he should know of or avoid, however extreme his caution. Suppose such an instance occurs, and the dealer is punished; if he does not, in view of the peril, leave the business, to the detriment of the public, the punishment can have no effect to prevent the repetition of the same thing, either by him or by any other dealer. Hence punishment should not be inflicted even if it were deserved. And when we consider also that it is not deserved, but is a gratuitous and wicked wrong inflicted on an innocent party, no fit word to characterize it is found in the language.

4. A familiar illustration of the doctrine under discussion may be seen in an old case, in which it was held that one is not punishable for killing in the night a member of his own household whom he mistakes for a burglar; "for he did it ignorantly, without intention of hurt to the said Frances." *Levett's Case*, stated Cro. Car. 538. And this is the law in all our courts, without dissent, down to the present day. Post, § 305.

5. Again, a statute in Massachusetts provided, that, "If any person shall be found in a state of intoxication in any highway, street, or other public place, any sheriff, deputy-sheriff, constable, watchman, or police officer shall, without any warrant, take such person into custody and detain him in some proper place until, in the opinion of such officer, he shall be so far recovered from his intoxication as to render it proper to carry him before a court of justice." Thereupon an officer, having "reasonable or probable cause to believe" that a person was thus intoxicated, arrested him, while in

of innocent mistake, some have inconsiderately referred to the pardoning power as affording an adequate remedy. But, alike

fact he was not; and, being indicted for this as for an assault and battery, the court held him to be justified. After stating from Blackstone the common doctrine as to mistake of fact, Hoar, J., delivering the opinion of the court, proceeded: "This principle is recognized by all the best authorities upon criminal law. Thus in Russell on Crimes, volume 1 (7th Am. ed.), it is said that, 'without the consent of the will, human actions cannot be considered as culpable; nor, where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences.' And in Hale's Pleas of the Crown, volume 1, page 15, the general doctrine is stated that, 'where there is no will to commit an offence, there can be no transgression.' See, also, 1 Gab. Crim. Law, 4. And, in all these writers, ignorance of fact, unaccompanied by any criminal negligence, is enumerated as one of the causes of exemption from criminal responsibility." *Commonwealth v. Presby*, 14 Gray, 65, 67.

6. Illustrations of this sort might be repeated indefinitely; but in this connection I shall simply mention one other, which I select because it bridges over the argument to my next proposition. It is that, if a person is insane, not in all his faculties, but simply to the extent of having insane delusions which he accepts as facts, then if a thing falsely believed by him is such as would, were it true, legally justify the taking of another's life, and, impelled by the mistaken belief, he takes the life, he is not punishable. So it has been clearly adjudged in Massachusetts, *Commonwealth v. Rogers*, 7 Met. 500, and in England, *Opinion on Insane Criminals*, 8 Scott, N. R. 595, 1 Car. & K. 130, note, 10 Cl. & F. (in *McNaghten's Case*) 200, and the doctrine is everywhere accepted as sound. "If," asked the House of Lords, questioning the common-law judges, "a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" "To which question,"

replied Lord Chief Justice Tindal, "the answer must, of course, depend on the nature of the delusion; but, making the assumption . . . that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." *Ib.* at p. 135 of the report, in Car. & K. "It would be singular indeed," said Hoar J., in the Massachusetts case, wherein an officer took up a person in the streets for being drunk, when he was not, "if a man deficient in reason would be protected from criminal responsibility, and another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty." *Commonwealth v. Presby*, 14 Gray, 65, 68, 69.

7. This brings us to an extraordinary series of professional and judicial delusions, next to be considered.

8. No one ever doubted that, if a statute says, "Whoever does so and so shall be punished," it does not subject to punishment an insane person, or a person under the age of seven years. But why not? The legislature has made no exception. Is not the legislative will to be obeyed? What right has a court to set up its notions against the express command of a statute? If the statute is wrong, let the prosecuting officer enter a *nolle prosequi*; or, if he does not choose to do this, let the governor pardon the offender after conviction! Why look to the judges for mercy, when their function is awful justice?

9. Still, in spite of these high consid-



under our National constitution and the constitutions of the several States, either by express words or by construction, the gov-

ernments, what is thus assumed to be the legislative will is disobeyed every time an insane person, or an infant below the age of legal capacity, is set at the bar of a court for trial. There is no exception, and no complaint that the judges act in contempt of the legislative authority. But there are localities in which — not always, but now and then, and not in accordance with any intelligible rule yet discovered — the judges, when an unfortunate person who has done the best he could, yet has been misled as to some fact, is brought before them, having violated the letter of a statute by *act*, yet not by *intent*, resort to the high considerations and turn him over to such mercy as he can find in the prosecuting officer or the governor. The legislative will, they tell us, is plain! The prosecuting officer may disregard it, but the judges should do better, and mind! Or, if the governor chooses, they further inform us, he may accomplish by the pardoning power what he could not by his veto — the annulling of the legislative will!

10. Now, adapting the before-quoted language of Hoar, J., to this sort of judicial decision, we have the following: "It is singular, indeed, that a man deficient in reason is protected from criminal responsibility for violating the letter of a statute, and another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty."

11. The jumble comes from an entire ignoring of a familiar and well-settled rule of statutory interpretation. It is, as explained in another connection, that whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law. Stat. Crimes, § 139. So that, as an insane person will go free who does a thing forbidden by the common law, in like manner he will when the thing done is contrary to a statute. And, as one of sound mind will not be punished at the common law if, being circumspect and careful to obey the law, he is misled con-

cerning facts, and does the thing which he should were the facts what he believes them to be, so neither will he be under a statute. The common-law doctrines are applied to a statutory the same as to a common-law offence.

12. It will be helpful to go for illustrations to two cases, in each of which the true rule appears. A statute of the United States declared that "any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter." And it was ruled to be no defence for such a person that his misconduct proceeded from ignorance of the business. "He should not have engaged in a duty so perilous as that of an engineer when he was conscious that he was incompetent." *United States v. Taylor*, 5 McLean, 242, 246. Here was the wicked mind; and the common-law rule, simple and pure, was applied to the indictment under the statute the same as if it had been at common law. So, likewise, was the common-law rule applied in the following case, but it was a different rule. A statute required the masters of steamboats passing from one port to another, where a post-office is established, to deliver to the postmaster in the latter place, within a specified time after arrival, all letters and packets destined for the place. Still it was held that, if, for example, a letter is put into the hands of his clerk, or otherwise conveyed on board, yet not within his personal control, and he has no knowledge of it, this ignorance of fact will excuse the non-delivery of it to the postmaster, notwithstanding the unqualified terms of the statute. Here, the reader perceives, there was an ignorance of fact which proceeded from no negligence or culpability; and, therefore, the common-law rule, applied to the statute, screened from guilt the party who had committed a formal violation of the legislative com-

ernment is divided into three separate branches, the executive, the legislative, and the judicial ; and no one branch is permitted

mand. "It is not to be supposed," said Johnson, J., "that it was the intention of the law-maker to inflict a penalty upon the master of a steamboat in a case where he was ignorant that a letter had been brought upon the boat, either by the clerk or any person employed on board, and had not the means of ascertaining the fact by the use of reasonable diligence. This would be little less unjust than the disreputable device of the Roman tyrant who placed his laws and edicts on high pillars, so as to prevent the people from reading them, the more effectually to ensnare and bend the people to his purposes." *United States v. Beaty, Hemp. 487, 496.*

13. Let us now see how the doctrine is put by a court in a moment of forgetfulness of the rules of statutory interpretation. A statute in Massachusetts made it polygamy and heavily punishable "if any person who has a former husband or wife living shall marry another person," except in particular circumstances pointed out. *Rev. Stat. Mass. 1836, c. 130, § 2.* Does this forbid marriage after the former husband or wife is dead, in a case not within the exceptions of the statute? No one pretends that it does. Then, if a married woman has an insane delusion that her husband is dead, and under its influence marries another, the adjudged law in Massachusetts, the same as elsewhere, holds her free from guilt. But is not an insane woman a "person"? Every court deems her such. So the sophistical argument would be, that, as the case is within the exact terms of the statute, the insane woman must be punished by the court or remitted to the governor for pardon. The legislature has spoken, and must be obeyed!

14. The true and only answer to such a suggestion is the one already given, namely, that statutes are to be construed as limited by the rules of the unwritten law ; and, in this instance, as the woman, through an insane delusion and therefore without her fault, believed her husband to be dead, she is to be judged on a question of crime the same as though he were so.

In other words, as the unwritten law requires a criminal intent, so consequently does the written. And the woman's delusion that her husband was dead renders it impossible she should intend to marry another while he is living.

15. Hereupon one, not insane, was abandoned by her husband under circumstances inducing the honest belief that he was dead. So, in due time, she married another man, but instantly left him on hearing that her husband was alive. She was indicted for polygamy, and the court held that nothing which these facts tended to prove would constitute a defence. The case differs, as we have seen, in no essential particular from one of insane delusion, in which the doctrine of the same court is directly the reverse. Said the learned judge: "It was urged in the argument that, where there is no criminal intent, there can be no guilt, and if the former husband was honestly believed to be dead there could be no criminal intent. The proposition stated is undoubtedly correct in a general sense, but the conclusion drawn from it in this case by no means follows. Whatever one voluntarily does, he of course intends to do. [Not "of course," but *prima facie*, as we saw in the text. Ante, § 302, "Burden of Proof."] The accusation in this case was, that the woman married again, her husband being alive, but the proof she offered was, that she *intended* to marry again, her husband being dead, which was a very different thing, and not forbidden by the statute.] If the statute made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it. [True, if he knows the circumstances, he is ; but, if he is under an innocent delusion as to them, and supposes they do not exist, and does the act believing it to be another act which the law approves, it is absurd to say he means to do the forbidden thing.] On this subject the law has deemed it so important to prohibit the crime of polygamy, and found it so difficult to prescribe what shall be sufficient evidence of the death of

to discharge the functions of another. If the executive power cannot repeal laws directly, so neither should it undertake indi-

an absent person to warrant a belief of the fact, and, as the same vague evidence might create a belief in one mind and not in another, the law has also deemed it wise to fix a definite period of seven years' continued absence, without knowledge of the contrary, to warrant a belief that the absent person is actually dead. [Here, if the judge is to be understood as speaking of the evidence derivable from absence alone, we have come to views which are unquestionably sound and just. But, if such is the meaning, they have nothing whatever to do with the case in hand. What the woman relied upon was, not mere absence of the husband for less than seven years, but evidence which, though having some relation to the protracted absence, was substantially independent of it and of the rest of the statutory provision. Whether the evidence should have satisfied the jury I do not know, but according to the doctrine as commonly held elsewhere than in Massachusetts it should have been submitted to them. *Dotson v. The State*, 62 Ala. 141; *Squire v. The State*, 46 Ind. 459; *Reg. v. Moore*, 18 Cox C. C. 544; *Reg. v. Jones*, 11 Cox C. C. 358; *Reg. v. Dane*, 1 Fost. & F. 323. There are some other English cases on this question in polygamy, but the present discussion does not require their examination.] One, therefore, who marries within that time, if the other party be actually living, whether the fact is believed or not, is chargeable with that criminal intent, by purposely [the purpose, where death is honestly believed to have occurred, is to do a thing which the law permits] doing that which the law expressly prohibits." *Commonwealth v. Mash*, 7 Met. 472, 474.

16. Here, the reader perceives from the matter inserted in brackets, is a jumble. "If the statute," says the judge, "has made it criminal to do any act under particular circumstances," — that is, to marry a second husband *while the former one is living*, — "the party voluntarily doing that act is chargeable with the criminal intent of doing it." But in fact, as the court admitted, this woman did not intend to do what the statute for-

bids. Her *intent* was to marry a second husband, her *former husband being dead*. The statute did not forbid this. It was a very different thing from the intent to marry again, her former husband being alive. But the judge tells us that the statute has prescribed "what shall be sufficient evidence of the death of an absent person to warrant a belief of the fact," should it afterward appear that he was alive. In one view of the learned judge's meaning, the answer to this has already been given. The proposition is just, and it does not conflict with the better doctrine. But taking the meaning to be, that always where a seven years' absence has not transpired, the marrying party is guilty if it turns out that the other is alive, we have consequences palpably absurd. Insanity is not set down in the statute among the evidences; hence, if this exposition is correct, an insane person marrying in such circumstances should be punished. But, no; we all see that the court would not hold this. The act of the insane person was not "voluntary;" it was impelled by disease. Neither was the act of the woman marrying under mistake "voluntary;" it was impelled by the mistake. This is so even in civil affairs; for, if one enters into a contract through mistake of fact, there is no voluntary concord of minds, and the formal undertaking is not binding. The act is of the same sort as the constable's is in arresting a person supposed to be drunk, while he is not. The mistake caused it. Nor ought we to attribute to the court the meaning, that the statute excludes all other evidence of death than the seven years' absence. That would be too absurd. Suppose a husband is riding away on a train of cars, and it is thrown down an embankment, and he is killed. His mangled body is taken back to the widow, and she buries it. A year afterward she marries again, but she is indicted for polygamy. This court would not hold that she could prove the death of the absent husband only by showing a seven years' absence, so that she must go to prison for re-marrying, while her for-

rect repeals by pardon. With us, a pardon is properly grantable only for some special cause arising out of the particular instance.

mer husband was known to be buried. But suppose the body to have been greatly mangled, yet the identification was satisfactory to all, and it should afterward appear to have been the body of some other person, while the real husband ran away and concealed himself. Here was evidence adequate in any court; and, in this case of mistake, the intent of the woman was precisely the same as in the case of actual death. She proceeded cautiously and honestly; she meant to obey the law, not to break it; and the central, fundamental principle of our criminal jurisprudence forbids that she should be punished. The statute, construed as such enactments generally are outside of Massachusetts, screens the woman who does not know whether her former husband is dead or alive, if his absence has continued seven years. If she knows he is dead, she may at once marry. And, if there is an unavoidable mistake in such knowledge, she is still not to be punished for what she could not avoid. Nor could the Massachusetts court, in this actual case, so blind itself by sophistry as to come to any other conclusion; for the case was continued to allow the woman to apply to the governor for a pardon, which was procured and pleaded, and then she was discharged. But, if the court interpreted aright the legislative will, with what propriety could the governor frustrate it, or the court connive at its frustration? A pardon, as well as a judicial judgment, may be wrongly granted. And it is not a just function of the pardoning power to annul what the legislature has intentionally established.

17. In the law, precedents are so prevailing that, unless a false step is pointed out by some one who can succeed in arresting the attention of the judges, it almost necessarily leads to another. So it was in Massachusetts. I shall not attempt to trace the whole course of subsequent erratic *dicta* on this subject of mistake of fact in criminal cases, including one or more actual decisions contrary to sound doctrine, but something further seems desirable. The case of the arrest

by a police officer, the decision in which was right, was subsequent to this one of polygamy. Subsequent, also, were the following:—

18. The General Statutes of Massachusetts provide, that "whoever commits adultery shall be punished," in a way pointed out. Gen. Stat. Mass. 1860, c. 165, § 3. A woman married and lived awhile with her husband, but his habits were dissipated and he did not provide for her, so that she was compelled to leave him. She read in the newspapers of the killing of a man of his exact name, in a drunken row, and had no suspicion that the person killed could be any other than her husband. Thereupon she represented herself to be a widow. Eleven years after she last saw or heard from him, she and another man intermarried, both acting in absolutely good faith, with no doubt of the death of the former husband. But, in fact, he was alive, and the second husband was indicted for adultery committed by cohabiting under the second marriage. He was convicted, and the court held the conviction to be right. *Commonwealth v. Thompson*, 11 Allen, 23. He had exerted his best faculties to obey the law; the supposed widowed woman had waited the very decent time of eleven years; he had done what the best judge on the bench would have done if he, too, had been single, and had loved her; but all was of no avail. The majesty of the law must not be snubbed! There is some advantage in Massachusetts in being insane. If this man had been blessed with a mere insane delusion that the supposed facts were true, while the woman was cohabiting with her first husband, and had married her and cohabited with her also, he would have been "all right."

19. I am not aware of any Massachusetts case which better merits the fame of key-stone in the new arch than the one last stated.

20. A man was indicted for being a common seller of intoxicating liquor, contrary to a statute providing: "Whoever is a manufacturer of spirituous or

But if, whenever there is an unavoidable and honest mistake, it is the legislative will that the victim of the mistake shall be

intoxicating liquor for sale, or a common seller thereof, shall" be punished in a way pointed out. Gen. Stat. Mass. 1860, c. 86, § 31. He offered to prove that the article sold was bought by him for non-intoxicating beer, that he believed it to be such, and had no reason to suppose it to be otherwise. This evidence was rejected; he was convicted, and the court held the conviction to be right. The learned judge observed that this "is not one of those cases in which it is necessary to allege and prove that the person charged with the offence knew the illegal character of his act." Of course, this is so. Ante, § 302. The indictment need not allege, or the evidence show, that the defendant was not under seven years of age, or was not insane; yet affirmative proof of either would be adequate in defence. Crim. Proced. II. § 669, 670. Neither, added the judge, was this a case "in which a want of such knowledge would avail him in defence." If the want of knowledge proceeded from carelessness, or a will to disobey the statute or do any other wrong, or an indifference to its commands, this utterance, thus modified, would accord with the general doctrine pervading the criminal law. But, if the mistake arose out of a proper inquiry, prompted by a purpose to obey the statute, and do all things lawfully and well, it ought to excuse the person misled thereby. Yet the learned judge continues: "If the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which was sold." This is a different doctrine from that laid down where an officer arrested a man believed to be drunk, while he was not. So, probably, thought the judge, who proceeded: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law, he incurs the penalty." Thus the case appears to be distinguished from the one of arrest. There was for the

distinction no law except what reposes in the breast of a judge. But what a jumble! Whence comes the idea that a legislature, making a statute, and knowing that by fundamental doctrine the world over there can be no crime without a criminal intent, proceeds "without reference to the intent or purpose," unless in words it professes so to proceed? Let us assume that the real meaning of the Legislature was indisputably to frame just such a statute as this, construed by the rules which prevail under the common law. By what form of words could it be done? The words actually employed are: "Whoever is a common seller of intoxicating liquor shall," &c. These words, by the common interpretation, would require the indictment simply to allege that the defendant did the unlawful act, thus making a *prima-facie* case against him, and the prosecutor to prove at the trial that he did it; leaving the accused person to excuse himself if he could, the same as in a case of insanity, or of a child too young for crime. And what can be more reasonable than that this is what the Legislature means in any such case, even if we suppose its members to be ignorant of all rules of law? If the words are, instead of the above, "Whoever is a common seller of liquor which he knows to be intoxicating," the meaning is very different. The indictment must conform to the statute; and the prosecutor, to make a *prima-facie* case, must prove knowledge. And the same observation will apply to any other change of the like sort. Another method would be to introduce a clause that "this act shall be construed by the courts in accordance with the fundamental principles of the law." But, without such a clause, the courts are required to construe every statute in this way; so that this method would be nugatory. The result is, that, in Massachusetts, there is no possible form of words whereby the Legislature can make the law which it desires. The learned judge proceeds: "The salutary rule that every man is conclusively presumed to

punished, the governor has no right to open a pardon-shop to frustrate this will. It is an attempt to repeal so much of the

know the law, is sometimes productive of hardship in particular cases." But that rule comes from necessity. Ante, § 294. Shall, therefore, unnecessary hardship be inflicted by the court? It seems so. "And the hardship is no greater," he continues, "where the law imposes the duty to ascertain a fact." *Commonwealth v. Boynton*, 2 Allen, 160. This statute does not say it is the duty of the party to ascertain a fact. That is put on by the court in the interpretation. And, to be consistent, the court should add, that the statute makes it the duty of the party to be sane, and to be over seven years old; so that, if a child of six, or a lunatic escaped from the hospital, should be caught at liquor selling, such person must be punished. The statute is general—"Whoever,"—and it imposes on every person the duty to be old enough, and sound enough in mind for crime!

21. I might go on with these cases—but why? The doctrine and the authorities appear in condensed forms in the text of this chapter, and post, § 440, 441, 874, 1074-1076; II. § 664, 693, 922; Stat. Crimes, § 132, 351, 355-359, 632, 663-665, 730, 820-825, 877; and 12 Am. Law Rev. 469, the article to be mentioned further on.

22. Nor need we here inquire how far this Massachusetts doctrine has found favor in other States. I have seen no case elsewhere in which it has been adopted on any thoughtful consideration or investigation. There is a Rhode Island case in which one was indicted for selling adulterated milk, contrary to a statute prohibiting such sale in general terms; and, said the learned judge of the appellate court, the defendant asked the instruction to be given the jury "that there must be evidence of a guilty intent on the part of the defendant, and of a guilty knowledge." This request was refused, and the court very properly held the refusal to be right. The learned judge, however, added: "Our statute, in that provision of it under which this indictment was found, does not essentially differ from the statute of Massachusetts; and in Massachusetts, previous to the en-

actment of our statute, the Supreme Judicial Court had determined that a person might be convicted although he had no knowledge of the adulteration; the intent of the legislature being that the seller of milk should take upon himself the risk of knowing that the article he offers for sale is not adulterated." For this observation he refers to a case, *Commonwealth v. Farren*, 9 Allen, 489, from one of the reporter's head-notes to which he copies it; but the court simply holds that guilty knowledge need not be alleged and proved against a defendant, to convict him. This determination was right, though made in Massachusetts; and the learned judge well adds: "We think our statute should receive the same construction." *The State v. Smith*, 10 R. I. 258. Whether this or any other court will at a future period follow the Massachusetts doctrine, where it departs from what is generally held elsewhere, no one can tell in advance. There is a single Wisconsin case, not much considered, adopting more nearly the Massachusetts view. *The State v. Hartfiel*, 24 Wis. 60. As to which, see Stat. Crimes, § 1022, note. And there may be a few other like cases in our States. But, as I said, the general doctrine is the other way.

23. The capacity of the human mind to adapt itself to any sort of sinuous position is remarkable. Without it, who could be happy in our crooked world? We all admire Blackstone; and specially pleasing is it to note, in reading him, how, in his eye, everything connected with the English law is rosy—not an absurdity in it, all is "the perfection of reason." And a judge, under the rule of *stare decisis*—how could he get on if he did not occasionally see from the back side of his head? How, in Massachusetts, could a prosecuting officer?

24. An excellent and clear-headed lawyer and upright man, who for several years served as prosecuting officer in the most populous county in Massachusetts, has informed the public through what contortions, in this State, such an officer can so adapt himself to the adjudications

law, and the power of repeal is with the legislature. If the legislature does not mean conviction and punishment, the judiciary has no right to suffer such conviction.

on the present subject as to render himself comfortable, if not absolutely happy. He commences an article in the "American Law Review," 12 Am. Law Rev. 469, with the following formulated eclipse, so absolutely total that even the stars appear: "In this country, at least, it is still an open question whether a person who honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime, can properly be convicted." The stars here revealed are Peter and John, who demanded of the legal authorities, "Whether it be right *in the sight of God*, to hearken unto you more than unto God, judge ye;" Acts 4, 19; John Rogers, who was burned at the stake, "with nine small children and one at the breast;" John Brown, hung at Harper's Ferry, whose "soul is marching on;" and various others whose names are not important in this connection. They raised the question of *ethics*, as to the comparative obligation of the law of the land and the law of God. But that it is, or ever was, in this country, or any other, a question in the criminal law of the land, whether or not one who violates it, even by honestly doing "that which appears to him to be lawful, right, and proper," "can properly be convicted," is a contortion, pleasant undoubtedly to him who is compelled to it, but startling to the looker-on. He proceeds to picture Massachusetts standing bravely on the side of the law! Those who disobey the criminal law in this State "can properly be convicted," however proper in their own eyes may be the thing which they do! To sustain this proposition he states or cites various cases, of the sort which I have already commented on, wherein the court ignores the most familiar rules of statutory interpretation; mingled with other cases relating to pleading and evidence, in which the universal doctrine was followed, yet not distinguishing them from the former, and accepting them as upholding the same doctrine. In this way he makes it appear that

Rhode Island, in the case which I have already stated, stands side by side with Massachusetts. No one knows but she will — she has not done it yet. And something like the same thing appears as to Connecticut and Kentucky.

25. The contortion need not consist of any intentional unfairness, nor do I discover any in the writer I am now considering. He gives with entire candor what he esteems to be the authorities on the other side, namely, to the proposition which, in his language, is, that, if a man "honestly does that which appears to him to be lawful, right, and proper, but which, in point of fact, is in violation of a law which punishes the act as a crime," he cannot "properly be convicted!" He admits that the courts of some of our states have placed themselves squarely on this doctrine, and that it has considerable English support. But, candid as he is, he cannot bring himself fully to the conclusion that England stands on it; and, on the whole, he places her on the side of law and order! For this he cites several cases, particularly some penal actions, in which the law was permitted to prevail over the honest convictions of the party; ignoring the fact that a penal action is not a criminal proceeding, ante, § 32, but a civil, and that by all opinions the doctrine of the criminal intent does not necessarily prevail in civil cases as in criminal. I might add that there are cases, criminal in form, but civil in their nature and purposes, in which, being governed by the rules of civil causes, it does not prevail. Post, § 1074-1076, and the places there referred to. "In fact," he concludes, "we doubt whether any court could be found to assert the doctrine of the *mens rea* in the face of a statute distinctly dispensing with it. It is for the Legislature to judge whether the injury to the public from the indulgence of any particular practice is so great as to justify the risk of possible injustice to an individual, in providing for its punishment. Moreover, should such a case of injustice arise, though the courts cannot

§ 304. *Misinterpretation of Statute.* — One of the most common forms of blundering on this subject consists in the assumption,

help it, an appeal to the prosecuting officer, or in the last resort to the executive clemency, could not fail to be effectual. Meanwhile, the person who persists in a prohibited practice, which he knows may be injurious or fraudulent as against the public, — a fact which he may, if he will, determine, — whereby he is to profit at the risk of the public, is not in a position to assert his want of wrongful intent. The peril should be his, as well as that of his poisoned or defrauded victim."

26. Here is a close worthy of the beginning. And no judge ever adorned a bench who could do better at throwing intellectual mud in defence of a bad *stare decisis*. Was there ever, in fact, a Legislature so demented as, by express enactment, to dispense with the criminal intent in crime? Has it been so much as proposed to punish insane men and sucking babes as criminals? Did any law-maker, any demagogue on the stump, ever recommend the passage of a law that men and women who marry shall do it at the risk of being sent to the penitentiary, should a latent impediment, unsuspected, and impossible to be discovered at the time, appear afterward? It takes a bench of wise judges, in a State whose ripened jurisprudence rises golden above the green of the younger States, to do that.

27. Let us see a little, how this stands: A police officer, if he arrests a man for being drunk when he is not, is excused; because, as the foregoing explanations have shown, he was required to act, and he should not be punished when his intent accorded with his duty. That, it is agreed on all sides, was right. But he was not obliged to become a police officer. Both Scripture and the law of nature command that man shall replenish the earth. Our laws encourage people in doing this, quite as much as in becoming police officers. Not long would police officers be required, not long would courts, if the places of the present inhabitants passing away were not filled. Well, a man has made up his mind to do his part toward keeping up the population. But in Massachusetts, fornication

and adultery are both indictable; the law requires him to marry and live by his marriage vows. Yet, let him be as circumspect as he may, he cannot take the first step toward population without being in peril of the penitentiary. If he chooses fornication, he must be punished; if adultery, he must be; if he selects lawful marriage as the means, he is liable to bring up at the same end. Should he choose a widow, her former husband may not, after all, be dead. Should his choice be a maid, she may have indulged in the fun of a mock marriage, supposed to be of no binding force, never cohabited under, and never heard of by him, yet held afterward by the courts to be valid. So the door of the State prison swings open, and in he must walk! Well, if he cannot in safety become a married man, he may find refuge in the badge of a police officer. If he will "indulge" in the evil of an honest endeavor to provide inhabitants for police officers to look after fifty years hence, — why, "the peril should be his!"

28. We have already been told, that the creating of a crime out of an endeavor to obey the law is productive of no more hardship than sometimes proceeds from the rule of a presumed knowledge of the law. And, as a remedy for all, we have "the executive clemency." The ship glides on over the blue sea; the captain is on deck, and his young bride by his side. "You look pensive, love," she says. "I was thinking of jurisprudence; I learned it a little while after the happy day when we were married." "And what is jurisprudence? Teach jurisprudence to me." "Do you not think," he replies, "it was very hard for that sailor-boy to drop from the jib-boom yesterday, and be drowned?" "Yes;" and she dashes the tear from her eye. "And would it be any harder if I should throw you overboard?" "Dying would be no harder." Then, tossing her over, he continues, as she lifts up her cry for help, "The Governor, my dear, will save you with his whale, as in the case of Jonah." Great is Jurisprudence!



contrary to established rule, that a statute in mere general terms is to be interpreted as excluding exceptions; so that, if it says nothing of mistake of fact, the courts cannot except the case of such mistake out of its operation. But the considerations mentioned in the last note ought to set this question at rest. All statutes are to be and constantly are interpreted with reference to the unwritten law, by the principles of which they are limited and extended, so as to preserve harmony in our juridical system and promote justice.<sup>1</sup>

§ 305. **Further Illustrations**—of the doctrine will appear throughout these volumes and the one on “Statutory Crimes.” But the subject is so important that others may profitably be given here. Thus, —

**Homicide under Mistake — Self-defence.** — If, in language not uncommon in the cases, one has *reasonable cause to believe* the existence of facts which will justify a killing, — or, in terms more nicely in accord with the principles on which the rule is founded, if, without his fault or carelessness, he does believe them, — he is legally guiltless of the homicide; though he mistook the facts, and so the life of another innocent person is unfortunately extinguished.<sup>2</sup> In other words, and with reference to the right of

<sup>1</sup> See on this question, Stat. Crimes, § 88, 123, 131-144, 355-359, 632, 664, 665, 730, 806, 819-825, 877, 1021, 1022. Some of the cases, on the one side and on the other, are Reg. v. Cohen, 8 Cox C. C. 41; Reg. v. Willmet, 3 Cox C. C. 281; Halsted v. The State, 12 Vroom, 552; The State v. Hartfiel, 24 Wis. 60; Humpeler v. People, 92 Ill. 400; People v. White, 34 Cal. 183; The State v. Smith, 10 R. I. 258; The State v. Hause, 71 N. C. 518; Commonwealth v. Hallett, 103 Mass. 452; Williams v. The State, 48 Ind. 306; Beckham v. Nackle, 56 Misso. 546; Jakes v. The State, 42 Ind. 473; Goetz v. The State, 41 Ind. 162. On an indictment under the Georgia statute for permitting a minor to play at billiards without the consent of his parents, McCay, J., put the doctrine pertinently, thus: “To make a crime, there must be the union of act and intent, or there must be criminal negligence. . . . It is clear to us that if the defendant, after due diligence, thought honestly that this young man was not a minor, he is not guilty. If he

did so think, after proper inquiry, the element of intent does not exist; the act was done under a mistake of fact. In such a case, there is no guilt and no crime. This is the doctrine of all the books, and is, besides, common sense and common justice.” Stern v. the State, 53 Ga. 229, 230. And see Reich v. The State, 63 Ga. 616, 620, 621.

<sup>2</sup> The State v. Scott, 4 Ire. 409; Rex v. Scully, 1 Car. & P. 319; The State v. Field, 14 Maine, 244; Grainger v. The State, 5 Yerg. 459; The State v. Rutherford, 1 Hawks, 457; The State v. Roane, 2 Dev. 58; Rex v. Holloway, 5 Car. & P. 524; 1 East P. C. 273-277; 1 Hale P. C. 42; Broom Leg. Max. 2d ed. 200, 201; 1 Gab. Crim. Law, 13; Oliver v. The State, 17 Ala. 587; United States v. Wiltberger, 3 Wash. C. C. 515; The State v. Shippey, 10 Minn. 223; The State v. O'Connor, 31 Misso. 389; Yates v. People, 32 N. Y. 509; Smaltz v. Commonwealth, 3 Bush, 32; Isham v. The State, 38 Ala. 213. Contra, majority of the court, in People v. Shorter, 4 Barb. 460. And see Mc-

self-defence and the not quite harmonious authorities, it is the doctrine of reason, and sufficiently sustained in adjudication, that, notwithstanding some decisions apparently adverse, whenever a man undertakes self-defence, he is justified in acting on the facts as they appear to him. If, without fault or carelessness, he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, the law will not punish him; though they are in truth otherwise, and he has really no occasion for the extreme measure.<sup>1</sup>

*Daniel v. The State*, 8 Sm. & M. 401; *Fahnestock v. The State*, 23 Ind. 231. The case is not different if it is the life of a third person which is thus accidentally taken away. *Plummer v. The State*, 4 Texas, Ap. 310. Where the facts, if they truly existed, would not excuse the homicide, no erroneous belief of them will. *People v. Cook*, 39 Mich. 236.

<sup>1</sup> *People v. Miles*, 55 Cal. 207; *Murray v. Commonwealth*, 29 Smith, Pa. 311, 317; *Roach v. People*, 77 Ill. 25; *Holloway v. Commonwealth*, 11 Bush, 344; *Richardson v. The State*, 7 Texas, Ap. 486; *Pharr v. The State*, 7 Texas, Ap. 472; *Bode v. The State*, 6 Texas, Ap. 424; *The State v. Fraunburg*, 40 Iowa, 555; *The State v. Rutherford*, 1 Hawks, 457; *The State v. Scott*, 4 Ire. 409; *United States v. Wiltberber*, 3 Wash. C. C. 515; *Shorter v. People*, 2 Comst. 193; *People v. Shorter*, 4 Barb. 460; *Oliver v. The State*, 17 Ala. 587; *Carroll v. The State*, 23 Ala. 28; *People v. Sullivan*, 3 Seld. 396; *Monroe v. The State*, 5 Ga. 85; *People v. Anderson*, 44 Cal. 65; *Patterson v. People*, 46 Barb. 625; *People v. Hurley*, 8 Cal. 390; *Yates v. People*, 32 N. Y. 509; *Carico v. Commonwealth*, 7 Bush, 124; *Philips v. Commonwealth*, 2 Duv. 328; *Adams v. People*, 47 Ill. 376; *The State v. Potter*, 13 Kan. 414; *The State v. Bryson*, Winston, No. II., 86; *Dawson v. The State*, 33 Texas, 491; *Williams v. The State*, 3 Heisk. 376; *The State v. Collins*, 32 Iowa, 86; *Stoneman v. Commonwealth*, 25 Grat. 887; *Berry v. Commonwealth*, 10 Bush, 15; *People v. Campbell*, 30 Cal. 312; *Lingo v. The State*, 29 Ga. 470; *Commonwealth v. Carey*, 2 Brews. 404; *The State v. Sloan*, 47 Misso. 604; *Evans v. The State*, 44 Misso. 762; *People v. Scoggins*, 37 Cal.

676; *Scott v. The State*, 56 Misso. 287; *Rogers v. The State*, 62 Ala. 170. The expression in many of the cases is, that the erroneous belief of facts must, to justify the act, proceed on reasonable grounds of belief. *Wall v. The State*, 51 Ind. 463; *The State v. Brown*, 64 Misso. 367; *Roach v. People*, 77 Ill. 25; *Murray v. Commonwealth*, 29 Smith, Pa. 311; *The State v. Abbott*, 8 W. Va. 741; *The State v. St. Geme*, 31 La. An. 302; *Marts v. The State*, 26 Ohio State, 162; *Darling v. Williams*, 35 Ohio State, 58; *The State v. Alley*, 68 Misso. 124; *People v. Lilly*, 38 Mich. 270; *Brownell v. People*, 38 Mich. 732. This statement of the doctrine is, under the facts of most cases, not in essence different from that in my text; namely, without fault or carelessness. But, as general doctrine, it is deemed to be less accurate, and more likely to mislead the jury. See also *Grainger v. The State*, 5 Yerg. 459; *The State v. Clements*, 32 Maine, 279; *The State v. Harris*, 1 Jones, N. C. 190; 2 East P. C. 273; *People v. Austin*, 1 Parker C. C. 154; *Meredith v. Commonwealth*, 18 B. Monr. 49; *Teal v. The State*, 22 Ga. 75; *Keener v. The State*, 18 Ga. 194; *McPherson v. The State*, 22 Ga. 478; *Commonwealth v. Fox*, 7 Gray, 585; *Lingo v. The State*, 29 Ga. 470; *The State v. O'Connor*, 31 Misso. 389; *Glad-den v. The State*, 12 Fla. 562; *The State v. Kennedy*, 20 Iowa, 569; *People v. Williams*, 32 Cal. 280; *Hicks v. The State*, 51 Ind. 407. Parsons, C. J., in the Massachusetts court, once laid down the doctrine thus: "If the party killing had reasonable grounds for believing that the person slain had a felonious design against him, and under that supposition kill him, although it should after-

**Reducing to Manslaughter.** — All the consequences of this doctrine go with it. Therefore, when the erroneous belief is of

wards appear that there was no such design, it will not be murder, but it will be either manslaughter or excusable homicide according to the degree of caution used, and the probable grounds of such belief." Charge to the Grand Jury in Selfridge's Case, Whart. Hom. 417, 418, Lloyd's Report of the case, p. 7. In this case, Parker, J., charging the petit jury, enforced the doctrine of our text by observations from which the following are extracted: "A, in the peaceable pursuit of his affairs, sees B rushing rapidly towards him, with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A, who has a club in his hand, strikes B over the head before or at the instant the pistol is discharged; and of the wound B dies. It turns out that the pistol was loaded with *powder only*, and that the real design of B was only to *terrify* A. Will any reasonable man say, that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrine must require that a man so attacked, must, before he strike the assailant, stop and ascertain how the pistol is loaded, — a doctrine which would entirely take away the essential right of self-defence. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." Lloyd's Rep. p. 160. In a Pennsylvania case, Thompson, J., said: "I take the rule to be settled, that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm, and the danger must appear so imminent at the moment of the assault as to present no alternative of escaping its consequences but by resistance. Then the killing may be excusable, even if it turn out afterwards that there was no actual danger." *Logue v. Commonwealth*, 2 Wright, Pa. 265, 268; *s. p. People v. Cole*, 4 Parker C. C. 35; *Pond v. People*, 8 Mich. 150; *Schnier v.*

*People*, 23 Ill. 17; *Maher v. People*, 24 Ill. 241; *Hopkinson v. People*, 18 Ill. 264. **Peculiar Beliefs.** — In 1874, an Indian was tried in Washington Territory for the murder of another Indian. The defence was, that he committed the homicide to save his wife from being killed through a pernicious power of the deceased. Evidence was introduced to show, that, in the language of Greene, J., in his charge to the jury, "the deceased Doctor Jackson was reputed to be a *musatchee tomaawos* man, a bad doctor man, a sorcerer, a man able at his will to bring unseen evil agencies to bear upon the bodies of the living; that he thus possessed the power of life and death over persons even at a distance from him, and over defendant's wife in particular; that, in defendant's presence, he threatened by use of this evil power to destroy the life of defendant's wife; that, in the presence of defendant, he professed and claimed that he by means of this power caused an actual sickness of defendant's wife, of which she lay dangerously ill at the time of his own death; that, in defendant's presence, he threatened he would cause this illness to terminate in her death; and that the only means of saving the life of defendant's wife was by killing this man, who claimed to wield over her such subtle and terrible power." It appeared in evidence that the defendant, and with him all his tribe, was born into the belief in *musatchee tomaawos*, and this belief controlled him in the homicide. The learned judge charged the jury, that the law permitted one to kill another to save his wife's life, which the latter was in the act of taking away; and, though they would not themselves credit the deceased with the power attributed to him, yet, if the defendant in good faith did, and this belief was a reasonable one in *him*, considering his education and surroundings, it would furnish him, under the circumstances proved, a good defence. And the jury acquitted him. *Territory v. Fisk*, Olympia Transcript, April 11, 1874. If the learned judge committed any error in this case,

facts which, if true, would reduce to manslaughter what otherwise would be murder, the offence is in law but manslaughter.<sup>1</sup> Again,—

§ 306. **Capturing Merchant-vessel as Pirate.**—Since the vessels of all nations may capture pirates on the high seas, if an innocent merchant-vessel conducts in a way to induce the commander of another vessel to believe her piratical, this one by capturing her does not become subject to forfeiture.<sup>2</sup> So,—

**Apparently transporting Goods to Enemy.**—In a time of war, a reasonable suspicion that one is transporting property to the enemy's country is a good defence, by a military officer, to an action for the false imprisonment of such person;<sup>3</sup> but the authorities are not distinct as to how far ignorance of fact may thus be shown to defeat a *civil* suit.<sup>4</sup>

it was in requiring that the mistaken belief should be a reasonable one for the defendant to entertain. I do not say that this direction was wrong, for it is supported by the language of many of the cases. Yet, to my mind, it would more certainly accord with just principle, and conform to other of the cases, to say, that, if without fault or carelessness, the defendant in good faith entertained the belief, then, &c. A like question has arisen before the English courts. A man and his wife were indicted for manslaughter through neglect to procure medical aid for a sick child, by reason of which the child died. The defendants belonged to a sect calling themselves "Peculiar People;" one of whose beliefs is, that, if a person of the household is sick, the elders should be called in, and they should anoint the sick person with consecrated oil, and pray over him; but to send for a physician is deemed to show a want of faith in Providence, and to do no good. Willes, J., not believing in the doctrines of these people, still thought "this was a case where affectionate parents had done what they thought the best for a child, and had given it the best of food;" and the jury acquitted them. *Reg. v. Wagstaffe*, 10 Cox C. C. 530, 534. Thereupon an act of parliament was passed, making it punishable by summary conviction for a parent to "wilfully neglect to provide adequate food, clothing, medical aid, or lodging for his

child, &c., whereby the health of such child shall have been, or shall be likely to be, seriously injured." 31 & 32 Vict. c. 122, § 37. Then, after one of these Peculiar People lost a child through what was looked upon as his neglect to call in a physician, he was indicted for manslaughter; and both the judge at the trial, and the Court of Criminal Appeal held, that, in consequence of this statute, the indictment could be maintained. The language of the judges implies, that but for the statute, there would be no offence. *Reg. v. Downes*, Law Rep. 1 Q. B. D. 25, 13 Cox C. C. 111.

<sup>1</sup> 1 East P. C. 251, 273, 292, 315, 316, 318; *Rex v. Woolmer*, 1 Moody, 334; *Reg. v. Walters*, Car. & M. 164; *Stanley's Case*, J. Kel. 86; *The State v. Zeibart*, 40 Iowa, 169.

<sup>2</sup> *The Marianna Flora*, 11 Wheat. 1. With regard to the principle in this and other similar cases, see, however, *United States v. The Malek Adhel*, 2 How. U. S. 210; *United States v. Nine Packages of Linen*, 1 Paine, 129; *Phile v. Anna*, 1 Dall. 197.

<sup>3</sup> *Clow v. Wright*, Brayt. 118.

<sup>4</sup> *Imlay v. Sands*, 1 Caines, 566, *Murray v. Charming Betsy*, 2 Cranch, 64; *Little v. Barreme*, 2 Cranch, 170; *Maley v. Shattuck*, 3 Cranch, 458; *Nicholson v. Hardwick*, 5 Car. & P. 495; *Sugg v. Pool*, 2 Stew. & P. 196; *Reed v. Rice*, 2 J. J. Mar. 44; ante, § 301.

§ 307. **Transporting Person Unknown.** — Under a former statute, making it penal for the captain of a steamboat to carry from one place to another “any black or colored person, unless” he produces free papers, or, if a slave, a pass, — the offence was adjudged not committed by the captain whose boat received and carried off a slave without his knowledge or consent.<sup>1</sup> So, —

**Omitting Item by Accident — (Revenue Laws).** — Under revenue laws, no forfeiture is incurred if the master of a vessel, in making out the required papers, omits some of the cargo through accident.<sup>2</sup>

**In Champerty, &c.** — A like principle governs the penalties provided in statutes against champerty and maintenance; there being no offence if the party acts under misapprehension of the facts.<sup>3</sup> So, —

**Minor Voting.** — If one who is in fact a minor is told by his parents he is of age, and in good faith so believes, he is not punishable for voting at an election as though he were of age.<sup>4</sup>

§ 308. **In Libel — (Belief of Truth — Defendant's Meaning).** — In the law of criminal libel, though the defendant's belief that his words are true is no justification for him, because their truth would not be, yet, if the circumstances cast on him the duty to speak, he is protected equally, as indeed he is in the civil action, whether what he says is true in fact, or erroneously believed to be true.<sup>5</sup> For the like reason, the words of a criminal libel are to be interpreted as the defendant understood them, rather than as they are understood by others or by the court.<sup>6</sup> But, —

§ 309. **Opinions contrary to Law.** — Though, in general, all

<sup>1</sup> *Duncan v. The State*, 7 Humph. 148; *Price v. Thornton*, 10 Misso. 135; and the same principle in *Commonwealth v. Stout*, 7 B. Monr. 247; *Reg. v. Grasseley*, 2 Dy. 210, pl. 25; *Sturges v. Maitland*, Anthon, 153. But under some statutes of this kind, and more especially with reference to the civil action for damages, the defendant is responsible though acting in honest misapprehension of the facts. *Western and Atlantic Railroad v. Fulton*, 4 Sneed, 589; *The State v. Baltimore Steam Company*, 13 Md. 181; *Mangham v. Cox*, 29 Ala. 81.

<sup>2</sup> *Fairclough v. Gatewood*, 4 Call, 158.

<sup>3</sup> *Etheridge v. Cromwell*, 8 Wend. 629. And see *Swett v. Poor*, 11 Mass. 549, 553;

*Everenden v. Beaumont*, 7 Mass. 76, 78; *Wolcot v. Knight*, 6 Mass. 418, 421; *Brinley v. Whiting*, 5 Pick. 348, 360. See, concerning the principles laid down in this section, *Stat. Crimes*, § 131, 132.

<sup>4</sup> *Carter v. The State*, 55 Ala. 181; *Gordon v. The State*, 52 Ala. 308.

<sup>5</sup> *The State v. Burnham*, 9 N. H. 34; *Bradley v. Heath*, 12 Pick. 163; *Grimes v. Coyle*, 6 B. Monr. 301; *Bodwell v. Osgood*, 3 Pick. 379; *Swan v. Tappan*, 5 Cush. 104; 2 Stark. Slander, 257, 258. And see 50 Eng. Law Mag. 115.

<sup>6</sup> *Commonwealth v. Kneeland*, 20 Pick. 206, 216; *Updegraff v. Commonwealth*, 11 S. & R. 394, 405, 406.

forms of belief are tolerated by the law, one exception is imperative. If a man deems that to be right which the law pronounces wrong, and accepts it as duty to do what the law holds to be a crime, this is a sort of mistake which does not free him from guilt.<sup>1</sup> Perhaps it should be regarded as ignorance of law, not of fact. Resting on these doctrines is an English case of—

**Obscene Libel.**—One, to do good, kept for sale, at cost, a pamphlet entitled: “The Confessional Unmasked; showing the Depravity of the Romish Priesthood, the Iniquity of the Confessional, and the Questions put to Females in Confession.” So far from thinking it pernicious, what he did was “as a member of the Protestant Electoral Union, to promote the objects of that society, and to expose what he deems to be errors of the Church of Rome, and particularly the immorality of the confessional.” But it was, in parts containing extracts from authors of authority in the church, grossly obscene. Thereupon the court held that an offence was committed, authorizing the destruction of the pamphlet under a statute.<sup>2</sup>

<sup>1</sup> Post, § 344; *Reynolds v. United States*, 98 U. S. 145; *United States v. Anthony*, 11 Blatch. 200.

<sup>2</sup> *Reg. v. Hicklin*, Law Rep. 3 Q. B. 360. As to which see also *Steele v. Brannan*, Law Rep. 7 C. P. 261. And see *Ex parte Bradlaugh*, 3 Q. B. D. 509. It was in *Reg. v. Hicklin* held, according to the reporter's note, “that the publication of such an obscene pamphlet was a misdemeanor, and was not justified or excused by the appellant's innocent motives or objects; he must be taken to have intended the natural consequences of his act.” It would consume unnecessary space to quote the views of the learned judges at large. The doctrine seems to have been, that the contents of the pamphlet were of a sort to render their publication in itself a violation of law; therefore the rule applies, that one is not legally justified in doing, from good motives, and to promote a lawful end, what the law forbids. This case appears to me to stand, in principle, as follows: The man was not mistaken as to any fact. The difference between him and the magistrate who found the facts was, not as to them, but as to their tendency. It was a question of opinion. And, looking

at this question still more closely, we perceive it to be really one of law. By the law, it is a crime to circulate printed matter adapted to excite the baser passions, prejudicially to the public morals. If a man thinks a certain publication is not obnoxious to this inhibition, but the court think otherwise, it is in him ignorance of the law, which does not excuse. For further particulars, and a review of this case, see a pamphlet entitled “The Case of the Confessional Unmasked,” by “a barrister.” London: Printed by A. Gadsby, 10 Crane Court, Fleet Street, E. C. A copy was kindly sent me by some unknown person. I cannot but think that the reviewer is mistaken in supposing that this case undermines fundamental principles in the criminal law. On the question whether, on the whole, the publication was unlawful, considering its object, its argumentation, the methods of its circulation, and the like, I can have no opinion, it not being given in the reports. See *Commonwealth v. Tarbox*, 1 Cush. 66. In this case, I happen to know, it was contended at the trial, that the obscene libel was published from good motives; but the point was not much pressed in the upper court.

§ 310. **Innocent Agent.** — The doctrines under discussion explain how it is, that the books speak of crimes being committed through an “innocent agent.” Such an agent is one who does the forbidden thing, moved by another person; yet incurs no legal guilt, because either not endowed with mental capacity or not knowing the inculpatory facts.<sup>1</sup>

### III. *Ignorance and Mistake both of Law and Fact.*

§ 311. **Mixed Question.** — In civil causes, it seems that, if law and fact are blended as a mixed question, or if one’s ignorance of fact is produced by ignorance of law, the whole is treated as ignorance of fact, of which the party may take advantage. Perhaps this doctrine is analogous to one discussed under our first sub-title.<sup>3</sup> If not, we must deem that it has not been much illustrated on the criminal side of our law. No reason appears why it may not, under some circumstances, have a force in criminal cases.<sup>4</sup>

§ 312. **Conclusion.** — This discussion, though long, is necessarily not absolutely full; because many of the questions will require to be treated of under the specific offences, and these volumes are so crowded that the substantial avoiding of repetition becomes indispensable.

<sup>1</sup> See, for various principles concerning an innocent agent, *Reg. v. Clifford*, 2 Car. & K. 202; *Reg. v. Mazeau*, 9 Car. & P. 676; *Rex v. Giles*, 1 Moody, 166, Car. Crim. Law, 3d ed. 191; Anonymous, J. Kel. 53; *Reg. v. Bannen*, 2 Moody, 309, 1 Car. & K. 295; *Reg. v. Bleasdale*, 2 Car. & K. 765; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. James*, 8 Car. & P. 292; *Adams v. People*, 1 Comst. 173; *Commonwealth v. Hill*, 11 Mass. 136; *Wixson v. People*, 5 Parker C. C. 119; *Reg. v. Butcher*, Bell

C. C. 6, 8 Cox C. C. 77; *Gregory v. The State*, 26 Ohio State, 510.

<sup>2</sup> See 1 Story Eq. Jurisp. c. 5; and the article in 23 Am. Jur. 147, 371.

<sup>3</sup> Ante, § 297-300.

<sup>4</sup> And see *Reg. v. Bishop*, 5 Q. B. D. 259, 14 Cox C. C. 404; *The State v. Castle*, 44 Wis. 670; *The State v. Wells*, 70 Misso. 635; *The State v. Whitcomb*, 52 Iowa, 85; *Dorn v. The State*, 4 Texas, Ap. 67; *The State v. Waltz*, 52 Iowa, 227.

## CHAPTER XX.

## CARELESSNESS AND NEGLIGENCE.

§ 313. **Carelessness Criminal — Why.** — There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not. Therefore carelessness is criminal; and, within limits, supplies the place of the direct criminal intent.<sup>1</sup> Thus, —

§ 314. **Homicide from Carelessness — (Omission of Duty).** — Every act of gross carelessness, even in the performance of what is lawful, and, *a fortiori*, of what is not lawful, and every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter.<sup>2</sup> “If a man,” says Archbold,<sup>3</sup> “take upon himself an office or duty requiring skill or care, — if, by his ignorance, carelessness, or negligence, he cause the death of another, he will be guilty of manslaughter: as, —

**Furious Driving — Steamboat.** — “If a person by careless or furious driving unintentionally run over another and kill him, it will be manslaughter;<sup>4</sup> or, if a person in command of a steamboat by negligence or carelessness unintentionally run down a boat, &c., and the person in it is thereby drowned, he is guilty of manslaughter.<sup>5</sup> In like manner, —

<sup>1</sup> *Sturges v. Maitland*, Anthon, 153; *Commonwealth v. Rodes*, 6 B. Monr. 171.

<sup>2</sup> *Rex v. Carr*, 8 Car. & P. 163; *Reg. v. Haines*, 2 Car. & K. 368; *Rex v. Sullivan*, 7 Car. & P. 641; *Errington's Case*, 2 Lewin, 217; *Reg. v. Edwards*, 8 Car. & P. 611; *Ann v. The State*, 11 Humph. 159; *United States v. Freeman*, 4 Mason, 505; *Castell v. Bambridge*, 2 Stra. 854, 856; *Rex v. Fray*, 1 East P. C. 236; *Reg. v. Marriott*, 8 Car. & P. 425; *United States v. Warner*, 4 McLean, 463; *Rex v. Smith*, 2 Car. & P. 449; 1 East P. C. 264, 331; *Hilton's Case*, 2 Lewin, 214; *Reg. v. Barrett*, 2 Car. & K. 343; *The State v. Hoover*, 4 Dev. & Bat. 365; *Reg. v. Ellis*, 2 Car. & K. 470; *Etchberry v.*

*Levielle*, 2 Hilton, 40; *The State v. O'Brien*, 3 Vroom, 169; *Reg. v. Martin*, 11 Cox C. C. 136. And see also the cases cited in the remaining notes to this section. In accordance with the text is the Scotch law. 1 *Alison Crim. Law*, 113. And see Vol. II. § 643, 656 b, 659-662 a, 664, 665, 668, 681, 690-693, 696.

<sup>3</sup> Archb. New Crim. Proced. 9.

<sup>4</sup> *Rex v. Walker*, 1 Car. & P. 320; *Rex v. Mastin*, 6 Car. & P. 396; *Rex v. Grout*, 6 Car. & P. 629; *Rex v. Timmins*, 7 Car. & P. 499; *Reg. v. Swindall*, 2 Car. & K. 230.

<sup>5</sup> *Rex v. Green*, 7 Car. & P. 156; *Rex v. Allen*, 7 Car. & P. 153; *Reg. v. Taylor*, 9 Car. & P. 672. And see Vol. II. § 662 a.



**Medical Malpractice.** — “If a person, whether a medical man or not, profess to deal with the life or health of another, he is bound to use competent skill and sufficient attention; and, if he cause the death of the other through a gross want of either, he will be guilty of manslaughter.<sup>1</sup> . . .

**Casting Missiles in Street.** — “If a man, in building or repairing a house, throw a stone from it into the street or way, and it hit a person passing, and kill him, — if he did this in a street where many persons were passing, and without properly warning the persons below, he is guilty of murder; if, in a retired place, where no persons were likely to pass, he would not be liable to punishment.<sup>2</sup>

**Riding Dangerous Horse into Crowd.** — “If a man, being on a horse which he knows to be used to kick, wilfully ride him amongst a crowd of persons, and the horse kick a man and kill him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him.<sup>3</sup> But if a horse run away with his rider, so that he has no control over him, and the horse kill or injure a man, the rider is dispensable.”<sup>4</sup>

§ 315. **Doctrine pervades entire Criminal Law.** — And this doctrine of the criminal nature of carelessness or negligence pervades the entire law of crime, — not applying to all offences, but to all of a sort to admit of its application. Thus, —

§ 316. **Neglect of Legal Duty** — (**Scour River**). — The bare neglect of a legal duty — as, of the owner of a river to scour it, whereby the neighboring lands are overflowed — may render one indictable for a nuisance.<sup>5</sup> In like manner, —

<sup>1</sup> *Rex v. Spiller*, 5 Car. & P. 333; *Rex v. Van Butchell*, 3 Car. & P. 629; *Rex v. Williamson*, 3 Car. & P. 635; *Rex v. Long*, 4 Car. & P. 398, 423; *Rex v. Webb*, 1 Moody & R. 405, 2 Lewin, 196; *Reg. v. Spilling*, 2 Moody & R. 107. The Scotch law is the same. 1 *Alison Crim. Law*, 116. There are some American cases which seem to be a little more lenient to ignorance than these. *Commonwealth v. Thompson*, 6 Mass. 134; *Rice v. The State*, 8 Misso. 561. Said a learned English judge: “I call it acting wickedly, when a man is grossly ignorant, and yet affects to cure people, or when he is

grossly inattentive to their safety.” *Park, J.*, in *Rex v. Long*, 4 Car. & P. 398, 410. And see Vol. II. § 664, 685, 691, 693.

<sup>2</sup> 3 *Inst.* 57; *Foster*, 263. And see Vol. II. § 691.

<sup>3</sup> 1 *Hawk. P. C.* 7th ed. c. 31, § 68. And see Vol. II. § 656 *b*, 693.

<sup>4</sup> *Gibbon v. Pepper*, 2 *Salk.* 637; *s. c. nom. Gibbons v. Pepper*, 1 *Ld. Raym.* 38. This doctrine of negligence producing death is discussed by Mr. Bennett in 1 *Ben. & H. Lead. Cas.* 42 et seq.

<sup>5</sup> *Rex v. Wharton*, 12 *Mod.* 510; ante, § 216; post, § 433, 1075.

**Negligent Escape.** — An officer of the law, who keeps a prisoner in custody so negligently that he escapes, must answer for this neglect as a crime.<sup>1</sup> And —

**Master's Criminal Liability as to Servant.** — There are circumstances in which a master will be held liable criminally for his servant's act, or his own in respect to the servant; for, said Bayley, J.: "If a person employ a servant to use alum, or any other ingredient the unrestrained use of which is noxious, and do not restrain him in the use of it, such person is answerable if the servant use it to excess, because he did not apply the proper precaution against its misuse."<sup>2</sup> On the same principle, if a man's servant throws dirt into the street, the master may be indicted for the nuisance.<sup>3</sup> And the directors of a gas company were rightly convicted of nuisance, where the act was by their superintendent and engineer, authorized to manage the works; though themselves ignorant of the plan, which, in fact, was a departure from the one originally contemplated, and which they had no reason to believe discontinued.<sup>4</sup>

§ 317. **Continued.** — In these cases, and some others of a like sort brought to view in a previous connection,<sup>5</sup> the law casts upon the master a duty of care in the employment of his servants, and a constant supervision. The real thing punishable, therefore, is his own carelessness.<sup>6</sup> But, where this element does not aid the prosecution, the rule is clearly established that, in the criminal law, the principal is not answerable, as he is in civil jurisprudence, for the act of his servant or agent.<sup>7</sup>

<sup>1</sup> 4 Bl. Com. 130; 1 Hale P. C. 600; 2 Hawk. P. C. Curw. ed. p. 198, § 28, 31; ante, § 218; post, § 321; Vol. II. § 1095, 1100.

<sup>2</sup> *Rex v. Dixon*, 3 M. & S. 11, 14. One may be liable criminally for the acts of his agent, if he participates in them. *Commonwealth v. Gillespie*, 7 S. & R. 469, 477.

<sup>3</sup> *Turberville v. Stampe*, 1 Ld. Raym. 264.

<sup>4</sup> *Rex v. Medley*, 6 Car. & P. 292. Denman, C. J., observed: "It seems to me both common sense and law, that, if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants." p. 299. And see post, § 1075, 1076;

*Verona Central Cheese Co. v. Murtaugh*, 50 N. Y. 314.

<sup>5</sup> Ante, § 218-221.

<sup>6</sup> See *Reg. v. Lowe*, 3 Car. & K. 123, 4 Cox C. C. 449, 7 Law Reporter, n. s. 375 and note, 1 Ben. & H. Lead. Cas. 49; *Commonwealth v. Morgan*, 107 Mass. 199; *Mullins v. Collins*, Law Rep. 9 Q. B. 292.

<sup>7</sup> *Miller v. Lockwood*, 5 Harris, Pa. 248; *The State v. Dawson*, 2 Bay, 360; *Hern v. Nichols*, Holt, 462; *Rex v. Huggins*, 2 Stra. 882; *United States v. Halberstadt*, Gilpin, 262, 270; *Hipp v. The State*, 5 Blackf. 149; *The State v. Privett*, 4 Jones, N. C. 100; *Reg. v. Willmet*, 3 Cox C. C. 281, 288; *Thompson v. The State*, 45 Ind. 495; *Hanson v. The State*,

§ 318. **Vicious Beast at Large.** — If one having an ox which he knows is wont to gore permits it to go at large, and it kills a man, he is indictable; though Mr. East tells us there is doubt what his precise offence is. “However, as it is agreed by all, such person is at least guilty of a very great misdemeanor.”<sup>1</sup> So —

**Selling Liquor, producing Disorderly Conduct.** — One selling liquor, and permitting it to be drank in his store, has been held criminally for the disorderly conduct, about the store, of those to whom he made the sales.<sup>2</sup> And, —

**Setting Fire.** — If a person sets fire to an out-house, so near a dwelling-house as to endanger the latter, and it is burned, this act is deemed in law to be a burning of the dwelling-house.<sup>3</sup> Again, —

§ 319. **Rumor in Defence of Libel.** — If a man publishes a libel, — a statute permitting him, when indicted for it, to show its truth in his defence, — he cannot take advantage of his own negligence, and introduce evidence that there was floating in the community a rumor which he was so incautious as to believe and act upon.<sup>4</sup>

#### § 320. *Limits of the Doctrine:* —

**Offences requiring Particular Intent.** — There are offences which do not spring from general malevolence of mind; but, to constitute them, a particular evil intent is required. Of course, an act done from mere carelessness or inexcusable neglect, where the specific intent is wanting, cannot constitute such an offence. Thus, —

**Perjury.** — The better opinion probably is, that perjury is not committed by any mere reckless swearing to what the witness would, if more cautious, learn to be false; but the oath must be wilfully corrupt.<sup>5</sup> So, —

43 Ind. 550; *Anderson v. The State*, 39 Ind. 553; *Anderson v. The State*, 22 Ohio State, 305; *Louisville, &c. Railroad v. Blair*, 1 Tenn. Ch. 351; *Commonwealth v. Mason*, 12 Allen, 185; *Reg. v. Bennett*, Bell C. C. 1; 1 East P. C. 331.

<sup>1</sup> 1 East P. C. 265.

<sup>2</sup> *The State v. Burchinal*, 4 Harring. Del. 572.

<sup>3</sup> *Gage v. Shelton*, 3 Rich. 242.

<sup>4</sup> *The State v. White*, 7 Ire. 180. And see *Graves v. The State*, 9 Ala. 447;

*Mitchell v. The State*, 7 Eng. 50; *Butler v. McLellan*, Ware, 219.

<sup>5</sup> See 1 Hawk. P. C. Curw. ed. p. 429, § 1, 2; *United States v. Shellmire*, Bald. 370, 378; *The State v. Cockran*, 1 Bailey, 50; *United States v. Babcock*, 4 McLean, 113; *Commonwealth v. Brady*, 5 Gray, 78; *United States v. Atkins*, 1 Sprague, 558. Contra, *Commonwealth v. Cornish*, 6 Binn. 249. And see *Jesse v. The State*, 20 Ga. 156, 169. See Vol. II. § 1045-1048. The New York Penal Code Commissioners propose the following, — but

**Larceny.** — It is clear that a charge of larceny, which requires an intent to steal, could not be founded on a mere careless taking away of another's goods.<sup>1</sup>

§ 321. **Degree of Criminality.** — Moreover, the law regards carelessness as being, what it is in morals, less intensely criminal than an absolute intention to commit crime. Thus, —

**Voluntary and Negligent Escape.** — In the words of Blackstone, “officers who, after arrest, *negligently* permit a felon to escape, are punishable by fine; but *voluntary* escapes, by consent and connivance with the officer, are a much more serious offence.”<sup>2</sup> So, —

**Murder or Manslaughter.** — In felonious homicide, the killing is sometimes either murder or manslaughter, according as it was intended or careless.<sup>3</sup>

§ 322. **Conclusion.** — Other illustrations of the doctrine of this chapter will take their more appropriate places in connection with other discussions.

it does not quite meet the point of the text: “An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one believes to be false.” And they add: “See, in support of the rule, *People v. McKinney*, 3 Parker C. C. 510; *Bennett v. Judson*, 21 N. Y. 238; *Commonwealth v. Cornish*, 6 Binn. 249; *Steinman v. McWilliams*, 6 Barr, 170; and opposed to it, *United States v. Shellmire*, Bald. 370.” Draft of Penal Code, p. 51.

<sup>1</sup> 1 Hale P. C. 507.

<sup>2</sup> 4 Bl. Com. 130; 1 Hale P. C. 600; 2 Hawk. P. C. Curw. ed. p. 196, 197, § 22, 30, 31. And see ante, § 315.

<sup>3</sup> 4 Bl. Com. 192; *Rex v. Hazel*, 1 Leach, 4th ed. 368, 1 East P. C. 236. And see *People v. Enoch*, 13 Wend. 159, 174; *Oliver v. The State*, 17 Ala. 587; *Commonwealth v. Keeper of the Prison*, 2 Ashm. 227.

## CHAPTER XXI.

## THE INTENT PRODUCING AN UNINTENDED RESULT.

§ 323. **Evil Result not meant.** — The result of human actions is often different from what the doer intended. When it is so, and is evil, the rule of morals excuses him if his motive was good. The rule of law is the same.<sup>1</sup> But, —

§ 324. **Neglect to learn** — (**Law and Morals compared**). — If a man neglects obvious means to learn what will be the probable consequences of his act, and so proceeds rashly, the doctrine of carelessness already discussed<sup>2</sup> applies to the case, and he is not excused. Still, the law, regarding only the more palpable things, does not notice all the nice distinctions which moral science would draw, and an enlightened conscience recognize; therefore a man may be legally excusable for the ill consequence of a well-intended act, while we should hold him to be, in some sense, morally guilty on account of his neglecting to learn.

§ 325. **Good Result from Evil Motive.** — On the other hand, if a man means ill, but unintentionally his act results in good, we hold him to be morally guilty. But as, to constitute a crime, an act from which the public has suffered must be joined to the evil intent,<sup>3</sup> it does not quite follow, that, in a case of this kind, the doer is under all circumstances answerable to the criminal law. Probably no rule on this subject could be laid down so absolutely accurate, and so clearly sustained by the authorities that the courts would accept it as their unquestioned guide. The doctrine is recognized, that an act may take its quality of good or evil from the intent which prompted it; and many things indifferent of themselves are punished because proceeding from an evil mind. But if the thing done is, in its nature and consequences,

<sup>1</sup> Ante, § 286 et seq.

<sup>2</sup> Ante, § 313 et seq. And see *Tardiff v. The State*, 28 Texas, 169.

<sup>3</sup> Ante, § 204 et seq.

a positive good, it is difficult to see how it can be punished merely because the doer meant ill.

§ 326. **The Practical View.** — On principle, the true view doubtless is, that the court must look at the circumstances of each case, and decide whether, under them all, the thing done and the intent producing it together make up such a wrong as should be judicially noticed. And, in deciding any particular case, recourse must be had to former decisions, and to the analogies of the law. True, indeed, this rule is vague; but, in dealing with human affairs, a court must sometimes proceed on vague rules, not being able to explore the full original sources of right and motives of expediency which lie, the former in the bosom of God, and the latter scattered over the entire face of earthly things. But, to proceed to what is more completely within the adjudications, —

§ 327. **Evil Intent producing Unintended Evil.** — It is plain that, if a man means one wrong and does another, he is punishable. Not only is he so in morals; but, on the clearest principles, he is so in the law also. Now, in such a case, is the legal guilt to be measured by the motive, as in morals, or by the act? It must be by the one or the other. And the common-law rule measures it substantially by the latter, holding the person guilty of the thing done, where there is any kind of legal wrong in the intent, the same as though specifically intended; not always, however, guilty of the crime in the same degree.<sup>1</sup> Says Rutherford: "There is

<sup>1</sup> The State v. Ruhl, 8 Iowa, 447. See Eden Penal Law, 3d ed. 229; where the writer, admitting this doctrine to be law, disapproves of it, and maintains that "every member of society hath a right to do any act without the apprehension of other inconveniences than those which are the proper consequences of the act itself; for it is the right of every member of society to know, not only when he is criminal, but in what degree he is so." I confess it seems to me, that no man can set up a *right* to commit, on any terms, a *wrong*; as, to murder another on condition of submitting himself to be hung. When one has fully entertained a criminal purpose, he is to be treated as having done the thing meant, so far as concerns the moral aspect of the case. Indeed, as to the law, it was in one case judicially observed: "Anciently the will was re-

puted or taken for the deed, in matters of felony"; the court adding, "though it is not so now, yet it is an offence and finable." Bacon's Case, 1 Lev. 146. Evidently the party entertaining the criminal will cannot complain if he is punished for this mere intent. But *society* has no interest to interfere until injured by an act performed. And the injury to society is the same, whether the thing done was intended or not. Therefore, when society punishes him for what was done, he is not wronged unless his act was more evil than his intent. But, if more evil, the case presents a difficulty which the law seems not fully to have provided against. See also *People v. Enoch*, 13 Wend. 169, 174; *Reg. v. Camplin*, 1 Car. & K. 746; *Commonwealth v. Call*, 21 Pick. 515; *Rex v. Williams*, 1 Moody, 107; *Reg. v. Packard*, Car. & M. 286; *Gore's Case*, 9

so little difference between a disposition to do great harm, and a great disposition to do harm, that one of them may very well be looked upon as the measure of the other. Since, therefore, the guilt of a crime consists in the disposition to do harm, which the criminal shows by committing it, and since this disposition is greater or less in proportion to the harm which is done by the crime; the consequence is, that the guilt of a crime follows the same proportion; it is greater or less, according as the crime, in its own nature, does greater or less harm.”<sup>1</sup> The doctrine may otherwise be stated thus: the thing done, having proceeded from a corrupt mind, is to be viewed the same, whether the corruption was of one particular form or another.<sup>2</sup> On this principle,—

§ 328. **Homicide of Wrong Person — Killing not intended.** — If one, intending to murder a particular individual, shoots or strikes at him, and by accident the charge or blow takes effect on another, whom it deprives of life;<sup>3</sup> or gives poison to a person whom he means to kill, but who innocently passes it to another, not meant, yet who takes it and dies;<sup>4</sup> or lays poison for another,

Co. 81 *a*; *United States v. Ross*, 1 Gallis. 624. In *The State v. Ruhl*, cited above, we have the following illustration of the legal doctrine: **Seduction — Mistake of Age.** — A statute provided, that, “if any person take or entice away an unmarried female, under the age of fifteen years, from her father or mother, guardian, or other person having the legal charge of her person, without their consent, he shall, upon conviction,” &c. And a defendant, on trial under this statute, where the enticement was for the purpose of defilement, offered to show in his defence, that, though the girl was truly under fifteen years of age, she represented herself to him as being older, and he believed the representation, therefore he did not have the requisite criminal intent. But the court rejected the evidence, and it was held that this rejection was right. Said Wright, C. J.: “If the defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over the age of fifteen. The testimony offered was, therefore, irrelevant; for the only effect of it would have been to show that he

intended one wrong, and by mistake committed another. The wrongful intent to do one act is only transposed to the other. And, though the wrong intended is not indictable, the defendant would still be liable if the wrong done is so.” p. 450, 451. And see, as to the doctrine of this case, Stat. Crimes, § 359, 632.

<sup>1</sup> Ruth. Inst. c. 18, § 11.

<sup>2</sup> And see *Isham v. The State*, 38 Ala. 213, 219.

<sup>3</sup> *Rex v. Plummer*, 12 Mod. 627, 628; *Rex v. Jarvis*, 2 Moody & R. 40; *Golliher v. Commonwealth*, 2 Duvall, 163. And see *Yong’s Case*, 4 Co. 40 *a*; *Rex v. Hunt*, 1 Moody, 93; *Angell v. Smith*, 36 Texas, 542; *Wareham v. The State*, 25 Ohio State, 601. And see *Barcus v. The State*, 49 Missis. 17; *Reg. v. Stopford*, 11 Cox C. C. 643. So if, on a sudden quarrel, a blow is aimed at one, which accidentally takes effect on another, and kills him, this will be manslaughter, the same as if it had fallen on the person intended. *Rex v. Brown*, 1 Leach, 4th ed. 148, 1 East P. C. 231, 245, 274.

<sup>4</sup> *Reg. v. Saunders*, 2 Plow. 473.

and a third, finding it, takes it and dies ;<sup>1</sup> or, if one attempting to steal poultry discharges a gun to shoot the poultry, and thereby accidentally kills a human being ;<sup>2</sup> or, if a jailer, with no design against life, confines a prisoner contrary to his will in an unwholesome room, not allowing him necessaries for cleanliness, whereby the prisoner contracts a distemper of which he dies ;<sup>3</sup> or, if one, with the purpose of procuring an abortion, does an act which causes the child to be born so prematurely as to be less capable of living, and it dies from exposure to the external world,<sup>4</sup> — the party unintentionally causing the death is guilty, the same as if he had intended it, of murder. So, —

§ 329. **Robbery where Rape meant.** — If a man assaults a woman to commit rape upon her, not intending to rob her ; and she, hoping to redeem her chastity, offers him money which he puts in his pocket, though he did not demand it ; this is, in law, robbery.<sup>5</sup> In like manner, —

**Arson of Wrong House — Burning not intended.** — If one attempts to burn the house of a particular individual, but accidentally burns another's ;<sup>6</sup> or shoots at poultry not his own to steal it, and undesignedly sets a house on fire ;<sup>7</sup> or, to defraud the insurance office, lights in his own dwelling the flame which communicates unmeant to his neighbor's ;<sup>8</sup> he is guilty of arson. And, "if A command B to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house."<sup>9</sup>

§ 330. **Intent and Act need not be Natural Accompaniments.** — Looking closely into this doctrine, we see, that the evil of the intent and the evil of the act, added together, constitute what is punished as crime ; the same rule prevailing here as throughout the entire criminal law. And the present peculiarity of this doctrine is in its teaching, that the intent and the act, which consti-

<sup>1</sup> Gore's Case, 9 Co. 81 a ; Rex v. Jarvis, 2 Moody & R. 40 ; Rex v. Lewis, 6 Car. & P. 161 ; The State v. Fulkerson, Phillips, 233.

<sup>2</sup> 1 East P. C. 255 ; Eden Penal Law, 3d ed. 227.

<sup>3</sup> Rex v. Huggins, 2 Stra. 882, 2 Ld. Raym. 1574.

<sup>4</sup> Reg. v. West, 2 Car. & K. 784.

<sup>5</sup> Rex v. Blackham, 2 East P. C. 711.

<sup>6</sup> 1 Hawk. P. C. Curw. ed. p. 140, § 18 ; Roscoe Crim. Ev. 272.

<sup>7</sup> Roscoe Crim. Ev. 272 ; 2 East P. C. 1019.

<sup>8</sup> Rex v. Proberts, 2 East P. C. 1030, 1031 ; Rex v. Isaac, 2 East P. C. 1031 ; Rex v. Scofield, Cald. 397 ; Rex v. Pedley, Cald. 218, 2 East P. C. 1026.

<sup>9</sup> 2 Plow. 475 ; 2 East P. C. 1019 ; Roscoe Crim. Ev. 272.



tute the sum, need not be the natural or usual accompaniments of each other, provided they in fact accompany each other in the particular instance. The consequence of which is, that, —

**Intent need not be of Indictable Sort.** — If the intent is sufficient in degree of turpitude, and a result of the indictable sort proceeds from it casually, the crime is committed, even in cases where, had the exact thing been accomplished which was meant, no indictment would lie.<sup>1</sup> For, in many mere civil cases, the intent is sufficient in evil to be indictable, while the act is insufficient in kind, as being directed against individual rights only, not against the public. Yet, as just said, if in these circumstances an unintended result comes to the public detriment, of sufficient magnitude and altogether of the kind punishable as crime, this result subjects the accidental doer to indictment.

§ 331. **Intent to be Malum in Se.** — But in these cases of an unintended evil result, the intent whence the act accidentally sprang, must, it seems, be, if specific, to do a thing which is *malum in se*, and not merely *malum prohibitum*.<sup>2</sup> Thus Archbold says:<sup>3</sup> “When a man, in the execution of one act, by misfortune or chance, and not designedly, does another act, for which, if he had wilfully committed it, he would be liable to be punished; — in that case, if the act he was doing were lawful, or merely *malum prohibitum*, he shall not be punishable for the act arising from misfortune or chance; but, if *malum in se*, it is otherwise.”<sup>4</sup> For illustration, —

§ 332. **To violate Game Laws — (Homicide).** — Since it is *malum prohibitum*, but not *malum in se*, for an unauthorized person to

<sup>1</sup> See ante, § 327, note.

<sup>2</sup> Reg. v. Plummer, 1 Car. & K. 600; Reg. v. Packard, Car. & M. 236; Commonwealth v. Dana, 2 Met. 329; Commonwealth v. Cone, 2 Mass. 132; Commonwealth v. Judd, 2 Mass. 329; 1 East P. C. 255, 257, 260; Eden Penal Law, 8d ed. 227; ante, § 210, 286. This doctrine, like many others which it is necessary to lay down in the text, is the combined result of general principles and specific authorities, but it is in no case fully stated in words.

<sup>3</sup> Archb. New Crim. Proced. 9.

<sup>4</sup> 1 Hale P. C. 89; Foster, 259; Roscoe Crim. Ev. 710. **Meaning of Malum**

**in Se — Maintenance.** — As to what is *malum in se*, the Ohio Court, discoursing of maintenance and champerty, observed: “It is alleged that such contracts were never considered as *mala in se*. This will depend on determining whether they be perfectly indifferent in themselves, or whether they involve any degree of public mischief or private injury. If the latter, they must belong to the class of actions denominated *mala in se*, as this appears to be the distinction recognized by the best writers on criminal law.” And so the judges considered that maintenance is *malum in se*. Key v. Vattier, 1 Ohio, 132.

kill game in England contrary to the statutes, if such an one, in unlawfully shooting at game, accidentally kills a man, the result is not criminal in him, any more than if he were authorized.<sup>1</sup> But, —

**To kill another's Fowls — (Homicide).** — If one shoots at another's fowls, wantonly or in sport (an act which, though only a mere civil trespass, is *malum in se*), and the death of a human being accidentally follows, this is manslaughter; if his intent were to commit larceny of the fowls, we have seen<sup>2</sup> that it would be murder.<sup>3</sup>

§ 333. **Malum in Se, continued — (How intense in Evil the Intent).** — The formal distinction between *malum in se* and *malum prohibitum* is not quite apparent in principle, though something like it is. If any law, statutory or common, prohibits a thing, one can hardly be said to intend innocently the doing of it; and, should the intent to do it exist, while casually the act terminates in a criminal result not intended, there seems in principle to be here the completed crime. Still, as in these cases the intent may be sufficient, though it is to inflict only a civil injury;<sup>4</sup> so doubtless there may be circumstances in which it will be inadequate, though it is to do what, if done, would be indictable. The evil of the intent may be too small in degree,<sup>5</sup> or it may be wanting in other respects. And into the consideration of a case, in this aspect, the distinction of *malum prohibitum* and *malum in se* might well enter.<sup>6</sup>

§ 334. **Intensity of Evil in Intent, continued.** — How intensely evil the intent must be to infuse the bane of criminality into the unintended act is not easily stated in a word. Evidently there may be cases wherein, as just intimated, it is too minute in evil for the law's notice, the same as where the act is its true echo, and where the culpability consists in carelessness.<sup>7</sup> So also, —

**Degree of Crime — (Homicide — Arson).** — As the evil intended is the measure of a man's desert of punishment, and the wrong inflicted on society is the measure of its right to punish him, and there can be no punishment except where the two combine,<sup>8</sup> — it

<sup>1</sup> 1 East P. C. 260; Roscoe Crim. Ev. 710.

<sup>2</sup> Ante, § 328.

<sup>3</sup> 1 East P. C. 255.

<sup>4</sup> Ante, § 330.

<sup>5</sup> Ante, § 212 et seq.

<sup>6</sup> And see and compare *The State v. Stanton*, 37 Conn. 421, 424; *Commonwealth v. Adams*, 114 Mass. 323.

<sup>7</sup> Ante, § 216.

<sup>8</sup> Ante, § 210.

follows, that, if the offence is one in which there are degrees, like felonious homicide, which is divided into murder and manslaughter, the guilt of the unintending doer must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong.<sup>1</sup> And it is reasonable that, where there is no low degree of a very aggravated offence, the law, leaning to mercy, should refuse to recognize, as within it, some cases which would be so regarded if there were a low degree. Thus, we have seen that to shoot unlawfully, but not feloniously, at the poultry of another, and thereby accidentally to kill a human being, is manslaughter; to do the same thing with the felonious intent to steal the poultry is murder.<sup>2</sup> On the other hand, if the charge from the gun, instead of killing the man, set his house on fire, the burning would be arson only when the intent was to steal; while, if the intent was simply to execute a civil trespass, no offence would be committed,<sup>3</sup> the law having no low degree of arson. But the distinction last mentioned is very technical; and possibly our American courts will not recognize it to its full extent.

§ 335. **Offences requiring Special Intent.**—The doctrine of the transfer of the intent to the unintended act, discussed in this chapter, is limited, like many others, in the scope of its application. There are offences of the peculiar nature, that, only when the doer intends some specific wrong, do they exist in law; not being regarded as flowing merely from general malevolence.<sup>4</sup> Of course, our present doctrine has no application to these offences. Almost of the same sort are some acts which are neither criminal in themselves, nor criminal as proceeding from a corrupt mind, but only when the specific intent is joined to the specific act.<sup>5</sup> To these offences, also, the doctrine of this chapter does not apply.

§ 336. **Concluding Observations.**—In discussing the very delicate and intricate topic of this chapter, the author has been obliged to confine himself chiefly to general views, not descending much

<sup>1</sup> Ante, § 321; *The State v. Smith*, 32 Maine, 369.

<sup>2</sup> Ante, § 328; *Eden Penal Law*, 3d ed. 227.

<sup>3</sup> *Roscoe Crim. Ev.* 272; 2 *East P. C.* 1019.

<sup>4</sup> See post, § 342.

<sup>5</sup> *Fairlee v. People*, 11 Ill. 1; *Rex v. Simmons*, 1 Wils. 329; *Rex v. Webb*, 1 W. Bl. 19; *Rex v. Summers*, 3 Salk. 194; *People v. Griffin*, 2 Barb. 427; *Rex v. Scofield*, Cald. 397, 403.

into their special applications. Such descent would require more space than can be spared. But they will practically aid the practitioner nearly as much as an ampler treatment could do; because we have not sufficient adjudications for a profitable entering upon details, yet enough for the ascertaining of the leading principles. While most of these principles are established beyond the chance of overthrow, and all seem just, possibly some courts may be induced to discard or modify some of them; as, for example, to require the act performed toward the crime meant, to have a natural tendency to produce the unintended result. This distinction would leave unimpaired the doctrine that an attempt to murder a particular person, resulting in taking the life of another, constitutes murder of the latter;<sup>1</sup> but, on the other hand, where, in an Irish case, a sailor on board a ship went into a part of it in which spirits were kept, and, while tapping a cask to steal rum, accidentally, and not meaning to burn the ship, got his match in contact with the flowing liquor whereby a conflagration was created destroying the vessel, the majority of the Irish Court of Crown Cases Reserved held that the offence was not a statutory arson.<sup>2</sup> This doctrine can hardly be deemed sound in principle, when applied to offences not requiring a specific evil intent. The reasons for this have already been given.<sup>3</sup> The Massachusetts court has held, that one does not commit assault and battery in driving over a person, merely because his speed exceeds what is allowed by a city ordinance.<sup>4</sup> But this does not contravene any prior doctrine.

<sup>1</sup> Ante, § 328; *Washburn v. The State*, 25 Ohio State, 601; *The State v. Gilman*, 69 Maine, 163; *The State v. Dugan*, 1 Houst. Crim. 563; *The State v. Johnson*, 7 Oregon, 210; *The State v. Raymond*, 11 Nev. 98. And see *Reg. v. Bradshaw*, 14 Cox C. C. 83; *The State v. Sloanaker*, 1 Houst. Crim. 62; *The State v. Brown*, 1 Houst. Crim. 539.

<sup>2</sup> *Reg. v. Faulkner*, 13 Cox C. C. 550, Ir. Rep. 11 C. L. 8, 19 Eng. Rep. 573. The case mostly relied on by the majority, was the English one of *Reg. v. Pembliton*, Law Rep. 2 C. C. 119, 12 Cox C. C. 607 referred to in *Reg. v.*

*Welch*, 1 Q. B. D. 23, 13 Cox C. C. 121, both for malicious mischief. But the reader, in considering these cases, should bear in mind (what the Irish judges did not advert to), that the malice in malicious mischief, unlike arson, is generally held to be special malice against the owner particularly, and not general malice. Yet perhaps a present English statute renders this consideration there unimportant. Post, II. § 996, 997.

<sup>3</sup> Ante, § 327.

<sup>4</sup> *Commonwealth v. Adams*, 114 Mass. 323.

## CHAPTER XXII.

## MORE INTENTS THAN ONE OPERATING TOGETHER.

§ 337. **Numerous Motives to one Act.**—In the affairs of life, it is seldom a man does any one thing prompted by one motive alone, to accomplish one end. As, in the material world, all the laws of nature are constantly operating together; so, in the world of human existence, all the motives about a man are continually exerting their power upon him. Not in either of these worlds do the impulses come singly, and single results follow.

§ 338. **The Law's Motives.**—As a general truth, the criminal law does not take within its cognizance all the motives of men, but only particular ones within its jurisdiction,—just as it does not assume control over all their acts.<sup>1</sup> And it is immaterial, in a criminal case, what motives may have operated on the mind of the accused person, or what may have been inoperative, provided the law's motives did or did not influence him.

§ 339. **Surplus Intents.**—Suppose, then, a man has several intents, and, in pursuance of them, together moving him, he does what the law forbids. The rule here is, that, if there are the intents necessary to constitute the offence, and intents not necessary, the latter do not vitiate the former, which in their consequences are the same as though they stood alone.<sup>2</sup> Thus, —

§ 340. **Demolishing House.**—Under the English statutes against demolishing houses, if one object of a mob attacking a house is to injure a person in it; yet, if another and even inferior object

<sup>1</sup> Ante, § 10, 11.

<sup>2</sup> *Rex v. Cox*, Russ. & Ry. 362; *Reg. v. Hill*, 2 Moody, 30; *Rex v. Batt*, 6 Car. & P. 329; *Reg. v. Johnson*, 11 Mod. 62; *Reg. v. Geach*, 9 Car. & P. 499; *Rex v. Hayward*, 1 Russ. Crimes, 8d Eng. ed. 729, Russ. & Ry. 78; *Commonwealth v.*

*McPike*, 3 Cush. 181; *The State v. Cocker*, 3 Harring. Del. 554; *The State v. Moore*, 12 N. H. 42; *Rex v. Davis*, 1 Car. & P. 306; *People v. Carmichael*, 5 Mich. 10; *People v. Adwards*, 5 Mich. 22; *Reg. v. Hamp*, 6 Cox C. C. 167. See *Reg. v. Doddridge*, 8 Cox C. C. 335.

is to demolish the house, the offence is committed in consequence of this inferior intent.<sup>1</sup> So,—

**Wounding to do Bodily Harm.**—If one with the principal purpose of robbing another, attacks him, and, to accomplish more easily the robbery, wounds him with intent to do him grievous bodily harm, the latter intent, though secondary to the former, is within the statute on the latter subject.<sup>2</sup> The same rule applies where the chief aim of the prisoner is to prevent his own lawful apprehension. “If both intents existed, it was immaterial which was the principal, and which the secondary one.”<sup>3</sup> Also,—

**Obstructing Officer.**—It will not excuse one for obstructing an officer in his public duties, that the motive was the officer’s personal chastisement.<sup>4</sup>

§ 341. **Intending Ultimate Good.**—And when a man does the forbidden thing, moved by the intent prohibited, it is of no avail for him that he also intends an ultimate good. Thus,—

**Obstructing, yet benefiting, Way, &c.**—**Repay Forgery, &c.**—On an indictment for obstructing a navigable river, the defendant cannot show, that in other respects, and on the whole, his act worked an advantage to its navigation;<sup>5</sup> or, for obstructing a road, that he opened a better one;<sup>6</sup> or, for the nuisance of erecting a wharf on public property, that the erection was beneficial to the public;<sup>7</sup> or, for uttering a forged bill, that he intended to provide for its payment;<sup>8</sup> or, for passing a counterfeit bank-note, that he promised to take it back if it proved not to be genuine.<sup>9</sup>

**Intent fairly deducible.**—In these cases, the forbidden intent must, of course, to establish the crime, be fairly deducible from the facts and proofs.<sup>10</sup>

<sup>1</sup> *Rex v. Batt*, 6 Car. & P. 329; *Reg. v. Howell*, 9 Car. & P. 437; *Rex v. Price*, 5 Car. & P. 510.

<sup>2</sup> *Reg. v. Bowen*, Car. & M. 149; *Commonwealth v. Martin*, 17 Mass. 359; *Rex v. Shadbolt*, 5 Car. & P. 504.

<sup>3</sup> *Rex v. Gillow*, 1 Moody, 85, 1 Lewin, 57. But see, as to the doctrine of the text, *Rex v. Williams*, 1 Leach, 4th ed. 529.

<sup>4</sup> *United States v. Keen*, 5 Mason, 453.

<sup>5</sup> *Rex v. Ward*, 4 A. & E. 384, overruling *Rex v. Russell*, 6 B. & C. 566. And see *Reg. v. Betts*, 16 Q. B. 1022,

1037; *Rex v. Watts*, Moody & M. 281; *Works v. Junction Railroad*, 5 McLean, 425; Vol. II. § 1272.

<sup>6</sup> *Commonwealth v. Belding*, 13 Met. 10; Vol. II. § 1272.

<sup>7</sup> *Respublica v. Caldwell*, 1 Dall. 150.

<sup>8</sup> *Reg. v. Hill*, 2 Moody, 30.

<sup>9</sup> *Perdue v. The State*, 2 Humph. 494; Vol. II. § 598.

<sup>10</sup> *Reg. v. Price*, 9 Car. & P. 729; *Reg. v. Boyce*, 1 Moody, 29; *Rex v. Holt*, 7 Car. & P. 518; *Rex v. Price*, 5 Car. & P. 510; *Rex v. Jarvis*, 2 Moody & R. 40; *Rex v. Hayward*, 1 Russ. Crimes, 3d Eng.

§ 342. **Crimes requiring more Intents than one.** — There are crimes which require, for their constitution, the concurrence of two or more separate intents; as, an intent to do wrong in general, or to do a particular wrong, with an ulterior purpose beyond. Thus, —

**Larceny — Burglary — (Two Intents).** — In larceny, there must be, first, an intent to trespass on another's personal property; secondly, this not being alone sufficient,<sup>1</sup> the further intent to deprive the owner of his ownership therein must be added.<sup>2</sup> So burglary consists of the intent, which must be executed, to break in the night-time into a dwelling-house; and the further concurrent intent, which may be executed or not, to commit therein some crime which in law is felony.<sup>3</sup> In these and other like cases,<sup>4</sup> the particular or ulterior intent must be proved, in addition to the more general one, in order to make out the offence; and nothing will answer as a substitute.

§ 343. **Crimes requiring only General Evil Intent.** — But aside from what is thus special to exceptional offences, the rule is, that, if a man intends to do what he is conscious the law, which every one is conclusively presumed to know,<sup>5</sup> forbids, there need be no other evil intent.<sup>6</sup> As already stated,<sup>7</sup> it is of no avail to him that he means, at the same time, an ultimate good.

§ 344. **Human Laws conflicting with Divine.** — The highest ultimate good which a man can have in view is obedience to the Divine law, and the blessings flowing therefrom. Yet even this,

ed. 729, Russ. & Ry. 78; *Rex v. Bailey*, Russ. & Ry. 1; *Rex v. Williams*, 1 East P. C. 424; *Reg. v. Sullivan*, Car. & M. 209.

<sup>1</sup> *Rex v. Crump*, 1 Car. & P. 658; *Rex v. Dickinson*, Russ. & Ry. 420; *McDaniel v. The State*, 8 Sm. & M. 401.

<sup>2</sup> *Reg. v. Godfrey*, 8 Car. & P. 563; *Rex v. Wilkinson*, Russ. & Ry. 470; *The State v. Hawkins*, 8 Port. 461.

<sup>3</sup> *Rex v. Dobbs*, 2 East P. C. 513; 2 East P. C. 509, 514; *J. Kel.* 47; *Anonymus*, Dalison, 22.

<sup>4</sup> *Rex v. Gnosil*, 1 Car. & P. 304; *Reg. v. Ryan*, 2 Moody & R. 213; *The State v. Absence*, 4 Port. 397; *Rex v. Kelly*, 1 Crawf. & Dix C. C. 186; *Morgan v. The State*, 13 Sm. & M. 242; *Rex v. Shaw*,

Russ. & Ry. 526; *Reg. v. Morris*, 9 Car. & P. 89.

<sup>5</sup> Ante, § 294.

<sup>6</sup> *Walls v. The State*, 7 Blackf. 572; *The State v. Presnell*, 12 Ire. 103; *Forsythe v. The State*, 6 Ohio, 19; *The State v. Nixon*, 18 Vt. 70; *The State v. Hunter*, 8 Blackf. 212; *Shover v. The State*, 5 Eng. 259; *Brittin v. The State*, 5 Eng. 299; *Reg. v. Johnson*, 11 Mod. 62; *Rex v. Jones*, 2 B. & Ad. 611; *Needham v. The State*, 1 Texas, 139; *Reg. v. Tivey*, 1 Car. & K. 704; *Perdue v. The State*, 2 Humph. 494; *Reg. v. Price*, 3 Per. & D. 421, 11 A. & E. 727; *Rex v. Fursey*, 6 Car. & P. 81; *Kelly v. Commonwealth*, 11 S. & R. 345; *Reg. v. Holroyd*, 2 Moody & R. 339; *The State v. Hart*, 4 Ire. 246.

<sup>7</sup> Ante, § 341.

to the eye of the human law, does not justify one in disobeying the lower rule. Indeed, the tribunals, while they enforce the human law, cannot admit that it is counter to the divine; for thus they would acknowledge it to be null.<sup>1</sup> The stream cannot rise higher than the fountain — no law of man can be superior to the Source of all law, and the rule which emanates from his presence. Before his word of command all things bow. Statutes, the judicial decisions of men, the usages of ages, are but rushes in the heavenly gale. A decision, therefore, that a legislative act is contrary to the law of God, would be equivalent to holding it void. And a court, that felt itself bound by a statute, could not permit a defendant to show, that he deemed it in conflict with God's law; because this would be equivalent to receiving from him a plea of ignorance of the law of the land, which, we have seen,<sup>2</sup> is not permitted. Therefore a man cannot make the defence in court, that there is a higher law than the one there administered forbidding him to obey the law of the court,<sup>3</sup> further than it may tend to shake the legal validity of the latter. Upon this point, Baron Hume observes, "the practice of all countries is agreed."<sup>4</sup> The rule lies necessarily at the foundation of all jurisprudence; yet, necessary though it is, it has shed the innocent blood of almost all the host of martyrs who have laid down their lives for conscience' sake.

§ 345. **Evil Intent Indispensable.** — This chapter does not teach, that there may be a crime without a criminal intent. While the intent need not necessarily be to do the specific wrong, it must be in some way evil. Even, —

**Statutory Offences.** — In statutory offences, there must be an evil intent, though the statute is silent on the subject. It is to be so construed in connection with the common law, which requires such intent in every crime, as to add, in favor of a defendant,<sup>5</sup> this provision.<sup>6</sup> A good illustration of this common doctrine is the interpretation given the English statute 12 Geo. 3, c. 48, § 1, which made it felony to write any matter or thing liable to stamp duty upon paper on which had previously been written some

<sup>1</sup> And see Bishop First Book, § 87 et seq. 145; United States v. Reynolds, 1 Utah, 226; ante, § 169, note.

<sup>2</sup> Ante, § 294.

<sup>3</sup> Specht v. Commonwealth, 8 Barr, 312; Reynolds v. United States, 98 U. S.

<sup>4</sup> 1 Hume Crim. Law, 2d ed. 25.

<sup>5</sup> Stat. Crimes, § 239, 240.

<sup>6</sup> And see Crim. Proced. I. § 521-524, 623-630.



other matter so liable, before the paper had been again stamped, but made no mention whether the intent need be fraudulent or otherwise. Yet it was ruled by Abinger, C. B., that the offence is not committed unless the intent is fraudulent.<sup>1</sup> Still, —

**Intent to Disobey.** — Where a man knows<sup>2</sup> all the facts, being presumed to know also the law, if by interpretation of the statute no special evil intent is necessary, as not under all statutes there is,<sup>3</sup> it is, as already intimated,<sup>4</sup> sufficient that he simply intends to do the thing which the statute forbids.<sup>5</sup> A will to disobey a legislative command, or otherwise to violate the law, is always, in legal contemplation, evil,<sup>6</sup> however it may be in theology or morals.<sup>7</sup> What in common language is termed a good motive, or honest belief in the right to do the thing, is of no avail with the courts.<sup>8</sup> Nor can one excuse himself by showing that he did it in sport.<sup>9</sup>

<sup>1</sup> *Reg. v. Allday*, 8 Car. & P. 136. And see *Stat. Crimes*, § 132, 240, 351–362; *Sasser v. The State*, 13 Ohio, 453, 483, 484; *Reg. v. Philpotts*, 1 Car. & K. 112; *United States v. Kirby*, 7 Wal. 482; *Richardson v. The State*, 5 Texas Ap. 470; *Elliott v. Herz*, 29 Mich. 202; *Waddell v. The State*, 37 Texas, 354; *Christian v. The State*, 37 Texas, 475; *Hilliard v. The State*, 37 Texas 358; *White v. The State*, 44 Ala. 409; *Core v. James*, Law Rep. 7 Q. B. 135; *Horan v. The State*, 7 Texas Ap. 183, 186, 192; *Vaughn v. The State*, 3 Coldw. 102; *Watson v. Hall*, 46 Conn. 204; *Gault v. Wallis*, 53 Ga. 675; *The State v. Peckard*, 5 Harring. Del. 500.

<sup>2</sup> *The State v. Maloney*, 12 R. I. 251.

<sup>3</sup> *Crim. Proced. I.* § 522, 523.

<sup>4</sup> Ante, § 343, 344.

<sup>5</sup> *The State v. Gould*, 40 Iowa, 372; *Rex v. Ogden*, 6 Car. & P. 631; *Fiedler v. Darrin*, 50 N. Y. 437; *People v. Adams*, 16 Hun, 549; *Hill v. The State*, 62 Ala. 168; *Halsted v. The State*, 12 Vroom, 552; *United States v. Smith*, 2 Mason, 143; *The State v. Hollyway*, 41 Iowa, 200.

<sup>6</sup> *Reg. v. Walker*, Law Rep. 10 Q. B. 355, 13 Cox C. C. 94; *United States v. Evans*, 1 Cranch C. C. 149.

<sup>7</sup> *Wayman v. Commonwealth*, 14 Bush, 466; *Stage Horse Cases*, 15 Abb. Pr. n. s. 51.

<sup>8</sup> *United States v. Anthony*, 11 Blatch. 200; *Minor v. Happersett*, 53 Misso. 58.

<sup>9</sup> *Hill v. The State*, 63 Ga. 578.

## CHAPTER XXIII.

NECESSITY AND COMPULSION.<sup>1</sup>

§ 346. **Unavoidable Act not Indictable.** — “No action,” says Rutherford, “can be criminal, if it is not possible for a man to do otherwise. An unavoidable crime is a contradiction; whatever is unavoidable is no crime; and whatever is a crime is not unavoidable.”<sup>2</sup> If, therefore, one seizes the hand of another in which is a weapon, and, in spite of resistance, kills a third person with it, the first only is guilty.<sup>3</sup> And always an act done from compulsion or necessity is not a crime.<sup>4</sup> To this proposition the law knows no exception.

§ 347. **Details of the Doctrine.** — But while the doctrine thus stated is plain, and to establish its truth requires no further illustration, something as to detail becomes important. The law of self-defence and the defence of one's property will be explained further on;<sup>5</sup> but —

**Save one's Life — Property — (Treason).** — Whatever it is necessary for a man to do, to save his life, is, in general, to be considered as compelled.<sup>6</sup> If one, therefore, joins with rebels from fear of present death, he is not a traitor while the constraint remains.<sup>7</sup>

<sup>1</sup> In connection with this chapter, consult *Crim. Proced. I.* § 493 et seq.

<sup>2</sup> *Ruth. Inst. c. 18, § 9*; *Reg. v. Dunnett*, 1 *Car. & K.* 425; *The Generous*, 2 *Dods.* 322, 323.

<sup>3</sup> 1 *East P. C.* 225.

<sup>4</sup> 1 *Plow.* 19; *Tate v. The State*, 5 *Blackf.* 73; *Reg. v. Bamber*, 5 *Q. B.* 279, *Dav. & M.* 367.

<sup>5</sup> *Post*, § 836 et seq.

<sup>6</sup> 1 *Russ. Crimes*, 3d *Eng. ed.* 660, 661; *Oliver v. The State*, 17 *Ala.* 587.

<sup>7</sup> 1 *East P. C.* 70; *Rex v. Gordon*, 1 *East P. C.* 71; *Respublica v. McCarty*, 2 *Dall.* 86. And see 1 *Russ. Crimes*, 3d *Eng. ed.* 664, 665. So, in the Scotch law, “a person is not guilty of treason,

who, being in a part of the country that is commanded by rebels, yields them, against his will, supply of money or arms and provisions; having no means of declining compliance, and being in the reasonable fear of military execution if he refused.” 1 *Hume Crim. Law*, 2d *ed.* 50; 1 *Alison Crim. Law*, 627. “Nay,” says the latter writer, “the same will hold without any treasonable insurrection, if an ordinary mob, or any unlawful assembly of persons, compel any individual, by threats and violence, to accompany them on any unlawful expedition, provided he did not yield too easily to intimidation, but held out as long as in such circumstances can be ex-

But an apprehension, however well grounded, of having property wasted or destroyed; or of suffering any other mischief not endangering the person; or even, it has been said, apprehension of personal injury less than will deprive of life; is not a justification of a traitorous act.<sup>1</sup>

§ 348. **Killing Assailant — Innocent Person to save own Life.** — One attacked by a ruffian may kill him, if he cannot otherwise save his own life.<sup>2</sup> Yet, “according to Lord Hale,” says Russell,<sup>3</sup> “a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life if he do not comply: so that, if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.<sup>4</sup> But upon this it has been observed,<sup>5</sup> that, if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder.”<sup>6</sup> Still, more recently, Lord Denman laid down the broad doctrine, “that no man from fear of consequences to himself has a right to make himself a party to committing mischief on mankind.”<sup>7</sup>

§ 349. **Taking Goods to save Life.** — It is the doctrine generally accepted among our text-writers, that, if one under an emergency however extreme supplies the demand of nature for food or clothing from another’s possessions, he commits larceny.<sup>8</sup> But surely if to save his own life he may join himself to traitors, or take the life of another, he may take another’s goods.<sup>9</sup> Yet, for a man to be justified, his case must extend beyond mere poverty

pected from a man of ordinary resolution.” 1 Alison Crim. Law, 673; 1 Hume Crim. Law, 2d ed. 51.

<sup>1</sup> Rex v. McGrowther, 1 East P. C. 71; Republica v. McCarty, 2 Dall. 86.

<sup>2</sup> 4 Bl. Com. 183; People v. Doe, 1 Mich. 451.

<sup>3</sup> 1 Russ. Crimes, 3d Eng. ed. 664.

<sup>4</sup> 1 Hale P. C. 51, 434. And see 4 Bl. Com. 80; 1 Broom Leg. Max. 2d ed. 8. There are cases in which one of two in-

nocent parties has no right to prefer his own life to that of the other. United States v. Holmes, 1 Wal. Jr. 1.

<sup>5</sup> 1 East P. C. 294.

<sup>6</sup> 1 Russ. Crimes, 3d Eng. ed. 664.

<sup>7</sup> Reg. v. Tyler, 8 Car. & P. 616.

<sup>8</sup> 4 Bl. Com. 31; 1 Hale P. C. 54, 665; Dalt. Just. c. 151, § 5; 2 East P. C. 698, 699.

<sup>9</sup> And see Broom Leg. Max. 2d ed. 8; Barrow v. Page, 5 Hayw. 97.

however severe, and be such as could not often arise in this country; because the laws make provision for the support of the poor, even to the relief of an immediate want.<sup>1</sup>

§ 350. **Necessity varying with Circumstances — (The Test).** — It is plain that what would justify the doing of one thing as necessary might not that of another. The special facts of each case must be considered. The test would seem to be, whether, under the circumstances, the person was morally free in doing what he did, or whether the doing was produced by constraint of his will. Thus, —

§ 351. **Vessel in Stress of Weather — (Breach of Embargo — Revenue Laws).** — If, during an embargo, a vessel is by stress of weather compelled to put into a foreign port, and there sell her cargo, for the preservation of the lives and property on board, she will not be adjudged guilty of a breach of the Embargo Act.<sup>2</sup> So where, in Virginia (anterior to the establishment of our national Constitution), a tempest forced a vessel from Hampton Roads to Warwick before an entry was made at the custom-house at Hampton, this was held to be no breach of the State revenue laws; it further appearing, that immediately afterward the entry was made, the duties were secured, and a permit was obtained.<sup>3</sup> And if a merchant ship from a foreign port is wrecked on our coast, the goods are not liable to forfeiture, though landed without a permit.<sup>4</sup> For, although revenue laws are in their nature rigid and

<sup>1</sup> Grotius, who, with some other writers, holds that such taking is not theft, puts the doctrine thus: "For, among theologians also, it is a received opinion, that, in such a necessity, if any one take what is necessary to his life from any other's property, he does not commit theft: of which rule the reason is, not that which some allege, that the owner of the property is bound to give so much to him that needs it, out of charity, but this, that all things must be understood to be assigned to owners with some such benevolent exception of the right thus primitively assigned," — a reason, which, if we receive it as good, is still not in conflict with the one stated in our text. He adds some "cautions" against carrying "this liberty too far." Among other things he says, "that we must first endeavor in every way to avoid this

necessity in some other manner; as, by applying to the magistrate, or by trying whether we cannot obtain the use of things from the owner by entreaty," and, when all is over, if "it is possible, restitution should be made." Grotius de Jure Belli et Pacis, I. 2, 7-9, Whewell's Translation, i. 238-240. **Necessary Labor — Lord's Day.** — As to the necessity which will justify laboring on the Lord's day, to save a growing crop from destruction and preserve life, see *The State v. Goff*, 20 Ark. 289; Vol. II. § 959.

<sup>2</sup> *The William Gray*, 1 Paine, 16. And see *United States v. Brig James Wells*, 3 Day, 296, 7 Cranch, 22; *Anderson v. The Solon*, Crabbe, 17.

<sup>3</sup> *Stratton v. Hague*, 4 Call, 564.

<sup>4</sup> *The Gertrude*, 3 Story, 68. And see *Ripley v. Gelston*, 9 Johns. 201; *Peisch*

inelastic, they “must,” in the graceful language of Lord Stowell, “yield to that to which every thing must bend, — to necessity.”<sup>1</sup>

**Compelled to stop in Street.** — And a city ordinance, forbidding any one to “suffer” a vehicle to “stop in any street” for more than twenty minutes, is not violated when the stopping is involuntary.<sup>2</sup> Again, —

**Money seized in a Rebellion.** — If one has received public money, which he has undertaken to pay over to the government, yet if a rebellion arises and grows to be a public war, and, without his fault or negligence, the rebel authorities seize and appropriate to themselves this money, he is excused.<sup>3</sup>

§ 352. **Necessity urgent and without Fault.** — The necessity, to excuse, must be real and urgent, and not created by the fault or carelessness<sup>4</sup> of him who pleads it.<sup>5</sup> “Where the law,” observes Story, J., “imposes a prohibition, it is not left to the discretion of the citizen to comply or not; he is bound to do every thing in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be instant and imminent, it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as cannot allow a different course without the greatest jeopardy of life and property. He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral, necessity to authorize the deviation. Under such circumstances the party acts at his peril; and, if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist or overcome, or any innocent course which ordinary skill might adopt and pursue, the party cannot be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity.”<sup>6</sup> “I do not mean,” said

*v. Ware*, 4 Cranch, 347; *Trueman v. Casks of Gunpowder*, Thacher Crim. Cas. 14.

<sup>1</sup> *The Generous*, 2 Dods. 322, 323. And see *Baptiste v. De Volunbrun*, 5 Har. & J. 86.

<sup>2</sup> *Commonwealth v. Brooks*, 99 Mass. 434.

<sup>3</sup> *United States v. Thomas*, 15 Wal. 337.

<sup>4</sup> Ante, § 216 et seq., 303, 313 et seq.

<sup>5</sup> 1 East P. C. 255, 277; *Roscoe Crim Ev.* 570; *The Joseph*, 8 Cranch, 451; *Reg. v. Dunnett*, 1 Car. & K. 425.

<sup>6</sup> *The Argo*, 1 Gallis. 150, 157; s. p. *The New York*, 3 Wheat. 59.

Lord Stowell, "all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion, and an ordinary knowledge of business."<sup>1</sup>

**Evidence Clear — Act not exceed Emergency.** — The evidence of the necessity must be clear and conclusive.<sup>2</sup> And the act must proceed no further than the emergency absolutely requires.<sup>3</sup>

§ 353. **Varying with Enormity of Crime.** — Some of the foregoing illustrations of necessity are taken from cases *quasi* criminal or civil. Perhaps, in purely criminal cases of the more aggravated sort, the rule may not be entirely the same. And the proposition is reasonable, that the greater the crime the greater must be the necessity to excuse it.<sup>4</sup>

§ 354. **Excuse for Delay of Trial — (Overriding Statute).** — It was held in Pennsylvania, that, though the law authorized a prisoner to demand his trial at the second term after being indicted, one infected with small-pox could not avail himself of this right, because of the necessity of protecting people against a contagious and deadly disease. And, "*per curiam*, there is no doubt that necessity, either moral or physical, may raise an invariable exception to the letter of the *habeas corpus* act. A court is not bound to peril life in an attempt to perform what was not intended to be required of it."<sup>5</sup>

**Qualifying Form of Allegation.** — So necessity may qualify the form of the allegations in an indictment.<sup>6</sup>

§ 355. **Command — (Military Officer — Parent — Master — Principal).** — The command of a superior to an inferior, as of a military officer to a subordinate,<sup>7</sup> or of a parent to a child,<sup>8</sup> will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent;<sup>9</sup>

<sup>1</sup> The Generous, 2 Dods. 322, 324.

<sup>2</sup> Brig James Wells v. United States, 7 Cranch, 22; The Generous, 2 Dods. 322, 324; The Josefa Segunda, 5 Wheat. 338.

<sup>3</sup> Broom Leg. Max. 2d ed. 9.

<sup>4</sup> Ante, § 350.

<sup>5</sup> Commonwealth v. Jailer, 7 Watts, 336.

<sup>6</sup> Crim. Proc. I. § 493 et seq.

<sup>7</sup> United States v. Jones, 8 Wash. C. C. 209, 220; Commonwealth v. Blodgett, 12 Met. 56; United States v. Carr, 1 Woods,

480. And see Harmony v. Mitchell, 1 Blatch. 549, 13 How. U. S. 115.

<sup>8</sup> Broom Leg. Max. 2d ed. 11; post, § 367 et seq.

<sup>9</sup> Hays v. The State, 13 Misso. 246; The State v. Bryant, 14 Misso. 340; Commonwealth v. Drew, 8 Cush. 279; Kliffeld v. The State, 4 How. Missis. 304; Schmidt v. The State, 14 Misso. 137; The State v. Bell, 5 Port. 365; The State v. Bugbee, 22 Vt. 32; Curtis v. Knox, 2 Denio, 341; Brown v. Howard, 14 Johns. 119; Commonwealth v. Hadley, 11 Met. 66.

but in all these cases the person doing the wrongful thing is guilty, the same as though he had proceeded self-moved. And if a servant executes a lawful direction in an unlawful manner, he is responsible.<sup>1</sup>

**Married Women — Persons acting under Legal Process.** — The partial exception, in favor of women under coverture obeying their husbands, will be treated of in the next chapter. And perhaps persons acting under authority of legal process, and thereby protected, may be regarded as in some sense within the exception.<sup>2</sup>

<sup>1</sup> *Naish v. East India Co.*, 2 Comyns, 462, 469.

<sup>2</sup> *Broom Leg. Max.* 2d ed. 69.

## CHAPTER XXIV.

## THE HUSBAND'S PRESUMED OR ACTUAL COERCION OF THE WIFE.

§ 356. **Doctrine Artificial.** — The doctrine of this chapter rests, in the main, upon mere artificial reasoning. Yet it is not quite destitute of other foundation. For, in fact, affection and fear in the wife sometimes operate as a real constraint on her will.

§ 357. **Doctrine in General Terms.** — A married woman, or *feme covert*, — under *coverture* of her husband, — has not lost by the marriage her general capacity for crime. Yet as the law has cast upon her a certain duty to him, of obedience, of affection, and of confidence,<sup>1</sup> it has compensated her by the indulgence that, if through constraint from his will she carries her obedience to the excess of doing unlawful acts, she shall not suffer for them criminally. This consideration for the weaker sex is unknown in Scotland,<sup>2</sup> and is probably peculiar to the common law, often reproached, in other respects, for depriving wives of their rights.

**Limits of the Doctrine.** — The precise limits of the doctrine are, at some points, a little uncertain; but the following propositions are believed to be reasonably well supported by the authorities.

§ 358. **First.** *Actual constraint*, short of what is mentioned in the last chapter, *imposed by a husband on his wife, will relieve her from the legal guilt of any crime whatever, committed in his presence*.<sup>3</sup> —

**Supposed Exceptions — (Treason — Murder — Robbery).** — From this proposition the offences of treason and murder, and some add robbery,<sup>4</sup> would appear from observations of judges and text-

<sup>1</sup> Commonwealth v. Lewis, 1 Met. 151.

<sup>2</sup> 1 Alison Crim. Law, 668.

<sup>3</sup> The State v. Parkerson, 1 Strob. 169; 1 Russ. Crimes, 3d Eng. ed. 18-25. In Arkansas, this is so by statute. But, under the statute, the coercion must be proved, or be presumable from the cir-

cumstances; the mere presence of the husband will not excuse the wife. Freel v. The State, 21 Ark. 212; Edwards v. The State, 27 Ark. 493.

<sup>4</sup> That robbery furnishes no exception, see People v. Wright, 38 Mich. 744; Miller v. The State, 25 Wis. 384.



writers to be excepted.<sup>1</sup> The reason usually assigned is the enormity of the offences. But this reason seems unsatisfactory in principle; and, looking for authority, Mr. Greaves has observed, that he finds “no *decision* which warrants the position.”<sup>2</sup> Therefore the true view probably is to disregard this distinction; and to accept, in place of it, the one, better sustained, to be stated in our section immediately after the next.

§ 359. Secondly. *Whatever, of a criminal nature, the wife does in the presence of her husband, is presumed to be compelled by him;*<sup>3</sup>

<sup>1</sup> 1 Hawk. P. C. Curw. ed. p. 4, § 11; Commonwealth v. Neal, 10 Mass. 152; Rex v. Knight, 1 Car. & P. 116, note; Rex v. Stapleton, Jebb, 93; and the references in the next note.

<sup>2</sup> See the two notes of this able English editor in 1 Russ. Crimes, 3d Eng. ed. p. 18, 25. In the second note he says: “Before Somerville’s Case, 26 Eliz., and Somerset’s Case, A.D. 1615, I find no exception to the general rule, that the coercion of the husband excuses the act of the wife. See 27 Ass. 40; Stamf. P. C. 26, 27, 142; Pulton de Pace Regis, 130; Br. Abr. Coron. 108; Fitz. Abr. Coron. 130, 160, 199. But after those cases I find the following exceptions in the books: Bac. Max. 57, excepts treason only. Dalton, c. 147, treason and murder, citing for the latter Mar. Lect. 12 (which I cannot find, perhaps some reader of some Inn of Court). 1 Hale P. C. p. 45, 47, treason, murder, homicide; and p. 434, treason, murder, and manslaughter. Kelyng, 31, an *obiter dictum*, murder only. Hawk. b. 1, c. 1, § 11, treason, murder, and robbery. Bl. Com. Vol. I. p. 444, treason and murder; Vol. IV. p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without an authority for so doing; and, on the contrary, in Reg. v. Cruse, 8 Car. & P. 541, a case is cited, where Burrough, J., held that the rule extended to robbery. [For an intimation that it does not extend to robbery, see Rex v. Buncombe, 1 Cox C. C. 183.] It seems long to have been considered that the mere presence of the husband was a coercion (see 4 Bl. Com. 28), and it was so contended in Reg. v. Cruse; and Bac. Max. 56, ex-

pressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will, and in the next page he says: ‘If husband and wife join in committing treason, the necessity of obedience does not excuse the wife’s offence, *as it does in felony*.’ Now, if this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somerville’s Case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville’s, and Somerset’s Case, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without advertent to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion.”

<sup>3</sup> Rex v. Price, 8 Car. & P. 19; Davis v. The State, 15 Ohio, 72; The State v. Nelson, 29 Maine, 329; Uhl v. Commonwealth, 6 Grat. 706; Reg. v. Cruse, 8 Car. & P. 541, 2 Moody, 53; Reg. v. Laugher, 2 Car. & K. 225; Commonwealth v. Trimmer, 1 Mass. 476; Commonwealth v. Neal, 10 Mass. 152; Martin v. Commonwealth, 1 Mass. 347; Com-

*while not even a command from him will excuse her, unless she does the act in his presence.*<sup>1</sup>—

**What is the Presence.**—For a married woman to be in the presence of her husband within this rule, it is not necessary she should be in the same room with him; but she must be within the range of his personal and present influence,—“near enough,” it was said in one case, “to act under his immediate influence and control.”<sup>2</sup>

**Not Entire Act in Presence — (Escape — Uttering Counterfeit).**—And if an act is completed in the presence of the husband, though begun elsewhere, it is within the rule. Therefore, when “Elizabeth Ryan, better known by the name of Paddy Brown’s wife,” had in England been convicted under 16 Geo. 2, c. 31, for conveying an implement of escape to her husband in prison, she was deemed to have acted under his coercion, rendering her conviction wrong; having procured the instrument by his direction.<sup>3</sup> Here she was absent until she delivered to him the instrument in, of course, his presence. And where a wife went from house to house uttering base coin; and her husband accompanied her, but remained outside; it was held, that her act must be presumed to have proceeded from his coercion.<sup>4</sup> In this case, however, she was all the while either actually or constructively in his presence.

§ 360. **How on the Authorities — In Principle.**—The doctrine that the wife can rely on the husband’s coercion only in respect of acts done in his presence has not always been in the minds of the judges, though perhaps never denied by them. But plainly it must be correct; for surely a wife out of her husband’s presence is sufficiently free from his influence to be answerable for

monwealth v. Eagan, 103 Mass. 71; The State v. Williams, 65 N. C. 398; J. Kel. 31. “Felons came to the house of Richard Day, and Margery his wife; the wife knew them to be felons, but the husband did not, and both of them received them and entertained them, but the wife consented not to the felony. And it was adjudged, that this made not the wife accessory.” 3 Inst. 108. See also McKeown v. Johnson, 1 McCord, 578.

<sup>1</sup> Rex v. Morris, Russ. & Ry. 270; Rex v. Hughes, 1 Russ. Crimes, 3d Eng. ed. 21, 2 Lewin, 229; Commonwealth v.

Butler, 1 Allen, 4; Commonwealth v. Feeney, 13 Allen, 560; The State v. Potter, 42 Vt. 495. And see Reg. v. Hill, 3 New Sess. Cas. 348, 1 Den. C. C. 453, Temp. & M. 150, 13 Jur. 545; Reg. v. Smith, Dears. & B. 553, 8 Cox C. C. 27; Reg. v. Cohen, 11 Cox C. C. 99.

<sup>2</sup> Commonwealth v. Burk, 11 Gray, 487; Commonwealth v. Welch, 97 Mass. 593; Commonwealth v. Munsey, 112 Mass. 287, 289.

<sup>3</sup> Note to Rex v. Knight, 1 Car. & P. 116.

<sup>4</sup> Connolly’s Case, 2 Lewin, 229.

whatever of crime she does, even supposing the general doctrine to be founded in just principle.

§ 361. Thirdly. *The proposition that coercion is presumed from the mere presence of the husband does not apply to certain crimes by reason of their peculiar nature:—*

**What within this Exception — (Treason — Murder — Robbery -- Bawdy House, &c.).—**The offences within this exception are those which show so much malignity as to render it improbable a wife would be constrained by her husband, without the separate operation of her own will, into their commission;<sup>1</sup> and those which, while of less magnitude, women are supposed peculiarly to participate in; so that, in these cases, something more is required than the mere presence to establish the coercion. Of the aggravated offences are treason, probably murder, possibly robbery, and it may be that the list should be even more extended.<sup>2</sup> Of the offences peculiar to the female sex is the keeping of brothels and other disorderly houses.<sup>3</sup>

§ 362. Fourthly. *The presumption that a wife acts, in her husband's presence, under his coercion, is only prima facie,— liable to be rebutted by evidence:—*

**Limits of this Doctrine.**— If the testimony merely shows that the two acted together in a crime, she, though the more busy

<sup>1</sup> Ante, § 358.

<sup>2</sup> Reg. v. Cruse, 2 Moody, 53, 8 Car. & P. 541; Rex v. Stapleton, Jebb, 93; J. Kel. 81; Rex v. Knight, 1 Car. & P. 116, note; Commonwealth v. Neal, 10 Mass. 152; Reg. v. Manning, 2 Car. & K. 887, 903. And see ante, § 358 and note.

<sup>3</sup> Rex v. Dixon, 10 Mod. 335; Reg. v. Williams, 10 Mod. 63, 1 Salk. 384; The State v. Bentz, 11 Misso. 27; 1 Hawk. P. C. Curw. ed. p. 5, § 12, and the authorities there cited. **How Decisions regarded.**— It must be acknowledged that the cases cited to this section will appear to lawyers who look at decisions only according to the letter of the language employed by the judges, as hardly sustaining the text. But such is an imperfect way of looking at them. Each case should be contemplated in the light of the whole subject to which it relates, of all analogous subjects, and of subsequent discoveries and improvements in

legal science; while the language of the judges should be taken as qualified by the facts under discussion. **Liquor Selling.**— In Commonwealth v. Murphy, 2 Gray, 510, it was held that the wife who sells intoxicating liquor without license, in her husband's absence, is not presumed to act under his coercion. And see, as to this, Rex v. Crofts, 7 Mod. 397, 2 Stra. 1120. See also Commonwealth v. Neal, 10 Mass. 152; Martin v. Commonwealth, 1 Mass. 347; Commonwealth v. Trimmer, 1 Mass. 476.

<sup>4</sup> 1 Russ. Crimes, 3d Eng. ed. 22; Rex v. Price, 8 Car. & P. 19; Rex v. Stapleton, 1 Crawf. & Dix C. C. 163; The State v. Parkerson, 1 Strob. 169; Roscoe Crim. Ev. 955; Rex v. Hughes, 2 Lewin, 229; Wagener v. Bill, 19 Barb. 321; Uhl v. Commonwealth, 6 Grat. 706; Reg. v. Torpey, 12 Cox C. C. 45, 2 Eng. Rep. 180; Commonwealth v. Eagan, 103 Mass. 71; The State v. Williams, 65 N. C. 398.

one, is to be acquitted.<sup>1</sup> But if he was a cripple, confined to his bed, therefore incapable of coercing her;<sup>2</sup> or, if in fact she was not only the active one, but acting from her own free and uncontrolled will,<sup>3</sup>—then, although he was present, she is to be convicted.

§ 363. Fifthly. From the foregoing propositions it follows, that, whatever the offence may be, the wife, like any other person, *may be proceeded against jointly with her husband, in the same indictment; and she can rely on the coercion only when the proofs are adduced at the trial.*<sup>4</sup>—

**How the Indictment.**—The indictment need not even in form negative the coercion.<sup>5</sup> Of course, also, she may be indicted without her husband.<sup>6</sup>

**Husband for Wife's Act.**—Or, if the wife commits the criminal act by command of the husband, the latter may be indicted for it.<sup>7</sup>

**Wife indicted as Single.**—If the wife is indicted alone as a single person, or if she and a man are jointly indicted as single, she can rely on coercion in defence, but she must satisfy the jury of her marriage.<sup>8</sup>

§ 364. Sixthly. *The legal relation between husband and wife makes it impossible for her to commit some offences:—*

**Limits of Doctrine**—(**Exercising Trade—Neglect of Apprentice**).—For example, she cannot, in England, be convicted jointly with her husband for exercising a trade, not being quali-

<sup>1</sup> Rex v. Price, 8 Car. & P. 19; Rex v. Knight, 1 Car. & P. 116; Commonwealth v. Trimmer, 1 Mass. 476; Anonymous, 2 East P. C. 559; Rex v. Tolfree, 1 Moody, 243; Reg. v. Matthews, 1 Den. C. C. 596, Temp. & M. 337; Rex v. Archer, 1 Moody, 143.

<sup>2</sup> Reg. v. Pollard, 1 Russ. Crimes, 3d Eng. ed. 22, cited in Reg. v. Cruse, 2 Moody, 53.

<sup>3</sup> Uhl v. Commonwealth, 6 Grat. 706; Rex v. Dicks, 1 Russ. Crimes, 3d Eng. ed. 19. See note to Rex v. Knight, 1 Car. & P. 116.

<sup>4</sup> The State v. Nelson, 29 Maine, 329; Rex v. Stapleton, 1 Crawf. & Dix C. C. 163; Rex v. Thomas, Cas. temp. Hardw. 278; Rex v. Chedwick, 1 Keble, 585, pl. 50; The State v. Bentz, 11 Misso. 27;

Commonwealth v. Murphy, 2 Gray, 510; Rex v. Morris, 2 Leach, 4th ed. 1096; The State v. Montgomery, Cheves, 120; The State v. Potter, 42 Vt. 495; Reg. v. Boober, 4 Cox C. C. 272; Commonwealth v. Tryon, 99 Mass. 442.

<sup>5</sup> The State v. Nelson, 29 Maine, 329.

<sup>6</sup> Commonwealth v. Lewis, 1 Met. 151; Rex v. Hanson, Say. 229; Rex v. Crofts, 7 Mod. 397.

<sup>7</sup> Williamson v. The State, 16 Ala. 431, 436; Mulvey v. The State, 43 Ala. 316; Commonwealth v. Barry, 115 Mass. 146.

<sup>8</sup> Rex v. Hassall, 2 Car. & P. 434; Reg. v. McGinnes, 11 Cox C. C. 391; Reg. v. Woodward, 8 Car. & P. 561; Reg. v. Torpey, 12 Cox C. C. 45, 2 Eng. Rep. 180.

fied;<sup>1</sup> because in law the exercise of it is his. If she is qualified, the qualification passes to him, and the exercise is still his.<sup>2</sup> So if a wife, as well as husband, wilfully neglects to give the husband's apprentice sufficient food, resulting in death, he only can be convicted of manslaughter; because, as we have seen,<sup>3</sup> there must be a legal duty in these cases, to provide the food; and this duty the law imposes on the husband only, not at all on the wife.<sup>4</sup> Perhaps in some circumstances she will be liable on other principles; for example, if the husband should put into his wife's care food and a young person dependent on him for it, and she should cause this person's death by neglecting to administer it, she would undoubtedly be liable.<sup>5</sup>

§ 365. **Accessory after Fact.** — So, as a wife has no legal right to separate from her husband, she can never be made an accessory after the fact to his felony, through harboring him with knowledge of it.<sup>6</sup> The same is the Scotch law,<sup>7</sup> where the doctrine of marital coercion does not prevail.<sup>8</sup> Likewise, —

**Forfeiture for Absence.** — As the wife must follow and dwell with her husband, her estate is not subject to forfeiture under an absentee act.<sup>9</sup>

§ 366. **Proceedings necessarily against Both.** — Also there may be cases in which, though the wife is liable, the husband must be proceeded against jointly with her. "The principle," a learned judge once observed, "is said to be general, that, for fines and forfeitures incurred by the act of the wife for which the husband is liable, either separately or conjointly with his wife, he must be made a party to the judgment, and equally subject to arrest and imprisonment to enforce the payment."<sup>10</sup> Yet, —

**Wife alone — (Purely Criminal — Liquor Selling).** — A *feme covert* may be convicted alone, under a penal statute, for selling gin; because, though she cannot pay damages, she is "as capable of forbearing the crime as a man." And Lee, C. J., observed: "I

<sup>1</sup> See Stat. Crimes, § 196 and note.

<sup>2</sup> Reg. v. Atkinson, 2 Ld. Raym. 1248.

<sup>3</sup> Ante, § 217; Vol. II. § 643, 659.

<sup>4</sup> Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 490.

<sup>5</sup> See Rex v. Saunders, 7 Car. & P. 277. And see Vol. II. § 661.

<sup>6</sup> 1 Russ. Crimes, 3d Eng. ed. 24; Reg. v. Manning, 2 Car. & K. 887, 903.

<sup>7</sup> 1 Alison Crim. Law, 669.

<sup>8</sup> Ante, § 357.

<sup>9</sup> Martin v. Commonwealth, 1 Mass. 347.

<sup>10</sup> Saffold, J., in *Rather v. The State*, 1 Port. 132, 137; 1 Hawk. P. C. Curw. ed. p. 5, § 13. See, however, *The State v. Montgomery*, Cheves, 120.

do not know of any case where there is a prosecution against a *feme covert*, for a crime upon the breach of an act for which there is a pecuniary penalty inflicted, and for default of payment corporal punishment, that the husband is liable.”<sup>1</sup>

<sup>1</sup> *Rex v. Crofts*, 7 Mod. 397. See also *Commonwealth v. Murphy*, 2 Gray, 510 • ante, § 363.

## CHAPTER XXV.

## INFANCY AS INCAPACITATING FOR CRIME.

§ 367. **Infants, who.** — All persons under the age of full legal capacity, fixed by the common law at twenty-one years in both males and females, are termed infants.

**Generally capable — Command of Parent.** — Those who have attained what the law deems sufficient maturity in years and understanding, are capable of committing crimes. Nor can they plead in justification the constraint of a parent, as married women can that of the husband.<sup>1</sup>

§ 368. **At what Age capable — (Seven — Fourteen).** — The period of life at which a capacity for crime commences is not susceptible of being established by an exact rule, which shall operate justly in every possible case. But, on the whole, justice seems best promoted by the existence of some rule. Therefore, at the common law, a child under seven years is conclusively presumed incapable of committing any crime.<sup>2</sup> Between seven and fourteen, the law also deems the child incapable; but only *prima facie* so; and evidence may be received to show a criminal capacity.<sup>3</sup> The question is, whether there was a guilty knowledge of wrong-doing.<sup>4</sup> Over fourteen, infants, like all other persons,

<sup>1</sup> Ante, § 355; *People v. Richmond*, 29 Cal. 414. See *The State v. Learnard*, 41 Vt. 585.

<sup>2</sup> *Broom Leg. Max.* 2d ed. 232; 4 Bl. Com. 23; 1 Russ. Crimes, 3d Eng. ed. 2; *Marsh v. Loader*, 14 C. B. n. s. 535. Such a child cannot commit a nuisance even on its own land, *People v. Townsend*, 3 Hill, N. Y. 479; nor be a vagrant, *Rex v. Inhabitants of King's Langley*, 1 Stra. 631.

<sup>3</sup> *The State v. Goin*, 9 Humph. 175; *Rex v. Owen*, 4 Car. & P. 236; *Rex v. Groombridge*, 7 Car. & P. 582; *The State v. Pugh*, 7 Jones, N. C. 61; *The State v.*

*Guild*, 5 Halst. 163; *Godfrey v. The State*, 31 Ala. 323; *The State v. Doherty*, 2 Tenn. 80; *Commonwealth v. Mead*, 10 Allen, 398; *The State v. Learnard*, 41 Vt. 585; *Reg. v. Vamplew*, 3 Fost. & F. 520; *People v. Davis*, 1 Wheeler Crim. Cas. 230. And see *Reg. v. Manley*, 1 Cox C. C. 104. Contra, that the burden of proof is on the infant, *The State v. Arnold*, 13 Ire. 184.

<sup>4</sup> *Rex v. Owen*, 4 Car. & P. 236; 4 Bl. Com. 23; *Broom Leg. Max.* 2d ed. 233; *The State v. Learnard*, supra; *The State v. Fowler*, 52 Iowa, 103. And see post, § 370.

are *prima facie* capable; and he who would set up their incapacity must prove it.<sup>1</sup>

§ 369. **Special Offences.** — But, as we have seen in respect of married women,<sup>2</sup> there may be offences which, by reason of the civil disqualifications of infancy, no minor can commit, whatever his general capacity for crime. The number of these is small.

**False Pretences — Treason.** — A minor, for instance, may obtain goods by a criminal false pretence.<sup>3</sup> So he may be guilty of treason, and thereby forfeit his estate.<sup>4</sup>

**Obsolete Distinctions.** — The old books have some other distinctions, probably not to be received at the present day.<sup>5</sup>

§ 370. **Between Seven and Fourteen, again — (Confessions).** — As to proof of capacity, between seven and fourteen, it is said: "The evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction."<sup>6</sup> Also, observes Lord Hale, "the infant is not to be convict upon his confession."<sup>7</sup> Yet evidently the presumption of incapacity decreases with the increase of years. There is a vast difference between a child a day under fourteen, and one a day over seven. And children bordering on fourteen have been convicted, it is believed properly, on their confessions.<sup>8</sup>

§ 371. **Continued.** — The cases are numerous, in the older books, in which children of very immature years have been convicted. "Thus," says Blackstone, "a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and,

<sup>1</sup> 1 Russ. Crimes, 3d Eng. ed. 2; The State v. Handy, 4 Harring. Del. 566; Irby v. The State, 32 Ga. 496. In Texas the respective ages are by statute nine and thirteen. Wusnig v. The State, 33 Texas, 651; McDaniel v. The State, 5 Texas Ap. 475. And the death penalty cannot be inflicted on an infant below seventeen. Ake v. The State, 6 Texas Ap. 398, 415. In Illinois, the ages are ten and fourteen. Angelo v. People, 96 Ill. 209.

<sup>2</sup> Ante, § 364.

<sup>3</sup> People v. Kendall, 25 Wend. 399.

<sup>4</sup> Boyd v. Banta, Coxe, 266.

<sup>5</sup> See 1 Russ. Crimes, 3d Eng. ed. 1, 2; 4 Bl. Com. 23.

<sup>6</sup> 4 Bl. Com. 24. And see ante, § 368.

<sup>7</sup> 1 Hale P. C. 27.

<sup>8</sup> Rex v. Wild, 1 Moody, 452; The State v. Aaron, 1 Southard, 231; The State v. Guild, 5 Halst. 163; The State v. Bostick, 4 Harring. Del. 563; s. p. 4 Bl. Com. 24.



it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing of this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.”<sup>1</sup> So also a negro-slave boy, between ten and eleven years old, was, in Alabama, convicted of the murder of his master’s child.<sup>2</sup>

§ 372. *Continued.* — But the case of a very young child, capable still in law of committing crime by reason of age, should receive a careful attention by the jury, before conviction. A mere appearance of shrewdness or general intelligence may exist in a mind too immature to incur legal guilt. And, although we may well suppose there are instances in which a child under fourteen should be punished by the tribunals as criminal, clearly the age of seven years, as the age of possible capacity, is quite too young for punishment to be given at the hand of the law; though it should be given at the hand of the parent, and the latter, rather than the former, be made to suffer the consequences of its neglect.<sup>3</sup>

§ 373. *Crimes depending on Physical Capacity.* — There are some things which depend on the physical capacity; and thus, in matrimonial law, a boy under fourteen, or a girl under twelve, cannot contract a perfectly valid marriage.<sup>4</sup> Even if puberty in fact commenced at an earlier period, the evidence of it will not be received.<sup>5</sup> Therefore —

**Rape, &c.** — A boy under fourteen cannot commit a rape, or the like offence of carnally abusing a girl under ten years of age, whatever be in fact his physical capabilities.<sup>6</sup> In Ohio, this doc-

<sup>1</sup> 4 Bl. Com. 23, 24.

<sup>2</sup> *Godfrey v. The State*, 31 Ala. 323. See, for a case in which a girl under fourteen seems to have been wrongly acquitted, *Crim. Proced.* II. § 687 *a*, note.

<sup>3</sup> And see *Louisville, &c., Canal v. Murphy*, 9 Bush, 522; *Chicago, &c.,*

*Railroad v. Becker*, 76 Ill. 25. See ante, § 368, note.

<sup>4</sup> 1 Bishop Mar. & Div. § 143, 147.

<sup>5</sup> 1 Bishop Mar. & Div. § 146.

<sup>6</sup> *Reg. v. Jordan*, 9 Car. & P. 118; *Reg. v. Brimilow*, 9 Car. & P. 366, 2 Moody, 122; *Reg. v. Philips*, 8 Car. & P.

trine is rejected; the court permitting the presumption of incapacity, in cases of rape, to be overcome by evidence.<sup>1</sup> And some of the New York judges have adopted the Ohio rule.<sup>2</sup>

786; *Rex v. Eldershaw*, 3 Car. & P. 396; And see *O'Meara v. The State*, 17 Ohio  
*Rex v. Groombridge*, 7 Car. & P. 582; State, 515; *Moore v. The State*, 17 Ohio  
*Commonwealth v. Green*, 2 Pick. 380. State, 521.  
And see *The State v. Handy*, 4 Harring. <sup>2</sup> *People v. Randolph*, 2 Parker C. C.  
Del. 566. 174. And see Vol. II. § 1117.

<sup>1</sup> *Williams v. The State*, 14 Ohio, 222.

## CHAPTER XXVI.

## WANT OF MENTAL CAPACITY.

§ 374. **Law, not evidence, for this chapter.**—The subject of mental incapacity embraces both law and evidence. In these volumes we treat only of the law; the evidence is considered in “Criminal Procedure.”<sup>1</sup>

§ 375. **Doctrine defined.**—Since a criminal intent is an essential element in every crime,<sup>2</sup> a person destitute of the mental capacity to entertain this intent cannot incur legal guilt.<sup>3</sup>

**Names and Classifications.**—Names have been given to different forms of mental incapacity; such as idiocy, lunacy, and the like. And the word insanity is not unfrequently employed in the large sense, as including the whole. But for the purpose of this chapter the distinctions they indicate are unimportant, however useful they may be in other inquiries into the infirmities of the mind.<sup>4</sup>

<sup>1</sup> Crim. Proce. II. § 664-687b.

<sup>2</sup> Ante, § 205, 287.

<sup>3</sup> “In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose. And if his reason and mental powers are so deficient that he has no will, no conscience or controlling mental power; or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated; he is not a responsible moral agent, and is not punishable for criminal acts.” Shaw, C. J., in *Commonwealth v. Rogers*, 7 Met. 500, 501. And see *Thomas v. The State*, 40 Texas, 60, 63; *People v. Kleim*, Edm. Sel. Cas. 13.

<sup>4</sup> Lord Coke says: “There are four manners of *non compos mentis*: 1. Idiot, or fool natural; 2. He who was of good and sound memory, and by the visitation of God has lost it; 3. *Lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes

*non compos mentis*; 4. By his own act, as a drunkard.” These divisions are to some extent recognized at the present day; but they are embarrassing, for they constantly call the attention away from the one great question which must necessarily control every case—namely, whether the person was mentally capable of entertaining the criminal intent—to special theories of medical science. Classification is not in all things helpful; and we may doubt whether any classification of mental incapacity, however just and accurate in itself, will aid legal practitioners and juries regarding this defence. Lord Coke, in the case from which the above words are quoted, says, that a person *non compos mentis* cannot commit petit treason, murder, or felony, because “no felony or murder can be committed without a felonious intent and purpose.” “But,” he adds, “in some cases, *non compos mentis* may commit high treason; as, if he kills or offers to kill the king, it is

§ 376. **Subject both Simple and Complicated.** — The doctrine of insanity as above stated — namely, that it is a lack of the mental capacity to entertain a criminal intent — is plain and axiomatic, neither requiring nor admitting argument. But there are great difficulties and perplexities in its application to particular cases. The consequence is, that, in our books of the law, discussions as to the application of the doctrine have swollen to enormous proportions, while the doctrine itself is often lost out of sight.

**Degree of Incapacity.** — There are degrees both of incapacity and of capacity. And, as the law does not regard small things,<sup>1</sup> the mind may be weak, ill formed, or diseased — in other words, insane — in a degree not relieving from criminal responsibility.<sup>2</sup> On the other hand, in a mind irresponsible because of insanity, reason and other normal phenomena may appear, inadequate in degree, or otherwise too imperfect, to subject the unfortunate being to the heavy pains provided for wilful wrong-doing.<sup>3</sup>

high treason, for the king *est caput et salus reipublicæ, et a capite bona valetudo transit in omnes*; and, for this reason, their persons are so sacred that none can offer them any violence." Beverley's Case, 4 Co. 123 b, 124 b. At the present day, no exception like this to the general doctrine is known. It prevails in all criminal causes.

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> Commonwealth v. Mosler, 4 Barr, 264; The State v. Stark, 1 Strob. 479; Lord Ferrer's Case, 19 Howell St. Tr. 886, 947; Hadfield's Case, 27 Howell St. Tr. 1281, 1286, 1287, 1312, 1323; United States v. McGlue, 1 Curt. C. C. 1; Hopps v. People, 31 Ill. 385; The State v. Shippey, 10 Minn. 223; The State v. Jones, 50 N. H. 369; People v. Griffen, Edm. Sel. Cas. 126; People v. Montgomery, 13 Abb. Pr. n. s. 207; The State v. Richards, 39 Conn. 591; The State v. Lawrence, 57 Maine, 574; United States v. Holmes, 1 Cliff 98; People v. Best, 39 Cal. 690; 1 Russ. Crimes, 3d Eng. ed. 9, 13. It will interest the reader to consult, on this question, the trial, for forgery, of Charles B. Huntington, edited by Roberts & Warburton, New York, 1857. The principal defence was insanity. The medical witnesses seemed to understand, that, if any particle of insane delusion,

however slight, was found in the mental operations of the accused, he ought, therefore, to be acquitted as insane. The judges, on the other hand, erred on some other points quite as much. In the case of Commonwealth v. Mosler, cited above, Gibson, C. J., speaking of general insanity, observed: "It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation which has caused men sometimes to sacrifice their wives and children." p. 266. Again: "The law is, that, whether the insanity be general or partial, the degree of it must have been so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." p. 267.

<sup>3</sup> "A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent." Gibson, C. J., in Commonwealth v. Mosler, *supra*.

**Insane compared with Immature Mind.**—To relieve this difficulty, Lord Hale suggests: "The best measure that I can think of is this, — such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."<sup>1</sup> But if we admit, to the full extent, the abstract accuracy of this test, we still derive from it little aid; because of the radically different workings of an insane mature mind, and a sane immature one.<sup>2</sup> At the same time, there are circumstances in which this test may be very profitably applied.<sup>3</sup>

<sup>1</sup> 1 Hale P. C. 30.

<sup>2</sup> Ray Med. Jurisp. Insan. 3d ed. § 8.

<sup>3</sup> 1. **Freeman's Case**, and what it suggests. — I cannot but think, that, if the court and jury by whom William Freeman was, in 1846, convicted of the murder of John G. Van Nest, had applied to the case this old test, they, while professing reverence for the old tests, and holding in disfavor the new, might have seen their way to an acquittal, instead of a conviction, of one of the most clearly insane persons ever put on trial for his life. And as this is perhaps the most important case of a modern date relating to this subject, and as sufficient time has now elapsed since the insanity of the prisoner was established by a post-mortem examination to render probable the hope that the temporary passions are subsided, I propose to make a statement of it, with some comments.

2. The prisoner was of mixed negro and Indian blood, the former predominating. In early life he had been practically uncared for, and, growing up neglected in education, had been sent by the courts to the State prison and had served out his sentence of five years for stealing a horse, of which offence he was wholly innocent. He left the prison with a deep conviction — termed by his counsel an insane delusion, and by the prosecuting officer an error of judgment to which discharged convicts are subject — that he was entitled to get, from somebody, pay for his time spent in prison under the wrongful sentence.

3. In pursuance of this delusion, or this error of judgment, he applied to magistrates for warrants against those,

not naming or knowing them, who had put him into prison; he called upon the owner of the horse alleged to have been stolen by him, and indistinctly intimated something about pay, and with much feeling mentioned the subject of pay to some other persons. Not getting, of course, any pay, he came to another delusion, or error of judgment, namely, that there was no law for him.

4. This led to a third delusion, or error, which was, that by *killing about*, as he expressed it, he might, after a while, get pay; or, at least, he thought this to be a work which he had to do. So he procured a club and a knife, and started out one evening to do his work. He met a man on the road, hesitated whether to attack him, but concluded not to begin then; went to one or two houses, but made up his mind not to attack there; came at last to the house of Mr. Van Nest, killed him, his wife, wife's mother, and an infant of two years, wounded a hired man, received a disabling wound in his own hand, went to the stable and took out a horse and fled, — all in an incredibly short time. His idea in fleeing seems to have been to protect himself from molestation while his wounded hand should heal, so that he might resume the work. The horse was an old one, and soon broke down; so he stabbed the horse, and took another one.

5. Continuing his flight, and attempting to sell this other horse, he was arrested; but he denied the homicide, until, being confronted with the dead bodies and the living witnesses, he acknowledged all. From this time until he died, he was open and truthful; stat-

§ 377. **Nature of the Adjudged Cases—How viewed.**—In this department of the law, as in every other, we arrive at the legal doc-

ing the facts, as far as he was able, to everybody who talked with him. And there was no pretence, that he undertook to feign insanity. The arrest was made in less than twenty-four hours after the homicide was committed

6. On one point, the testimony concurred; namely, that the intellect of this prisoner was very weak. Though the medical witnesses were in conflict on the main question, the most hostile agreed with his own that his intellect was but little above that of the brute; and one of these hostile witnesses, a leading and most determined one, answered to the prisoner's counsel, on cross-examination, as follows:—

"Q. You say he is ignorant; what is the degree of his intelligence?"

"A. He appears to have but little.

"Q. What is the degree of his intellect?"

"A. It is difficult to tell by any examinations that were made there in the jail. He was there to be tried for life; oppressed with the weight of his crimes; ignorant and deaf, to be sure, but with every motive to conceal and deceive. His intellect is of a low grade, but how much he has, precisely, cannot well be determined under the disadvantages of his situation.

"Q. From what you discover, can you compare his intellect to that of any other being?"

"A. I should not think he has as much intellect as an ordinary child of fourteen years of age. In some respects, he would hardly compare with children of two or three years.

"Q. With a child of what age would you compare him in respect to knowledge?"

"A. With a child two or three years old." Hall's Trial of Freeman, p. 343.

To illustrate this great imbecility and ignorance, it may be mentioned, that, though the prisoner knew and could call by name the letters of the alphabet; and though, notwithstanding this, he could not read a word; yet he really believed he could read, would take a book in his

hand and say over words and sounds which were not words, just like an infant two years old. He could with difficulty count to between twenty and thirty; but, when he reached the end of his knowledge, he would count right on wrongly, not imagining he was not right. He thought he once saw Jesus Christ in the Sabbath school. And this dead flat of ignorance and stupidity was enlivened by no green mound of intelligence and wisdom. He seldom or never asked a question, related nothing without prompting, and seemed entirely indifferent to his fate, even not to know the nature of the peril in which he stood; though, when the keeper, one night, forgot to bring him the bed which should separate him from the cold stone floor of his cell, whereto he was chained, he could call for it; and he could ask, whenever he needed, his visitors for tobacco.

7. I cannot speak for his personal appearance, for I never saw him; but all the witnesses for the defence spoke of a constant idiotic smile upon his face, and of a peculiar way in which he stood and held his head, as circumstances nearly, if not quite, conclusive. The witnesses for the prosecution did not read these signs in this way, neither did the judges and the jury.

8. The question of his insanity was referred to two successive juries, first, a jury to try whether he had mind enough to be tried; secondly, a jury to try the main issue. Both found against the plea of insanity; and the bench of judges concurred, and passed sentence of death.

9. Before this sentence was executed, a writ of error, founded on some rulings in point of law, was obtained from the Supreme Court, and in this latter tribunal the verdict was set aside and a new trial ordered. Thereupon the judge of the higher court, who was to preside at the new trial, visited the prisoner in jail; and, in consequence of what there appeared of his mental condition, refused to proceed with the trial. In a few months, this miserable being died; and no man, I presume, except one dissent-

trine by the twofold process of comparing together the cases adjudged on the specific questions, and of searching through other

ing doctor, who could not let go his grasp upon the judgment he had pronounced at the trial, will now dispute, that the post-mortem examination of the brain, taken in connection with the testimony at the trial, establishes this as a marked case of clear and indubitable insanity.

10. Indeed, at the trial, those particular medical witnesses who had such experience in insanity as to render their testimony of special value were clear in the opinion, that the prisoner was insane. Hence, *Experts in Insanity*. — We may conclude, that medical men are unsafe experts in questions of insanity, except where, in addition to their medical reading, they have had considerable practical experience with the insane.

11. *Prejudiced Public*. — Another fact to be noted is, that, in this case, an unreasoning outside pressure of excitement was bearing hard against the legal tribunal, and demanding the blood of the prisoner. Hence, *Continuance*. — We may conclude, that, in all such cases, the judges should yield to such applications for continuance as will enable judge and jury alike to proceed in their duties without embarrassment from such pressure.

12. *Duty of Lawyers*. — Moreover, there is derivable from this case a lesson of duty and of interest, which it may be well for practising lawyers to consider. This poor, demented, accused person was defended by the gentleman — that is, as leading counsel — who [at the time this note was written] holds the office of Secretary of State of the United States. He was subjected to no little abuse because he undertook the defence of this penniless colored man. In his own mind he was clear that the man was insane; and he dared to do his duty. Soon afterward, the providence of God, taking away the client, vindicated the advocate. And although I do not deem that the holding of office, even the highest, where office is sought and won by means too often resorted to in this country, should be looked upon as an honor; yet, as the public sentiment now is, it is so regarded;

and we may here see how the discharge of a duty did not interfere with the obtaining of a coveted honor. In a notice in the prefatory part of the second volume of this work, as it appeared in the second edition, I spoke of the obloquy voluntarily incurred by the late Mr. Choate, in bringing forward this defence of insanity in behalf of a prisoner whom, for aught I know, he deemed in his heart to have been a responsible being. The lawyers defending Freeman put their justification on the ground of a clear conviction of the truth of the plea of insanity. If Mr. Choate was himself not clearly convinced of the truth of the plea interposed by him in the case to which I have thus alluded, but was convinced that there was such semblance of truth in it as to render its presentation proper, his justification stands on higher ground. Every accused person has the right to have all proper defences made for him; and the lawyer who refuses through fear of public obloquy violates honor and a high behest of duty. And see *Crim. Proced. I. § 309, 310*.

13. *Public Insanity*. — Finally, let me observe, that, to a species of public insanity, yet not of a kind which excuses for crime, known sometimes by the term *negrophobia*, should probably this strange conviction of Freeman, in the blaze of the light of the nineteenth century, be more than to any thing else attributed. The reader of the trial will perceive, that, throughout the testimony, there seems to run in the minds of the witnesses an idea of the existence of an indefinable something which should hold negroes responsible when acting under a less amount of mind than would constitute the standard of responsibility in white men. And, on the other hand, there were gentlemen summoned upon the jury who were challenged to the favor by the prosecuting officer, though they were not set aside, on the ground that they belonged to a class of persons who were supposed to hold opinions which would lead them to show special favor to black men because of their color

titles for principles to control this one. In looking through other titles of the criminal law, we have learned, that, in every crime, there must be the element of a criminal intent; and, coming to this title, we have discovered the doctrine of insanity to be, that there is no crime where the mind is incapable of entertaining the criminal intent.<sup>1</sup> But, on the question of fact, which in each case of alleged insanity is to be decided, whether or not the accused person was mentally capable of entertaining the criminal intent,<sup>2</sup> the judges have endeavored to assist the juries; in doing which, they have often blended their sound law with erroneous views of the phenomena of insanity. For in former times, and even in comparatively modern, the diseases and imperfections of the mind were little understood by the medical faculty, still less by the community at large,<sup>3</sup> as indeed there yet remains much to be learned. And the minds of the judges necessarily shared the misapprehensions existing in minds not judicial. Thus, —

§ 378. **Infant, Brute, Wild Beast.**— In 1742, on a criminal trial for malicious shooting, Tracy, J., after laying down to the jury the law of insanity substantially in accordance with modern doctrines, proceeded to mingle with it views of fact which would be universally deemed erroneous now. “It must,” he said, “be a man that is totally deprived of his understanding and memory, and did not know what he was doing, more than an infant, a brute, or a wild beast; such a one was never the object of punishment; therefore he left to the jury the consideration, whether the condition the prisoner was proved to be in showed that he knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did; and, as it was admitted on the part of the prisoner that he was

The delusion of the prosecuting officer, who supposed there was such a class in the community, is one of the marks of this species of insanity, which, at the time of the trial, existed everywhere throughout our country. This *negrophobia* insanity, like the insanity known heretofore in New England as the Salem Witchcraft,—an insanity in which the delusion is even more in the accuser than in the accused,—is one of the blood-tracks to which all Time will hereafter point with horror. We are now [when this note was originally written]

among what I hope will prove to be near the closing scenes of a great civil war, which could never have been conjured up—or, if it had been, would have been speedily closed—but for this universal *negrophobia* insanity, prevailing over our whole country, South and North alike. In these public delusions, we may learn something concerning the delusions which affect individual minds.

<sup>1</sup> Ante, § 375, 376.

<sup>2</sup> The State v. Jones, 50 N. H. 369.

<sup>3</sup> Ray Med. Jurisp. Insan. 3d ed. § 1.



not an idiot, and, as a lunatic, he might have lucid intervals, the jury was to consider what he was at the day when he committed the fact in question. There were many circumstances about buying the powder and the shot, his going backward and forward; and, if they believed he had the use of his reason and understood what he did, then he was not within the exemption of the law, but was as subject to punishment as any other person.”<sup>1</sup> It is now believed, that a man may act without the concurrence of a responsible will, though he is not raving, though he knows what he is about, and lays and executes plans with great shrewdness and sagacity.

§ 379. *Varieties of Forms of Insanity.* — It should also be remembered, that the phases and manifestations of insanity are in number little less than infinite.<sup>2</sup> No reason indeed appears why they may not be even more numerous, certainly more difficult to be understood, than the qualities and phenomena of sound minds; and our assurance may well be humbled when we reflect, that what is called the learned world, much more the mass of human-kind, still gropes darkly on the borders of intellectual and moral science. Hence, —

*Language of the Judges.* — In examining the cases, not only must we take into the account any misapprehensions of the judges as

<sup>1</sup> *Arnold's Case*, 16 Howell St. Tr. 695, 764, 765. I have copied the above observations from Shelford on Lunacy, 459, 460, where the words of the judge are slightly abridged.

<sup>2</sup> A glance at the following classification of insanity, adopted by Dr. Ray, with the reflection that the several subdivisions necessarily run into one another, and also divide themselves indefinitely, will serve to impress us with its vast variety and extent: —

INSANITY	Defective development of the faculties.	IDIOTCY . .	<ol style="list-style-type: none"> <li>1. Resulting from congenital defect.</li> <li>2. Resulting from an obstacle to the development of the faculties, supervening in infancy.</li> </ol>
		IMBECILITY .	<ol style="list-style-type: none"> <li>1. Resulting from congenital defect.</li> <li>2. Resulting from an obstacle to the development of the faculties, supervening in infancy.</li> </ol>
	Lesion of the faculties subsequent to their development.	MANIA . .	<ol style="list-style-type: none"> <li>Intellectual . . { 1. General.</li> <li>                          2. Partial.</li> <li>Affective . . . { 1. General.</li> <li>                          2. Partial.</li> </ol>
		DEMENTIA .	<ol style="list-style-type: none"> <li>1. Consecutive to mania, or injuries of the brain.</li> <li>2. Senile, peculiar to old age.</li> </ol>

to phenomena of insanity, but we must interpret their words in the light of the particular facts in evidence, with reference to which, and not as enunciations of general doctrine, they were spoken. Considerations like these, we have seen,<sup>1</sup> are important in the examination of all judicial decisions; and they are peculiarly pertinent to those on this subject. Especially in looking at what is said to a jury should we remember, that judges do not lay down abstract doctrines to juries, but directions applicable to the evidence in review.

§ 380. **Monomania.** — There are those who, reasoning from the proposition that the mind is a unit, or that every part receives support from every other, and all the parts constitute together one harmonious whole, have inferred, perhaps truly, that, when one faculty is deficient, or is impaired by disease, or impelled by it into unnatural action, the whole mind suffers.<sup>2</sup> But, admitting this to be so, still the general derangement may not in all cases be sufficient to fall within the cognizance of the law, which does not notice small things.<sup>3</sup> Therefore judicial decisions have proceeded on the idea, that monomania is a reality in science; in other words, that a person may be insane and irresponsible as to one subject, while sane and responsible on another.<sup>4</sup>

**Intermittent Insanity.** — The judgments of the courts have proceeded also on the opinion, that general insanity may be intermittent, rendering the sufferer responsible for his acts at one time, but irresponsible at another.<sup>5</sup>

§ 381. **How Insanity defined.** — It follows from the foregoing views, that, in the criminal law, insanity is any defect, weakness, or disease of the mind rendering it incapable of entertaining the criminal intent which constitutes one of the elements in every crime. Beyond this, —

<sup>1</sup> Ante, § 361, note; 1 Bishop Mar. & Div. § 63.

<sup>2</sup> See Ray Med. Jurisp. Insan. 3d ed. § 242, 244, 245, 247.

<sup>3</sup> Ante, § 212 et seq.

<sup>4</sup> Freeman v. People, 4 Denio, 9; Martin's Case, Shelford Lun. 465; Hadfield's Case, 27 Howell St. Tr. 1281, 1814. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson,

C. J., in Commonwealth v. Mosler, 4 Barr, 264. The law is the same in Scotland. 1 Alison Crim. Law, 647. Such also is practically the doctrine of medical men. Ray Med. Jurisp. Insan. 3d ed. § 106, 185, 227.

<sup>5</sup> Reg. v. Renshaw, 11 Jur. 615, 616; Lord Ferrer's Case, 19 Howell St. Tr. 886, 946, 947; Hadfield's Case, 27 Howell St. Tr. 1281, 1810; 1 Beck Med. Jurisp. 10th ed. 756-762.

**Test of Insanity.** — Many attempts have been made to discover, what has been assumed to exist, a form of words termed a test of insanity, which, put into the hands of jurors, can be used by them as a sort of legal yardstick, to measure the evidence and determine whether or not the prisoner had a sufficient length of mental alienation to escape responsibility for his act. But the test has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist. At the same time, the courts, in instructing juries upon the facts of particular cases, have uttered many helpful words, which, though just in law when illumined by the special facts, have been taken up by men not lawyers, set to facts of a different sort, and shown to be, in the new light, abundantly absurd.

§ 382. **How, in Reason, as to Test.** — It is undoubtedly too vague, in general, for a judge simply to say to a jury unacquainted with the law, that they are to acquit the prisoner if they find him incapable of entertaining a criminal intent; because, at least, the nature of the particular evil intent required is to be taken into the account, and this they are entitled to have explained to them. In reason, therefore, the charge of the judge to the jury should show the intent required in the particular instance, and the bearing of the testimony upon it. And what will be proper in one offence and with reference to one set of proofs may be quite erroneous when, with reference to another offence, or even to the same, the proofs are of a different sort. Consequently, —

§ 383. **Question of Fact.** — In some late cases, it has been laid down, that whether, in a particular instance, the act alleged to be a crime proceeded from a sane or insane mind, is a pure question of fact for the jury, not of law for the court; as, for example, it is a question of fact for the jury, and not of law for the court, whether there is such a disease as dipsomania, and whether the act in question was the product of this disease or of a sound mind.<sup>1</sup> It is not in this form that the majority of our courts instruct juries; yet, in principle, the law is and must be so, while still in practice the directions to the jurors should extend to various explanations differing with the particular cases.

<sup>1</sup> The State v. Pike, 49 N. H. 399; v. Johnson, 40 Conn. 136. And see 4 Bradley v. The State, 31 Ind. 492; The Law Rev. 236; Stevens v. The State, 81 State v. Jones, 50 N. H. 369; The State Ind. 485.

§ 383 *a*. **Separating Law and Fact.** — Plainly, in these cases of insanity, as in all others, the charge of the judge to the jury<sup>1</sup> should so separate fact and law that they may perceive clearly what it is which they are required to decide. Hence it is of the highest importance in these discussions to distinguish the one from the other. Now, —

**Scotch Form.** — Quite in accord with the form of charge approved in the last section is that of the modern practice of the Scotch courts. Thus in a case in 1874 the Lord Justice-Clerk said to the jury: “The question is one of fact, that matter of fact being whether, when he committed this crime, the prisoner was of unsound mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense. Was he, in your opinion, a man of sound mind on the 25th of May?” And further on he said: “It is entirely imperfect and inaccurate to say, that, if a man has a conception intellectually of moral or legal obligation, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law. Probably a large proportion of those who occupy our asylums are in that position. It is not a question of knowledge, but of soundness of mind. If a man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined. If a man has a sane appreciation of right and wrong, he is certainly responsible; but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead.”<sup>2</sup> Still, —

§ 383 *b*. **With us.** — Among English and American lawyers in general, the tendency is very strong toward an adherence to old forms of charging the jury, adopted at times when the facts of insanity were very imperfectly understood. And there are those who appear to go so far as to hold, that, assuming one to be

<sup>1</sup> *Crim. Procd.* I. § 976-982.

<sup>2</sup> *Miller's Case*, 3 Couper, 16, 17, 18.

under a disease of the mind which, while he has the intellectual perception of right and wrong, and knows an act to be forbidden and punishable by law, deprives him of all rational capacity to adjust his conduct to the law and avoid doing it, still, should he do it, he is punishable the same as though he were sane.<sup>1</sup> The degrees of confidence and the forms of words with which this sort of doctrine is expressed differ. If any thing more is meant than that the speaker does not believe such cases truly exist, these utterances cannot be sound in law. It is not deemed to be within the scope of a legal treatise to discuss this class of questions of fact. But whether such fact exists or not, many or most experts in modern times deem that it does, and no judge can avoid the duty of laying down the law applicable to whatever the evidence *tends to prove*, whether the proof is really adequate or not.<sup>2</sup> For the purpose of the present discussion, therefore, we are compelled to assume the reality of this sort of insane mind, and inquire what is the law applicable thereto. Now, we have seen,<sup>3</sup> that, by established doctrine, about which there can be no possible dispute in any one of our States or in any civilized country, if a sane man, knowing the wrongfulness of a forbidden act, is impelled to do it by a power he cannot resist, he is exempt from punishment. So that the man pleading insanity is either sane or insane; if sane, and compelled by a power within or without him which he cannot resist, he is not to be punished; if insane, and thus impelled, *a fortiori* the law is the same. There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid. Looking, next, more minutely to the actual course of things among us, —

§ 384. **Common Form of Doctrine.** — It is not in all the cases absolutely clear what, of the language addressed to a jury, is meant for pure law, and what of it is for mere practical suggestion. But, either as the one or the other, the jury in the greater number of the cases are in substance directed to consider, whether, when the prisoner committed the act, he was in a state to comprehend his relations to others, the nature of the thing done, and its criminal character against, what he is presumed to

<sup>1</sup> *Flanagan v. People*, 52 N. Y. 467; *The State v. Shippey*, 10 Minn. 223; *Anderson v. The State*, 42 Ga. 9; *Brinkley v. The State*, 58 Ga. 296; *The State v. Pratt*, 1 Houst. Crim. 249; cases cited post, § 387; and some of the cases cited post, § 384. And see *Cunningham v. The State*, 56 Missis. 269.

<sup>2</sup> Crim. Proc. I. § 978.

<sup>3</sup> Ante, § 346, *et seq.*

know, the law of the land;<sup>1</sup> or, in another form of words which are regarded as in effect the same, whether, in what he did, he was of capacity to be conscious of doing wrong;<sup>2</sup> or, in still

<sup>1</sup> "The law of the land" seems to express the precise legal idea, according to the English judges. Opinion on Insane Criminals, 8 Scott N. R. 595. Yet, as a practical consideration, they add: "If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." *Ib.* p. 602. Lord Lyndhurst in one case employed the words, "offence against the laws of God and nature." *Rex v. Offord*, 5 Car. & P. 168; *s. r.* Mansfield, C. J., in *Bellingham's Case*, 1 Collinson Lun. 636, *Shelford Lun.* 462; also *McAllister v. The State*, 17 Ala. 434. The opinion of the English judges, above referred to, was given in answer to questions proposed to them by the House of Lords, growing out of a discussion relative to the acquittal of *McNaghten*. It embraces several interesting points on the law of insanity. Besides the report in *Scott N. R.*, as above, it may be found in a note to *Reg. v. Higginson*, 1 Car. & K. 129, 130, also *McNaghten's Case*, 10 Cl. & F. 200.

<sup>2</sup> The reader may consult, besides the last note, the following cases: *The State v. Spencer*, 1 Zab. 196; *Roberts v. The State*, 3 Kelly, 310; *Reg. v. Oxford*, 9 Car. & P. 525; *Commonwealth v. Rogers*,

7 Met. 500; *McNaghten's Case*, 10 Cl. & F. 200; *Rex v. Offord*, 5 Car. & P. 168; *Freeman v. People*, 4 Denio, 9; *People v. Pine*, 2 Barb. 566, 572; *Commonwealth v. Mosler*, 4 Barr, 264; *Reg. v. Renshaw*, 11 Jur. 615, 616; *Reg. v. Higginson*, 1 Car. & K. 129; *Parker's Case*, 1 Collinson Lun. 477, *Shelford Lun.* 460; *Bowler's Case*, 1 Collinson Lun. 673, note, *Shelford Lun.* 461; *Martin's Case*, *Shelford Lun.* 465; *McAllister v. The State*, 17 Ala. 434; *The State v. Huting*, 21 Misso. 464; *United States v. Shults*, 6 McLean, 121; *People v. Sprague*, 2 Parker C. C. 43; *United States v. McGlue*, 1 Curt. C. C. 1; *Loeffner v. The State*, 10 Ohio State, 598; *Fisher v. People*, 23 Ill. 283; *People v. Hurley*, 8 Cal. 390; *Bovard v. The State*, 30 Missis. 600; *People v. Coffman*, 24 Cal. 230; *Willis v. People*, 32 N. Y. 715; *The State v. Windsor*, 5 Harring. Del. 512; *People v. McDonell*, 47 Cal. 134; *Dove v. The State*, 3 Heisk. 348; *People v. Griffen*, *Edm. Sel. Cas.* 126; *People v. Kleim*, *Edm. Sel. Cas.* 13; *People v. Coffman*, 24 Cal. 230; *The State v. Haywood*, *Phillips*, 376; *The State v. Brandon*, 8 Jones, N. C. 463; *Reg. v. Davies*, 1 Fost. & F. 69; *Flanagan v. People*, 52 N. Y. 467; *People v. Montgomery*, 13 Abb. Pr. n. s. 207; *Macfarland's Case*, 8 Abb. Pr. n. s. 57, 89; *Cole's Case*, 7 Abb. Pr. n. s. 321; *Wagner v. People*, 4 Abb. Ap. Dec. 509, 511; *Willis v. People*, 5 Parker C. C. 621; *Reg. v. Townley*, 3 Fost. & F. 839; *Reg. v. Burton*, 3 Fost. & F. 772; *The State v. Lawrence*, 57 Maine, 574; *Humphreys v. The State*, 45 Ga. 190; *Spann v. The State*, 47 Ga. 553; *People v. Best*, 39 Cal. 690; *Loyd v. The State*, 45 Ga. 57; *Reg. v. Vaughan*, 1 Cox C. C. 80; *The State v. Thomas*, 1 Houst. Crim. 511, 525. In the Illinois case of *Hopps v. People*, 31 Ill. 385, 391, 392, *Breese, J.*, observed: "A safe and reasonable test in all cases would be, that, whenever it should appear from the evidence that at the time of doing the act the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause

other language, whether he could distinguish between right and wrong with reference to what he was doing.<sup>1</sup> Qualifications and variations of the modes of expression appear in the cases cited below, but the meaning and even the forms of words of most of them are embodied in these epitomizations. And some of these cases recognize the propriety of further and qualifying instructions according to the circumstances.

§ 385. **Identical Act.** — The inquiry is directed to the particular thing done, and not to any other; because, as we have seen,<sup>2</sup> a man may be responsible for some things, while not for others.<sup>3</sup> Of course, also, —

**Time.** — It relates to the time of the transaction, not to any other time.<sup>4</sup> These questions are distinguishable from those which concern the proof; for, —

**Evidence.** — To ascertain the state of the mind at a given period, we may inquire into its condition both before and after,<sup>5</sup> — in relation to a particular subject, its condition as to other subjects.

§ 386. **Concerning the Right-and-Wrong Test.** — No doubt every prisoner found insane by the test mentioned in the section before the last should be acquitted. But a medical writer, who seems well to comprehend his subject, has said: "It may be asserted, as the result of observation and experience, that, in all lunatics, even in the most degraded idiots, whenever manifestations of

of the act; and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them."

<sup>1</sup> Some of the foregoing cases, also *The State v. Brown*, 1 *Houst. Crim.* 539; *The State v. Pratt*, 1 *Houst. Crim.* 249; *The State v. Danby*, 1 *Houst. Crim.* 166; *The State v. Mewherter*, 46 *Iowa*, 88.

<sup>2</sup> Ante, § 380, 382.

<sup>3</sup> *Roberts v. The State*, 3 *Kelly*, 310; *Freeman v. People*, 4 *Denio*, 9; *Kinne v. Kinne*, 9 *Conn.* 102, 105.

<sup>4</sup> *Jones v. The State*, 13 *Ala.* 153; *Hadfield's Case*, 27 *Howell St. Tr.* 1281, 1353; *Hales v. Petit*, 1 *Plow.* 253, 260; *People v. Pine*, 2 *Barb.* 566; *The State v. Stark*, 1 *Strob.* 479; *Reg. v. Renshaw*, 11 *Jur.* 615, 616; *Commonwealth v. Rogers*, 7 *Met.* 500, 502; *The State v. Spencer*, 1 *Zab.* 196; *The State v. Huting*, 21 *Misso.* 464; *Shultz v. The State*, 13 *Texas*, 401; *The State v. Vann*, 82 *N. C.* 631; *Clark v. The State*, 8 *Texas Ap.* 350; *Crim. Proc.* II. § 667.

<sup>5</sup> *Freeman v. People*, 4 *Denio*, 9; *Jones v. The State*, 13 *Ala.* 153; *Dickinson v. Barber*, 9 *Mass.* 225; *Grant v. Thompson*, 4 *Conn.* 203; *Kinne v. Kinne*, 9 *Conn.* 102; *McLean v. The State*, 16 *Ala.* 672; *People v. March*, 6 *Cal.* 543; *McAllister v. The State*, 17 *Ala.* 434; *Wheeler v. The State*, 34 *Ohio State*, 394; *Crim. Proc.* II. § 674.

any mental action can be educed, the feeling of right and wrong may be proved to exist.”<sup>1</sup> And all agree, that, since the intellect is only a part of the mind of man which impels to action, the disease called insanity need not necessarily abide solely in the understanding.<sup>2</sup> At all events, whether this is really so or not, we are for the reason already given<sup>3</sup> compelled to assume it to be so for the purpose of this discussion. Now, —

**Continued.** — In a case wherein, beyond controversy, the mental disease or imperfection extends only to the intellectual powers, and there is no pretence of any want of control by the party over his actions, — no proof tending to show any insanity except the partial, which veils simply the understanding and not the whole man, — this right-and-wrong test, thus seen to be the more common form of putting the question to the jury, is correct in legal theory and practically not misleading. For, it should be borne in mind, in all issues the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not.<sup>4</sup> But —

§ 387. **Irresistible Impulse — Moral Insanity.** — The medical writers, it is understood, are in substantial accord on the further proposition, that the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled onward by a power to him irresistible.<sup>5</sup> Whether or not such is truly the case must, in the nature of things, be a pure question of fact, it cannot be of law.<sup>6</sup> The judge, looking at a prisoner, could not lay it down as of law to the jury, that, when he did the forbidden act, he was in this condition. But if it could not be the law of the case that he was, equally and consequently it could not be that he was not. However positively in the judge’s opinion he was not, the judicial assurance would be simply of a fact, not of a legal doctrine. If evidence tending to prove that such was the prisoner’s condition is offered in any case before any court, the judge cannot help dealing with it. He must either exclude or receive it. He cannot say, “I, as judge,

<sup>1</sup> Bucknill on Criminal Lunacy, 59.  
And see ante § 383 a.

<sup>2</sup> See on this point, the article before referred to, 4 Law Rev. 236.

<sup>3</sup> Ante, § 383 b.

<sup>4</sup> Crim. Proced. I. § 978, 980, 980 b.

<sup>5</sup> 1 Beck Med. Jurisp. 10th ed. 723, 724; Ray Med. Jurisp. Insan. 3d ed. § 17, 18, 22.

<sup>6</sup> Ante, § 383 and the cases there cited.



know the fact, and am certain it is otherwise than you contend; hence, assuming the fact not to be as you allege, I reject the tendered proofs." No court, on any question, rules in this way. If, on the other hand, the fact which the evidence tends to prove could not, were it established, alter the conclusion of law, the court may rule it out as irrelevant. But we have seen that, by the fundamental principles of our jurisprudence, this fact, if it exists, is relevant; it is a perfect defence.<sup>1</sup> Nor has any court the authority, whatever the private view of the incumbent of the bench, to exclude evidence of any fact which the law has made a complete defence. Now, to go back and repeat, —

**Continued.** — There are cases which either in terms deny the existence of this species of insanity, thus in violation of all analogies transmuting a mere question of fact into one of law; or hold, on the other hand, that, assuming it to exist, it furnishes no excuse for an act otherwise criminal. In this latter view the doctrine is, that, if a man is conscious of doing what the law forbids, he is criminally responsible, whether he has power over his conduct or not.<sup>2</sup> But, as already said, it is a principle fundamental in reason, in our jurisprudence, and in every other, that, in the language of Rutherford, "whatever is unavoidable is no crime."<sup>3</sup> Judges who, every day, are laying it down to juries, that men are not punishable for what they are unable to avoid, cannot be supposed to be eating their words and saying they are, when speaking to this class of questions. These cases, therefore, must be accepted as the mere distinct opinions of the judges, that every man who sees a thing to be wrong has the power to avoid doing it. Let us assume these opinions to be right, and those of the experts and other witnesses to be wrong, still it follows from the foregoing discussions that the jury, and not the court, is to settle the question for each particular case;<sup>4</sup> and, if the law's appointed triers err, the judge is not responsible. Still —

**Responsibility for Inability.** — It should not be lost sight of that, assuming the existence of the defendant's inability to control his own conduct, it is sometimes of a sort for which the law holds him answerable; as, —

<sup>1</sup> Ante, § 383 *b*.

<sup>2</sup> Ante, § 383 *b*; *Flanagan v. People*, 52 N. Y. 467; *In re Forman*, 54 Barb. 274; *The State v. Brandon*, 8 Jones, N. C. 463; *Loyd v. The State*, 45 Ga. 57; *Spann*

*v. The State*, 47 Ga. 553; *Reg. v. Burton*, 3 Fost. & F. 772; *Reg. v. Haynes*, 1 Fost. & F. 666; *Reg. v. Barton*, 3 Cox C. C. 275.

<sup>3</sup> Ante, § 346 et seq., 383 *b*.

<sup>4</sup> Ante, § 383, 383 *a*.

**Passion — Drunkenness.** — If one allows his passions to be excited to a frenzy,<sup>1</sup> or voluntarily puts his mind out of temporary balance by intoxicating drinks,<sup>3</sup> he is answerable to the criminal law for what he does in this condition. But, —

**Controlling Disease.** — If he is free from moral blame; and, in the language of Lord Denman, “if some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible.”<sup>3</sup> And the question for the jury, under such a state of the proofs, when the court permits, as it ought, the proofs to be introduced, should be so framed as to comprehend this view.<sup>4</sup> Descending more to detail, —

<sup>1</sup> Willis v. People, 5 Parker C. C. 621; The State v. Graviotte, 22 La. An. 587; Cole's Case, 7 Abb. Pr. n. s. 321; The State v. Stickley, 41 Iowa, 232; Guetig v. The State, 66 Ind. 94; People v. Finley, 38 Mich. 482. See for a sort of limit to the doctrine The State v. Draper, 1 Houst. Crim. 291, 301.

<sup>2</sup> Post, § 400 et seq.; Bradley v. The State, 31 Ind. 492; The State v. Hundley, 46 Misso. 414; People v. Bell, 49 Cal. 485; Colbath v. The State, 2 Texas Ap. 391; The State v. Coleman, 27 La. An. 691; The State v. Thompson, 12 Nev. 140; Fisher v. The State, 64 Ind. 435; The State v. Hurley, 1 Houst. Crim. 28; The State v. Thomas, 1 Houst. Crim. 511. And see Reg. v. Leigh, 4 Fost. & F. 915; The State v. Hart, 29 Iowa, 268; The State v. Johnson, 40 Conn. 136; Roberts v. People, 19 Mich. 401.

<sup>3</sup> Reg. v. Oxford, 9 Car. & P. 525, 546. And see The State v. Coleman, 27 La. An. 691.

<sup>4</sup> Commonwealth v. Rogers, 7 Met. 500, 502; Roberts v. The State, 3 Kelly, 310; Stevens v. The State, 31 Ind. 485; Bradley v. The State, 31 Ind. 492, 509. In a Kentucky case, it was justly deemed, as it has been in others, that this defence of moral insanity is liable to abuse, therefore that the court should use great caution in presenting to the jury the legal principles by which it is regulated. And the judge added, that, “before this species of insanity can be admitted to excuse crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings.” But the court

below having, in matter of law, instructed the jury “not to acquit upon such moral insanity unless it had manifested itself in former acts of similar character or like nature of the offence charged,” this was held to be wrong; and for this error a new trial was granted the defendant. Scott v. Commonwealth, 4 Met. Ky. 227, 228, 230. See also Smith v. Commonwealth, 1 Duv. 224; Andersen v. The State, 43 Conn. 514. And see some sensible views, and a collection of cases, in Taylor Med. Jurisp. In a Michigan case, Campbell, C. J., said: “The court in regard to insanity charged that the respondent would be blameless in law, 1, if by reason of insanity he was not capable of knowing he was doing wrong, or 2, if he had not power to resist the temptation to violate the law. This was correctly charged. The law has no theories on the subject of insanity. It holds every one responsible who is *compos mentis*, or a free agent, and every one irresponsible who is *non compos mentis*, or not having control of his mind.” This, it is perceived, quite accords with the Scotch view, as stated ante, § 383 a, and that of the New Hampshire and some other of our own courts, ante § 383; and that of reason, as explained in the foregoing sections. People v. Finley, 38 Mich. 482, 483. And see The State v. West, 1 Houst. Crim. 371; The State v. Brown, 1 Houst. Crim. 539, 557. The late Prof. Mittermaier, a German jurist of the highest eminence, says, in respect to insanity generally: “The true principle is to look to the personal character of the individual, to the grade of his mental powers,

§ 388. **Special Forms of Irresistible Impulse.** — According to medical views, which have found some legal recognition, this irresistible impulse is not always general, but sometimes is limited to a particular class of actions; as, for example, in —

“**Homicidal Insanity.**” — “There is,” said Gibson, C. J., “a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown,” but, in reason, this suggestion can be accepted only in the way of caution for the jury, “to have been habitual, or at least to have evinced itself in more than a single instance.”<sup>1</sup>

§ 389. **Difficulties of Subject.** — This subject of insanity is, in its practical, legal aspects, attended with great difficulties. Men of sane mind know themselves but imperfectly, and they comprehend others less than themselves; nor is there language to convey, in exact form, even the little knowledge we possess of the sane mind. When, therefore, we undertake to investigate the phenomena of insanity, to discuss them, and to deduce from the principles of the law the legal rules to govern them, we are embarrassed with difficulties which should make us cautious, and restrain us from any extensive laying down of doctrines for unseen future cases.<sup>2</sup> Therefore, —

to the notions by which he is governed, to his views of things, and, finally, to the course of his whole life, and the nature of the act with which he is charged. A person who commits a criminal act may be perfectly well acquainted with the laws and their prohibitions, and yet labor under alienation of mind. He may know that homicide is punished with death, and yet have no freedom of will.” Translation 22 Am. Jur. 311, 317, 1 Beck Med. Jurisp. 10th ed. 765, note.

<sup>1</sup> Commonwealth v. Mosler, 4 Barr, 264, 267, in which the same learned judge further observed of homicidal insanity: “The frequency of this constitutional malady is fortunately small, and it is

better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show, by clear proofs, either its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a second nature.” See also, as to homicidal mania, Sanchez v. People, 4 Parker C. C. 535. And see the last note.

<sup>2</sup> Dr. Ray has well observed: “No cases subjected to legal inquiry are more

§ 390. **Proceed cautiously.** — Judges, counsel, and juries cannot proceed too carefully in their investigation of cases of alleged insanity. They may well restrict their theories to the particular facts in issue; and, though they accept the aid of experts, they should remember that, in questions of this delicate nature, even experts are liable to err. The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals.<sup>1</sup> We think ourselves wiser upon this subject than were our fathers; undoubtedly we are; but there is wisdom yet to be acquired. In the days of darkness, it was perhaps better that insane men should suffer death than be permitted to go at large. And until we learn truly to distinguish between sanity and insanity, some must, on the one hand, suffer as criminals when they ought rather to be under treatment for disease; and, on the other hand, persons truly guilty will sometimes escape punishment under the plea of insanity.

§ 391. **Suggestions to aid Inquiry after the Fact.** — Perhaps the following suggestions will aid inquirers: All men are erring. Mere error, therefore, does not relieve from punishment. All men have vicious propensities. Therefore a mere propensity to do evil does not excuse the doer. All men are only in a limited degree deterred from wrong-doing by fear of its consequences. The mere fact, therefore, that one was not afraid of punishment, when doing an act, does not show him to have been insane. All men are more or less regardless of the demands of conscience. So the mere fact that a prisoner showed a hardened heart does not prove him insane.<sup>2</sup> But all sane men act with a certain uniformity of plan, varying and winding it may be in some respects, yet uniform in its manifestations of the mind; all are under some restraint concerning every question before them; all derive their knowledge of visible things from what is tangible to their outward senses; all love the friends who sincerely do them good; all manifest affection, under ordinary circumstances, for their offspring; all control themselves under the pressure of motives

calculated to puzzle the understandings of courts and juries, to mock the wisdom of the learned, and baffle the acuteness of the shrewd, than those connected with questions of imbecility;" and, he might

have added, insanity generally. See Ray Med. Jurisp. Insan. 3d ed. § 104.

<sup>1</sup> And see the observations of Gilpin, C. J., in *The State v. Danby*, 1 Houst. Crim. 166, 171, 172.

<sup>2</sup> *Loyd v. The State*, 45 Ga. 57.

sufficient; all obey, in short, certain laws which we recognize as belonging to the mind of a sane man. When, therefore, a person is found acting, either at times or habitually, contrary to these known laws, we say that he is more or less insane. But,—

**Sufficiently Insane.**—As we have already seen,<sup>1</sup> mere admitted insanity, palpable to the acute understanding, without reference to its degree, does not in law excuse the act. It must have attained the law's standard of magnitude.<sup>2</sup> And from this proposition we are led to a frequent error of the medical writers and experts on this subject. Often they assume it to be the law, that, if one is insane to however minute a degree, he is therefore to go unwhipped of justice; and hence, in part, their complaint, that men whom they pronounce insane are subjected by the courts to punishment. If, while they deal thus unjustly with the law, the courts do not always pay entire respect to their views, they should not complain.<sup>3</sup>

§ 392. **Insane Delusion.**—Delusion is, with many, a favorite test of insanity. It was established as a test in the famous case of Hadfield.<sup>4</sup> There are even judges who will not admit that there is any other test.<sup>5</sup> It excuses on the ground of a mistake of fact, already discussed.<sup>6</sup> If, then, a man under an aberration of mind even in one particular only, believes a thing to exist,—as, that another in his presence has designs upon his life, and is about to make the attack,—and he acts as he would be justified in doing if what he believes were real, in this instance kills the man to save his own life, he commits no crime.<sup>7</sup> Evidently the doctrine thus laid down is safe in almost any state of the proofs. But,—

<sup>1</sup> Ante, § 376, 380.

<sup>2</sup> *The State v. Geddis*, 42 Iowa, 264; *Cunningham v. The State*, 56 Missis. 269; *Warren v. The State*, 9 Texas Ap. 619; *Webb v. The State*, 5 Texas Ap. 596; *Patterson v. People*, 46 Barb. 625; *The State v. Danby*, 1 Houst. Crim. 166; *The State v. Pratt*, 1 Houst. Crim. 249.

<sup>3</sup> And see observations of Campbell, C. J., in *People v. Finley*, 38 Mich. 482, 483, 484.

<sup>4</sup> *Hadfield's Case*, 27 Howell St. Tr. 1281.

<sup>5</sup> *Willis v. People*, 5 Parker C. C. 621;

In re Forman, 54 Barb. 274; *Reg. v. Townley*, 3 Fost. & F. 839. And see *Reg. v. Davies*, 1 Fost. & F. 69; *Reg. v. Law*, 2 Fost. & F. 836.

<sup>6</sup> Ante, § 301 et seq.

<sup>7</sup> *McNaghten's Case*, 10 Cl. & F. 200; *Opinion on Insane Criminals*, 8 Scott N. R. 595; *Commonwealth v. Rogers*, 7 Met. 500; *Cunningham v. The State*, 56 Missis. 269. In *Commonwealth v. Rogers*, the court add the following illustration to the one given in the text: "A common instance is where he fully believes that the act he is doing is done by the

§ 393. **Insufficiency of Thing delusively believed.** — Should the mental aberration be admitted to extend only to the particular delusion in evidence, while all the other functions of the mind were unimpaired, the further rule would be, that, if the defendant insanely believed something which, were it true, would not legally justify his act, — as, in the language of the English judges, “if his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, — he would be liable to punishment.”<sup>1</sup> This branch of the doctrine should be cautiously received; for delusion of any kind is, of itself, strongly indicative of a generally diseased mind. And doubtless in some if not most of the instances, it does in fact extend beyond the precise point we have supposed, whether perceptibly to the casual eye or not. Hence, —

§ 394. **Delusion simple.** — In the case of Hadfield, — acquitted, as insane, of the high treason of shooting at the king, — though there was evidence of something like general insanity, his principal delusion was, “that,” in the language of his counsel, Mr. Erskine, “he had constant intercourse with the Almighty Author of all things; that the world was coming to a conclusion; and that, like our blessed Saviour, he was to sacrifice himself for its salvation.” And so he became impressed with the insane delusion, “that he *must be destroyed*, but *ought not to destroy himself*;” to bring about which result, he committed the act, intending to be arrested and executed. It seems not to have been a subject of inquiry in this case, whether, if the facts had been as delusively believed, they would have legally justified the act; but, in the able speech of Mr. Erskine, often commended for its just views,<sup>2</sup> the question is presented as turning, both in this

immediate command of God; and he acts under the delusive but sincere belief, that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature.” Shaw, C. J. p. 503.

<sup>1</sup> Opinion on Insane Criminals, 8 Scott N. R. 595, 603; McNaghten’s Case, 10 Cl. & F. 200; Bovard v. The State, 30 Missis. 600; The State v. Mewherter, 46 Iowa, 88.

<sup>2</sup> “The great speech of Mr. Erskine in

defence of Hadfield has shed new light upon the law of insanity. So conclusive was that celebrated argument, that it is now looked upon by the profession as authority. In the records of forensic eloquence, ancient and modern, nothing is to be found surpassing Erskine’s defence of Hadfield, for condensation, perspicuity, and strength of reasoning, as well as for beauty of illustration, and purity of style.” Nisbet, J., in Roberts v. The State, 3 Kelley, 310, 330.

case and in others which he brings forward by way of illustration, upon delusion simply, without reference to the nature of the ideal facts, as being sufficient or not, if true, to justify the otherwise criminal deed.<sup>1</sup> And in a modern Scotch case, the learned Lord Justice-Clerk said to the jury: "It does not appear that anybody ever doubted the soundness of the prisoner at the bar. There is evidently no doubt as to his sanity amongst those who were coming in constant contact with him. That does not bring you to a conclusion, but it is nine-tenths, as I have said, towards the conclusion to which you will have to come. There is a further step which you must take, and it is here that the great difficulty and importance of the case lies. There are states of mind which indicate unsoundness or insanity, which do not manifest themselves in ordinary life, but only on particular occasions, and in relation to special subjects. These are very exceptional instances. But if a man is clearly proved to labor under insane delusions, he is not of sound mind. Now, that the prisoner here labored under a strong delusion about his mother is certain; and the question for you is, was it an insane delusion? On that matter you have heard the medical evidence, and the account of the idea he entertained, that his mother and the doctor were in league to give him medicines to induce him to become a Roman Catholic. That part of the case impressed me very much; because that is an idea which no sane man could hold. . . . If you think that the delusion under which he thus labored was an insane delusion, then the man's mind was not sound, and you will rightly acquit him on that ground; the more so, that the delusion led directly to the act. The self-mutilation which occurred afterwards is also an indication of disturbed intellect." And thereupon the jury acquitted the defender as insane.<sup>2</sup>

**Connected with Criminal Act.**—While the learned judge, in this case, pertinently directed the jury's attention to a connection between the insane delusion and the criminal fact, he does not say it was absolutely essential. It doubtless was not. Yet with us it has been laid down in a general way, and we may deem the ordinary rule to be so, that, if the insane delusion has refer-

<sup>1</sup> *Hadfield's Case*, 27 Howell St. Tr. 1281. And see, on this subject, *Martin's Case*, Shelford Lun. 465.

<sup>2</sup> *Macklin's Case*, 3 Couper, 257, 260.

ence to something wholly unconnected with the crime, it does not excuse.<sup>1</sup>

§ 395. **Progressive Developments.** — It is impossible to anticipate all future queries. The diseases of the flesh are ever changing, while remaining in some prominent respects the same; so will be the diseases of the mind, — those shadows which appear in the advancing light. But the fundamental doctrines of the common law are reasonably stable, and they are adapted as well to the future with its changes as to the present and past.

**Deaf and Dumb.** — A person deaf and dumb is not therefore as of course insane; and, on his capacity sufficiently appearing, he may be tried and convicted for crime.<sup>2</sup> In a case of one who had never been to a school for mutes, the learned court laid down the doctrine in general terms to be, that *prima facie* a deaf and dumb person is to be regarded as incompetent; and “it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was criminal, and would subject him to punishment.” And, in this instance, the prisoner was acquitted under circumstances in which he plainly would not have been if endowed with hearing and speech.<sup>3</sup>

§ 396. **Criminal Liability and Civil, distinguished.** — The reader should not blend the insanity of the criminal law with that of the civil department. They are different in their natures, depending in some respects on diverse considerations. A person may be insane as to the one while not as to the other.<sup>4</sup> So likewise, —

**Capacity for Crime, and to be tried, distinguished.** — The question discussed in this chapter is not the same which arises preliminarily to the trial; namely, whether the prisoner is mentally capable of making his defence. If he is not, the court cannot go

<sup>1</sup> The State v. Gut, 13 Minn. 341, 358.

<sup>2</sup> Commonwealth v. Hill, 14 Mass. 207; Reg. v. Whitfield, 3 Car. & K. 121; Reg. v. Berry, 1 Q. B. D. 447, 13 Cox C. C. 189.

<sup>3</sup> The State v. Draper, 1 Houst. Crim. 291, 302.

<sup>4</sup> Reg. v. Oxford, 9 Car. & P. 425; Hadfield's Case, 27 Howell St. Tr. 1281, 1290, 1311, 1314. See The State v. Gardiner, Wright, 392, 399; Webb v. The State, 5 Texas Ap. 596; Warren v. The State, 9 Texas Ap. 619; Ray Med. Jurisp. Insan. 3d ed. § 8.



on with the case;<sup>1</sup> or, if he becomes insane after the trial commences, he can neither be sentenced, nor, if sentenced, punished, while his insanity continues.<sup>2</sup>

<sup>1</sup> *Freeman v. People*, 4 Denio, 9; *Reg. v. Goode*, 7 A. & E. 536; *Rex v. Fritchard*, 7 Car. & P. 303; *Rex v. Dyson*, 1 Lewin, 64; *Jones v. The State*, 13 Ala. 153; *People v. Ah Ying*, 42 Cal. 18; *The State v. Patton*, 12 La. An. 288; *Reg. v. Berry*, 1 Q. B. D. 447; *Crim. Proced. II.* § 666-668.

<sup>2</sup> *Freeman v. People*, 4 Denio, 9; *Jones v. The State*, 13 Ala. 153; *Shelford Lun.* 467; *Bonds v. The State*, Mart. & Yerg. 143; *The State v. Brinyea*, 5 Ala. 241; *People v. Lake*, 2 Parker C. C. 215; *Spann v. The State*, 47 Ga. 349; *The State v. Vann*, 84 N. C. 722.

## CHAPTER XXVII.

## DRUNKENNESS AS EXCUSING THE CRIMINAL ACT.

§ 397, 398. Introduction.

399-403. General Doctrine.

404-416. Limitations of the Doctrine.

§ 397. **The Doctrine stated.** — We have seen, that, if a man intending one wrong accidentally accomplishes another, he is punishable for what is done, though not intended; except in cases where a specific intent, in distinction from mere general malevolence or carelessness, is an essential element in the particular crime. That doctrine, explained in a previous chapter,<sup>1</sup> is the doctrine of this chapter also. The law deems it wrong for a man to cloud his mind, or excite it to evil action, by the use of intoxicating drinks; and one who does this, then, moved by the liquor while too drunk to know what he is about, performs what is ordinarily criminal, subjects himself to punishment; for the wrongful intent to drink coalesces with the wrongful act done while drunk, and makes the offence complete. This is the principle; the previous chapter, therefore, may profitably be consulted in connection with this one. Yet the judges, in deciding the cases, have not always had the principle in their minds; consequently the decisions show some zigzag lines of doctrine, and it is necessary we should trace them in detail.

§ 398. **How ~~the~~ Chapter divided.** — We shall consider, I. The General Doctrine; II. Limitations of the Doctrine.

I. *The General Doctrine.*

§ 399. **Mere Private Drunkenness not Indictable.** — Mere private intoxication, with no act beyond, is not indictable at the common law.<sup>2</sup> There are various old English statutes, early enough

<sup>1</sup> Ante, § 323 et seq.

O'Hanlon v. Myers, 10 Rich. 128. See

<sup>2</sup> The State v. Deberry, 5 Ire. 371; Smith v. The State, 1 Humph. 396; The State v. Waller, 3 Murph. 229; Hutchison v. The State, 5 Humph. 142.

in date to be common law with us, making drunkenness punishable or finable,<sup>1</sup> yet they seem not to have been regarded as of common-law force in this country. Still, —

**Supplies Criminal Intent.** — The common law has always regarded drunkenness as being, in a certain sense, criminal. Since, therefore, a man who intends one wrong and does another of the indictable sort is punishable,<sup>2</sup> even where the wrong intended would not be so if actually done,<sup>3</sup> voluntary drunkenness supplies in ordinary cases the criminal intent. Thus, —

§ 400. Continued — **No Excuse for Crime.** — When a man voluntarily becomes drunk, there is the wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence.<sup>4</sup> It is so even when the intoxication is so extreme as to make the person unconscious of what he is doing,<sup>5</sup> or to create a temporary insanity.<sup>6</sup> For example, —

<sup>1</sup> For example, see Stats. 4 Jac. 1, c. 5; 21 Jac. 1, c. 7. For discussions of the offences of drunkenness, being a common drunkard, and the like, under American statutes, see Stat. Crimes, § 967-981.

<sup>2</sup> Ante, § 327.

<sup>3</sup> Ante, § 330.

<sup>4</sup> *Kenny v. People*, 31 N. Y. 330; *People v. Pine*, 2 Barb. 566, 570; *The State v. Bullock*, 13 Ala. 413; *The State v. John*, 8 Ire. 330; *The State v. Stark*, 1 Strob. 479; *The State v. Turner, Wright*, 20, 30; *United States v. Cornell*, 2 Mason, 91, 111; *Rex v. Ayes, Russ. & Ry.* 166; *Burrow's Case*, 1 Lewin, 75; *Rennie's Case*, 1 Lewin, 76; *Pearson's Case*, 2 Lewin, 144; *United States v. Forbes, Crabbe*, 558; *Schaller v. The State*, 14 Misso. 502; *Pennsylvania v. McFall, Addison*, 255, 257; *Respublica v. Weidle*, 2 Dall. 88; *United States v. Drew*, 5 Mason, 28; *Whitney v. The State*, 8 Misso. 165; *Pirtle v. The State*, 9 Humph. 663; *Haile v. The State*, 11 Humph. 154; *Cornwell v. The State*, Mart. & Yerg. 147; *Swan v. The State*, 4 Humph. 136; *Tyra v. Commonwealth*, 2 Met. Ky. 1; *Golden v. The State*, 25 Ga.

527, 533; *Golliher v. Commonwealth*, 2 Duvall, 163; *Reg. v. Gamlen*, 1 Fost. & F. 90; *Outlaw v. The State*, 35 Texas, 481. And see *Hamilton v. Grainger*, 5 H. & N. 40; *Reed v. Harper*, 25 Iowa, 87; *Broom Leg. Max.* 2d ed. 13. Lord Coke says: "Although he who is drunk is for the time *non compos mentis*, yet this drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him." *Beverley's Case*, 4 Co. 123 b, 125 a. And see *Commonwealth v. Hart*, 2 Brews. 546. It is not, however, strictly true that drunkenness aggravates a crime; it simply furnishes no excuse. *McIntyre v. People*, 38 Ill. 514.

<sup>5</sup> *People v. Garbutt*, 17 Mich. 9. And see *Henslie v. The State*, 3 Heisk. 202.

<sup>6</sup> *People v. Lewis*, 36 Cal. 531. And see *Real v. People*, 42 N. Y. 270; post, § 406.

§ 401. **Supplies Malice in Homicide.** — The common law divides indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. And the doctrine is, that the intention to drink may fully supply the place of malice aforesaid; so that, if one voluntarily becomes so drunk as not to know what he is about, and then with a deadly weapon kills another, he commits murder, the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality.<sup>1</sup> Again, —

§ 402. **Cruelty to Animals.** — Evidence of intoxication will not avail a defendant charged with cruelty to his horse.<sup>2</sup>

§ 403. **Views of European Jurists — Question in Principle.** — Many European jurists view drunkenness more leniently, as to crimes committed under its influence, than the common law, thus explained, regards it.<sup>3</sup> So likewise does Paley, in his “Moral and Political Philosophy.”<sup>4</sup> In legal principle, the question turns on another; namely, whether drunkenness is to be esteemed

<sup>1</sup> *Reniger v. Fogossa*, 1 Plow. 1, 19; *Beverley's Case*, 4 Co. 123; *United States v. Cornell*, 2 Mason, 91, 111; *Haile v. The State*, 11 Humph. 154; *Pirtle v. The State*, 9 Humph. 663; *Pennsylvania v. McFall*, Addison, 255, 257; *Rex v. Carroll*, 7 Car. & P. 145; *Rex v. Ayes*, Russ. & Ry. 166; *The State v. Bullock*, 13 Ala. 413; *The State v. John*, 8 Ire. 330; *Rex v. Meakin*, 7 Car. & P. 297; *Mercer v. The State*, 17 Ga. 146; *People v. Fuller*, 2 Parker C. C. 16; *People v. Robinson*, 1 Parker C. C. 649; *Carter v. The State*, 12 Texas, 500; *Commonwealth v. Hawkins*, 3 Gray, 463; *People v. Robinson*, 2 Parker C. C. 235; *People v. Hammill*, 2 Parker C. C. 223; *The State v. Harlow*, 21 Misso. 446; *The State v. Mullen*, 14 La. An. 570; *McIntyre v. People*, 38 Ill. 514; *Friery v. People*, 54 Barb. 319, 2 Keyes, 424; *The State v. Johnson*, 41 Conn. 584. There are, in the books, a few cases which seem to lend countenance to the idea that

in special circumstances drunkenness may reduce a killing, which else would be murder, to manslaughter. Consult *McIntyre v. People*, 38 Ill. 514; *Shannahan v. Commonwealth*, 8 Bush, 463 (overruling *Smith v. Commonwealth*, 1 Duvall, 224, and *Blimm v. Commonwealth*, 7 Bush, 320); *Kriel v. Commonwealth*, 5 Bush, 362; *Curry v. Commonwealth*, 2 Bush, 67. It is believed, however, that the doctrine of the text is not unsound in legal principle, while it is sustained by the mass of the authorities. But, in connection with it, the reader should bear in mind what is laid down, post, § 409; 410, 414, 415.

<sup>2</sup> *The State v. Avery*, 44 N. H. 392.

<sup>3</sup> See an able article by Mittermaier, translated from the German, and published at Edinburgh, as No. 10 of the Cabinet Library of Scarce and Celebrated Law Tracts, and in the *American Jurist*, Vol. xxiii. p. 290.

<sup>4</sup> *Paley Phil. b. 4, c. 2.*

*malum in se*, or only an innocent mistake. Our jurisprudence deems it the former, hence its conclusion.<sup>1</sup>

## II. *Limitations of the Doctrine.*

§ 404. **Whence derivable — How the Decisions.** — From a consideration of the reasons whence the general doctrine proceeds, as shown under our last sub-title, its limitations will appear. And they are in exact accord with the better modern adjudications; but there are decisions, particularly of the earlier dates, pronounced by judges who did not have the true limitations in their minds. Let us, therefore, trace out adjudication and principle a little further.

§ 405. **Drunkenness not Voluntary.** — It follows from what has already been said, that, “if a party be made drunk by stratagem, or the fraud of another,” or the unskilfulness of his physician, “he is not responsible.”<sup>2</sup> Since the drunkenness is without his fault, it cannot supply the criminal intent.

§ 406. **Insanity from Drunkenness.** — Again, the law holds men responsible for the immediate consequences of their acts, but not ordinarily for those more remote. If, therefore, one drinks so deeply, or is so affected by the liquor, that, for the occasion, he is oblivious or insane, he is still punishable for what of evil he does under the influence of the voluntary drunkenness.<sup>3</sup> But, if the habit of drinking has created a fixed frenzy or insanity, whether permanent or intermittent, — as, for instance, delirium tremens,<sup>4</sup> — it is the same as if produced by any other cause, excusing the act.<sup>5</sup> For whenever a man loses his understanding,

<sup>1</sup> Ante, § 330-332.

<sup>2</sup> Parke, J., in *Pearson's Case*, 2 Lewin, 144; 1 Russ. Crimes, 3d Eng. ed. 7; 1 Hale P. C. 32; *People v. Robinson*, 2 Parker C. C. 235; *Choice v. The State*, 31 Ga. 424.

<sup>3</sup> Ante, § 399, 400; *People v. Pine*, 2 Barb. 566, 570; *United States v. Drew*, 5 Mason, 28; *United States v. Clarke*, 2 Cranch C. C. 158; *United States v. McGlue*, 1 Curt. C. C. 1; *Bennett v. The State*, Mart. & Yerg. 133; *Cornwell v. The State*, Mart. & Yerg. 147; *Carter v. The State*, 12 Texas, 500; *People v. Bell*, 49 Cal. 485; *The State v. Hundley*, 46 Misso. 414.

<sup>4</sup> 1 Bishop Mar. & Div. § 131; *United States v. McGlue*, 1 Curt. C. C. 1; *Maconnehey v. The State*, 5 Ohio State, 77.

<sup>5</sup> *United States v. Drew*, 5 Mason, 28; *Burrow's Case*, 1 Lewin, 75; *Rennie's Case*, 1 Lewin, 76; *Commonwealth v. Green*, 1 Ashm. 289, 302; *United States v. Forbes*, Crabbe, 558; *Cornwell v. The State*, Mart. & Yerg. 147; *The State v. Dillahun*, 3 Harring. Del. 551; *The State v. McGonigal*, 5 Harring. Del. 510; *Bailey v. The State*, 26 Ind. 422; *Roberts v. People*, 19 Mich. 401; *The State v. Hundley*, supra; *Cluck v. The State*, 40 Ind. 263; *Bradley v. The State*, 31 Ind.

as a settled condition, he is entitled to legal protection, equally whether the loss is occasioned by his own misconduct or by the dispensation of Providence.<sup>1</sup>

§ 407. *Dipsomania*. — Writers on medical jurisprudence inform us, that drunkenness, and indeed other causes, sometimes beget a disease called *dipsomania*, which overmasters the will of its victim, and irresistibly impels him to drink to intoxication.<sup>2</sup> Such a case stands, in principle, on a like ground with one of moral insanity, considered in a previous chapter.<sup>3</sup> We may presume that there are courts which will not permit that defence to be introduced; but other courts have allowed it, and have held, that the questions whether there is such a disease, and whether the act was committed under its influence, are not questions of law, but of fact for the jury.<sup>4</sup> Still, looking at such an inquiry, as a mere search after facts, it is obvious that, to distinguish a case of this sort from one of mere inordinate appetite may be difficult, requiring of judges and jurors great caution.

§ 408. *Cases requiring Specific Intent* : —

**Not supplied by Drunkenness.** — It is plain, that, when the law requires, as it does in some offences, a specific intent in distinction from mere general malevolence to render a person guilty,<sup>5</sup> the intent to drink, and drunkenness following, cannot supply the place of this specific intent.<sup>6</sup> Thus, —

§ 409. **Murder of first Degree.** — Drunkenness, we have seen,<sup>7</sup> does not incapacitate one to commit either murder or manslaughter at the common law; because, to constitute either, the specific intent to take life need not exist, but general malevolence is sufficient. But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life,<sup>8</sup> this specific intent does not in fact exist, and the murder is not in this degree, where one, not meaning to commit a homicide, becomes so drunk as to be incapable of intending to do it; and then, in this condition, kills a man.

492; *Boswell v. Commonwealth*, 20 Grat. 860.

<sup>1</sup> *Bliss v. Connecticut and Pass. Railroad*, 24 Vt. 424; *Bailey v. The State*, 26 Ind. 422; *Choice v. The State*, 31 Ga. 424; *Lanergan v. People*, 50 Barb. 266.

<sup>2</sup> *Ray Med. Jurisp. Insan.* 3d ed. § 441-447.

<sup>3</sup> *Ante*, § 387.

<sup>4</sup> *Ante*, § 383; *The State v. Pike*, 49 N. H. 899; *The State v. Johnson*, 40 Conn. 136.

<sup>5</sup> *Ante*, § 297, 298, 320, 335, 342.

<sup>6</sup> *Reg. v. Monkhouse*, 4 Cox C. C. 55; *Roberts v. People*, 19 Mich. 401. See post, § 412.

<sup>7</sup> *Ante*, § 401.

<sup>8</sup> Vol. II. § 728.

In such a case, the courts hold that the offence of murder is only in the second degree.<sup>1</sup>

§ 410. *Continued.* — This doctrine does not render it impossible for one to commit murder in the first degree while drunk. If he resolves to kill another, then drinks to intoxication, and then kills him, the murder is in the first degree; because, in this case, he did specifically intend to take life.<sup>2</sup> And a man, though drunk, may not be so drunk as to exclude the particular intent.<sup>3</sup> Drunkenness short of the extreme point, therefore, will not reduce the murder to the second degree.<sup>4</sup>

§ 411. *Larceny.* — Analogous to murder in the first degree is larceny. A mere intentional trespass on another's goods does not constitute it; but, to this, the specific intent to steal must be added.<sup>5</sup> And, though drunkenness does not necessarily disqualify a man to commit this offence; yet, if, without the intent to steal, he becomes so drunk as to be incapable of entertaining it, then, in this condition, he takes another's goods, and relinquishes them before the intent could come upon him, or returns them the instant his restored mind has cognizance of the possession of them, there is no larceny.<sup>6</sup>

§ 412. *Passing Counterfeit Money.* — In like manner, a man passing counterfeit money is not liable criminally, if too drunk

<sup>1</sup> *Pirtle v. The State*, 9 Humph. 663; *Haile v. The State*, 11 Humph. 154; *Gwatkin v. Commonwealth*, 9 Leigh, 678; *Swan v. The State*, 4 Humph. 136; *The State v. Bullock*, 13 Ala. 413; *Pigman v. The State*, 14 Ohio, 555; *Cornwell v. The State*, Mart. & Yerg. 147; *People v. Ham-mill*, 2 Parker C. C. 223; *People v. Robinson*, 2 Parker C. C. 235; *Kelly v. The State*, 3 Sm. & M. 518; *People v. Belencia*, 21 Cal. 544; *Keenan v. Commonwealth*, 8 Wright, Pa. 55, 57; *People v. Williams*, 43 Cal. 344; *Kelly v. Commonwealth*, 1 Grant, Pa. 484; *People v. Batting*, 49 How. Pr. 392; *Commonwealth v. Hart*, 2 Brews. 546; *People v. King*, 27 Cal. 507; *The State v. Johnson*, 41 Conn. 584; *Rafferty v. People*, 66 Ill. 118; *Jones v. Commonwealth*, 25 Smith, Pa. 403. See *O'Brien v. People*, 48 Barb. 274.

<sup>2</sup> *Smith v. Commonwealth*, 1 Duvall, 224. And see *The State v. Gut*, 13 Minn. 841.

<sup>3</sup> *Kenny v. People*, 31 N. Y. 330.

<sup>4</sup> *Keenan v. Commonwealth*, 8 Wright, Pa. 55.

<sup>5</sup> Ante, § 320, 342; Vol. II. § 840.

<sup>6</sup> I have thus stated the doctrine with care, as it rests in legal principle, and substantially in the authorities. But some of the cases, on this question, are indistinct and unsatisfactory, and perhaps some are adverse. The following are the cases before me, whether for or against what I have set down in the text. *The State v. Schingen*, 20 Wis. 71; *The State v. Bell*, 29 Iowa, 316; *Henslie v. The State*, 3 Heisk. 202; *Rogers v. The State*, 33 Ind. 543; *Rex v. Pitman*, 2 Car. & P. 423; *Commonwealth v. French*, Thacher Crim. Cas. 163; *O'Herrin v. The State*, 14 Ind. 420; *Dawson v. The State*, 16 Ind. 428, 429; *Commonwealth v. Finn*, 108 Mass. 466; *The State v. Hart*, 29 Iowa, 268. And see, as illustrative, *People v. Harris*, 29 Cal. 678.

to know it is counterfeit, or, consequently, to entertain the intent to defraud.<sup>1</sup>

**On what Principle.** — In the Tennessee court, Reese, J., well expressed the principle, thus: "When the nature and essence of a crime are made, by law, to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, What is the mental *status*?"<sup>2</sup>

§ 413. **Attempt.** — An indictable attempt is committed only when the intent is specific; namely, to do the particular thing which constitutes the substantive crime.<sup>3</sup> If, therefore, one is too drunk to entertain such specific intent, he cannot become guilty of the offence of attempt, however culpable, in a general way, he may be for his drunkenness.<sup>4</sup>

§ 414. *Cases not requiring a Specific Intent, wherein still the*

<sup>1</sup> *Pigman v. The State*, 14 Ohio, 555; *United States v. Roudenbush*, 1 Bald. 514.

<sup>2</sup> *Swan v. The State*, 4 Humph. 136, 141; *s. p. Kelly v. The State*, 3 Sm. & M. 518; *Reg. v. Cruse*, 8 Car. & P. 541, 546; *Haile v. The State*, 11 Humph. 154; *Pirtle v. The State*, 9 Humph. 663; *Reg. v. Moore*, 3 Car. & K. 319. In *United States v. Roudenbush*, supra (at p. 517), Baldwin, J., observed to the jury: "Intoxication is no excuse for crime when the offence consists merely in doing a criminal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong, was lost in the excitement of the occasion. But if the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same acts when sober. The simple question

is, Did he know what he was about? The law depends on the answer to this question. . . . If you shall believe, that, when he received these notes at Shive's he was in such a state of intoxication as not to know what he was giving, or what he was receiving in exchange, then you may say that he did not receive them as known counterfeits; and, before you can find him guilty, will require, besides proof of his passing them as true, proof of his knowledge that they were false." And see ante, § 408.

<sup>3</sup> Post, § 728-730.

<sup>4</sup> *Reg. v. Doody*, 6 Cox C. C. 463; *Reg. v. Stopford*, 11 Cox C. C. 643; *Mooney v. The State*, 33 Ala. 419; *The State v. Garvey*, 11 Minn. 154. And see *The State v. Bullock*, 13 Ala. 413; *Reg. v. Cruse*, 8 Car. & P. 541, 546. Some courts, indeed, have held, contrary to the general and better doctrine, that, for instance, there may be an indictable assault with intent to commit murder, where the intent to kill does not in fact exist, but the act would have been murder had death ensued. Under this view of the law of attempt, drunkenness cannot, as under the other, be made ground of acquittal. See also *Nichols v. The State*, 8 Ohio State, 435.



*precise state of the Prisoner's Mind is under special circumstances important:—*

**Drunkenness in these Cases.**—The doctrines, under the present head, are those which have already been discussed in this chapter. It is proposed simply to bring to view some applications of them.

**Reducing to Manslaughter.**—Not conflicting with what is laid down in a previous section,<sup>1</sup> it is pretty well settled that there are circumstances in which evidence of intoxication may properly be received to reduce a homicide to manslaughter. Some judges seem not willingly to yield this point;<sup>2</sup> but the better opinion is, that if, for instance, the question is, whether the killing arose from a provocation which was given at the time, or from previous malice, evidence of the prisoner's having been too drunk to carry malice in his heart may be admitted. And the consideration is not to be withheld from the jury, that his drunkenness may render more weighty the presumption of his having yielded to the provocation, rather than to the previous malice; because of the fact, that the passions of a drunken man are more easily aroused than those of a sober one. This doctrine differs from the untenable one, that drunkenness excuses or palliates passion or malice.<sup>3</sup> So intoxication is relevant to the question, whether

<sup>1</sup> Ante, § 401.

<sup>2</sup> See *Commonwealth v. Hawkins*, 3 Gray, 463; and other cases cited ante, § 401.

<sup>3</sup> *The State v. McCants*, 1 Speers, 384; *Rex v. Thomas*, 7 Car. & P. 817; *Rex v. Meakin*, 7 Car. & P. 297; *Haile v. The State*, 11 Humph. 154; *Kelly v. The State*, 3 Sm. & M. 518; *Pearson's Case*, 2 Lewin, 144; *Smith v. Commonwealth*, 1 Duvall, 224; *Golliher v. Commonwealth*, 2 Duvall, 163; 3 Greenl. Ev. § 6. But see *Rex v. Carroll*, 7 Car. & P. 145, overruling *Rex v. Grindley*, 1 Russ. Crimes, 3d Eng. ed. 8. And see *The State v. John*, 8 Ire. 330; *Pirtle v. The State*, 9 Humph. 663; *People v. Robinson*, 2 Parker C. C. 235; *People v. Ham-mill*, 2 Parker C. C. 223. In *Haile v. The State*, supra, the doctrine was stated as follows: "When the question is, can drunkenness be taken into consideration in determining whether a party be guilty of murder in the second degree, the an-

swer must be, that it cannot; but, when the question is, what was the actual mental state of the perpetrator at the time the act was done?—was it one of deliberation and premeditation?—then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case, it is murder, though the perpetrator was drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness is caused. The law, in such cases, does not seek to ascertain the actual state of the perpetrator's mind; for, the fact from which malice is implied having been proved, the law presumes its existence,

expressions used by a prisoner sprang from a deliberate, evil purpose, or were the mere idle words of a drunken man.<sup>1</sup> This evidence, moreover, assists in determining whether a defendant acted under the belief that his property or person was about to be attacked.<sup>2</sup>

§ 415. *Continued.* — In New York, intoxication is deemed pertinent to the question, whether and how far an act was done in the heat of passion, and in general explanation of the defendant's conduct; but it will not reduce a killing, which in a sober person would be murder, to manslaughter.<sup>3</sup>

§ 416. *Conclusion.* — This question of drunkenness will necessarily present itself in new forms and under new complications as the light and facts of our jurisprudence travel on. And the safe course for counsel and judges is to adhere, in these cases, to those principles which govern the intent, as well when the party is not drunk as when he is. Thus the law will be kept harmonious, and the most exact justice of which it is capable will be administered in these special cases where intoxication intervenes.

and proof in opposition to this presumption is irrelevant and inadmissible. Hence a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him." Opinion by Green, J. See also an article in 16 *Law Reporter*, 552. And see *Rogers v. People*, 3 *Parker C. C.* 632; *Jones v. The State*, 29 *Ga.* 594.

<sup>1</sup> *Rex v. Thomas*, 7 *Car. & P.* 817; *People v. Eastwood*, 4 *Kernan*, 562.

<sup>2</sup> *Marshall's Case*, 1 *Lewin*, 76; *Reg. v. Gamlen*, 1 *Fost. & F.* 90. And see *Eastwood v. People*, 3 *Parker C. C.* 25, 56.

<sup>3</sup> *People v. Rogers*, 18 *N. Y.* 9. And see *People v. Eastwood*, 4 *Kernan*, 562, 564; *Golden v. State*, 25 *Ga.* 527; *The State v. Cross*, 27 *Misso.* 332.

## CHAPTER XXVIII.

## THE CAPACITY OF CORPORATIONS FOR CRIME.

§ 417. **Corporation, what.** — A corporation, viewed in reference to the present inquiry, is a collection of persons, or a single individual, endowed by law with a separate existence as an artificial being; differing legally from a man unincorporate in this, that it covers only a part of his circle of action and responsibility.<sup>1</sup> To determine what part and how much it covers, we look at its particular nature and objects, and the terms of the act of incorporation.

**Entertaining Criminal Intent.** — Can this artificial being entertain a criminal intent? It is said, in an old case, that a corporation is not indictable, but its individual members are.<sup>2</sup> And this is correct as to some things. As to others, corporations have always been held to be indictable.

§ 418. **Continued.** — Even in civil affairs, the powers of these artificial beings are limited; but, since the capacity to act is given them by law, no good reason appears why they may not intend to act in a criminal manner. And mere intentional wrong acting, we have seen,<sup>3</sup> is all that is necessary in a class of criminal cases. Thus, —

§ 419. **Ways — (Towns — Railroad and Turnpike Companies).** — Towns and parishes, being corporations of a particular kind, are indictable for nuisance in not repairing the highways and bridges which their duty requires them to repair.<sup>4</sup> So also are railroad<sup>5</sup> and turnpike<sup>6</sup> companies. And, generally, —

<sup>1</sup> "A corporation is a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." Angell & Ames Corp. § 1.

<sup>2</sup> Anonymous, 12 Mod. 559.

<sup>3</sup> Ante, § 343-345.

<sup>4</sup> Grant on Corp. 283; The State v. Barksdale, 5 Humph. 154; The State v. Murfreesboro', 11 Humph. 217; Rex v. Hendon, 4 B. & Ad. 628. See Smoot v. Wetumpka, 24 Ala. 112; Vol. II. § 1281.

<sup>5</sup> Reg. v. Birmingham and Gloucester Railway, 2 Gale & D. 236, 9 Car. & P. 469, 6 Jur. 804, 3 Q. B. 223.

<sup>6</sup> Waterford and Whitehall Turnpike v. People, 9 Barb. 161.

**Neglects.** — When the law casts upon any corporation an obligation of such a nature that the neglect of it would be indictable in an individual, the corporation neglecting it may be indicted.<sup>1</sup>

§ 420. **Misfeasance** — (**Obstruction of Way, &c.**). — But while the courts everywhere hold corporations to be thus indictable for non-feasance, it is by some denied that they are for misfeasance.<sup>2</sup> Accordingly, in Maine, an indictment was adjudged not to lie against a corporation for the nuisance of erecting a dam across a river;<sup>3</sup> and, in Virginia, for obstructing a highway.<sup>4</sup> But the contrary is established in England; and there, if an incorporated railway company obstructs a highway, — as, for example, by laying a track over it on a line not conformable to the act of incorporation, — criminal proceedings are maintainable for the nuisance. “Many occurrences may be easily conceived,” said Denman, C. J., “full of annoyance and danger to the public, and involving blame in some individual or corporation, of which the most acute person could not clearly define the cause; or ascribe them with more correctness to mere negligence in preventing safeguards, or to an act rendered improper by nothing but the want of safeguards.”<sup>5</sup> This English doctrine prevails also in New Jersey,<sup>6</sup> Massachusetts,<sup>7</sup> Vermont,<sup>8</sup> and Tennessee,<sup>9</sup> and evidently it is the better doctrine in principle.<sup>10</sup>

<sup>1</sup> See the previous notes, also *Grant on Corporations*, 283; *People v. Albany*, 11 Wend. 539; *Lyme Regis v. Henley*, 3 B. & Ad. 77, 92, 93; *Angell & Ames Corp.* § 394. And see *Reg. v. Birmingham and Gloucester Railway*, 1 Gale & D. 457, 5 Jur. 40.

<sup>2</sup> *The State v. Great Works Milling and Man. Co.*, 20 Maine, 41; *Commonwealth v. Swift Run Gap Turnpike*, 2 Va. Cas. 362; *The State v. Ohio and Mississippi Railroad*, 23 Ind. 362. See *The State v. Burlington*, 36 Vt. 521.

<sup>3</sup> *The State v. Great Works Milling and Man. Co.*, supra. In such a case, an indictment would lie, the court said, against the individual members committing the act.

<sup>4</sup> *Commonwealth v. Swift Run Gap Turnpike*, supra.

<sup>5</sup> *Reg. v. Great North of England Railway*, 9 Q. B. 315, 10 Jur. 755, 16 Law J. N. S. M. C. 16; *Rex v. Medley*, 6 Car. & P. 292; *Angell & Ames Corp.* § 395.

In England it is even held, that a corporation may be made a defendant in the civil action for assault and battery. *Eastern Counties Railway v. Broom*, 6 Exch. 314, 15 Jur. 297, 20 Law J. N. S. Exch. 196.

<sup>6</sup> *The State v. Morris and Essex Railroad*, 3 Zab. 360.

<sup>7</sup> *Commonwealth v. New Bedford Bridge*, 2 Gray, 339.

<sup>8</sup> *The State v. Vermont Central Railroad*, 27 Vt. 103, 30 Vt. 108.

<sup>9</sup> *Louisville and Nashville Railroad v. The State*, 3 Head, 523.

<sup>10</sup> See also, as lending support to this doctrine, *Wartman v. Philadelphia*, 9 Casey, 202; *Whitfield v. Southeastern Railroad*, 1 Ellis, B. & E. 115; *Benson v. Manufacturing Co.*, 9 Met. 562. And see *Commonwealth v. Ohio and Pennsylvania Railroad*, 1 Grant, Pa. 329; *The State v. Cincinnati Fertilizer Co.*, 24 Ohio State, 611; *Two Sicilies v. Wilcox*, 1 Sim. N. S. 382.

§ 421. **Limit to Indictability for Non-feasance.**—To render a corporation indictable for a non-feasance, it must have the power of acting; the same rule applying here as to an individual. Thus, —

**Railway controlled by Receiver.**—If the affairs of a railway corporation are under the sole management of a receiver appointed by the Court of Chancery, over whose acts the corporation has no control, it is not liable to a criminal prosecution for the nuisance of obstructing a highway by stopping thereon its trains; because, said Bennett, J., “no man or corporation should be made criminally responsible for acts which he has no power to prevent.”<sup>1</sup>

§ 422. **Limit to Indictability for Misfeasance.**—Not every act of misfeasance is indictable in a corporation which would be in an individual. It must come within the scope of corporate duty.<sup>2</sup> Therefore, —

**Treason — Felony — Perjury — Assault — Riot, &c.**—In a case cited a little way back,<sup>3</sup> Denman, C. J., said: “Some dicta occur in the old cases, ‘A corporation cannot be guilty of treason or of felony.’ It might be added, ‘of perjury, or offences against the person.’”<sup>4</sup> The Court of Common Pleas lately held, that corporations might be sued in trespass; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties, cannot be guilty in these cases; but it may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large.” So it is said, that a corporation cannot be guilty of an assault, or riot, or other crime involving personal violence, or any felony.<sup>5</sup>

§ 423. **How these Limits in Principle.**—But, in principle, the

<sup>1</sup> The State v. Vermont Central Railroad, 30 Vt. 108.

<sup>2</sup> See ante, § 417.

<sup>3</sup> Reg. v. Great North of England Railway, 9 Q. B. 315, 326.

<sup>4</sup> But see ante, § 420, note.

<sup>5</sup> Reg. v. Birmingham and Gloucester Railway, 2 Gale & D. 236, 9 Car. & P. 469, 6 Jur. 804, 3 Q. B. 223; Orr v. Bank of United States, 1 Ohio, 86. “A corporation aggregate of many is invisible,

immortal, and rests only in intendment and consideration of the law. . . . They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney.” Case of Sutton’s Hospital, 10 Co. 23, 32*b*. See, however, a note to the last section, in which it appears that a corporation may commit assault and battery.

limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation, and the extent of its powers in the special matter. And, though a corporation cannot be hung, there is no reason why it may not be fined, or suffer the loss of its franchise, for the same act which would subject an individual to the gallows.

§ 424. **Individual Members Indictable.** — Though a corporation is indictable for a particular wrong, still the individual members and officers who participate in it may be also for the same act.<sup>1</sup> But they are not so liable in all cases in which the corporation is.<sup>2</sup> This question is governed by principles sufficiently explained elsewhere in the present volume.

<sup>1</sup> *Reg. v. Great North of England Railway*, 9 Q. B. 315, 327; *Kane v. People*, 8 Wend. 363; *Edge v. Commonwealth*, 7 Barr, 275; *Kimbrough v. The State*, 10 Humph. 97; *Rex v. Gaul, Holt*, 363; *The State v. Conlee*, 25 Iowa, 237. See

also *Sloan v. The State*, 8 Blackf. 361; *Kane v. People*, 8 Wend. 203; *Rex v. Kingston*, 8 East, 41.

<sup>2</sup> *The State v. Barksdale*, 5 Humph. 154. And see Vol. II. § 1270, 1282.

## CHAPTER XXIX.

## BY WHAT WORDS THE INTENT IS IN LEGAL LANGUAGE INDICATED.

§ 425. **Inadequacy of Language.** — Human language originated in the wants of men at a period when they had not learned to think, but their ideas were indefinite. And it has been *perfected* (if that is the right word) by constant use in the conveyance of more vague thoughts than exact ones. Certain scientific terms have been made precise in meaning when scientifically employed; and this is so, to some extent, in legal science.<sup>1</sup> But though the language of the common law is in a high sense cultivated, and many of its words have acquired fixed meanings, there are not separate ones to designate every differing form of the criminal intent. Thus, —

§ 426. **Intent in Larceny.** — To constitute larceny, there must be the specific intent to deprive the owner of his ownership in the thing taken; but to express this intent, the language has no single word. So it employs a circumlocution. And the form which usage has established as adequate, is, to say that the defendant “feloniously did steal, take, and carry away” the thing.<sup>2</sup> By force of constant use and adjudication this circumlocution, in the paucity of our language, has been made to answer the purpose, and he would be a bold pleader who should dare now to attempt the substitution of another.

**Other Forms of Intent.** — But there are some other forms of the criminal intent which can be more shortly and aptly expressed. The principal single words are the following.

§ 427. **Felonious.** — This word, standing singly, rather designates the grade of the crime — that it is “felony” in distinction from misdemeanor — than any particular form of the felonious intent. Yet, in a sort of general sense, it points to the intent which enters into a felony.<sup>3</sup>

<sup>1</sup> Stat. Crimes, § 269.

<sup>2</sup> Crim. Proced. I. § 522, 533-537.

<sup>3</sup> Crim. Proced. II. § 697.

**Wilful — Malicious.** — The appropriate place for these words is in criminal pleading, where they are established too firmly to be uprooted.<sup>1</sup> They are too vague in meaning to be often employed in discussions of the law itself, except by one who has no distinct ideas to convey, and who wishes to appear learned when he is not. Naturally, therefore, they are not unfrequently found in statutes.

§ 428. **Wilful.** — “Wilfully” sometimes means little more than plain intentionally, or designedly.<sup>2</sup> Yet it is more frequently understood to extend a little further, and approximate the idea of the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse.<sup>3</sup> And Shaw, C. J., once remarked in a Massachusetts case, that, “in the ordinary sense in which it is used in statutes, it means not merely ‘voluntarily,’ but with a bad purpose;”<sup>4</sup> in other words, it means corruptly.<sup>5</sup>

§ 429. **Malice — Malice Aforethought.** — “Malice,” “malicious,” “maliciously,” are words more purely technical in their legal use than “wilfully.”<sup>6</sup> “Malice aforethought” is a technical phrase employed in indictments; and, with the word “murder,” distinguishes the felonious killing called murder from what is called manslaughter.<sup>7</sup> In opinions of courts and other law writings we frequently meet with language from which it might be inferred that the word “malice” alone signifies the same thing as “malice aforethought;”<sup>8</sup> but the better use makes a distinction, and assigns to the former a meaning somewhat less intense in respect of wickedness than to the latter.<sup>9</sup> Malice, in legal phrase, is

<sup>1</sup> Bouv. Law Dict., Malice, Wilfully; *Rex v. Richards*, 7 D. & R. 665; *Rex v. Stevens*, 5 B. & C. 246. Cas. 143; *Smith v. Wilcox*, 47 Vt. 537; *The State v. Townsell*, 3 Heisk. 6.

<sup>6</sup> Ante, § 427.

<sup>2</sup> Bouv. Law Dict., Wilfully; *Reg. v. Holroyd*, 2 Moody & R. 339; *Commonwealth v. Bradford*, 9 Met. 268; *Harrison v. The State*, 37 Ala. 154.

<sup>3</sup> *The State v. Abram*, 10 Ala. 928; *Carpenter v. Mason*, 4 Per. & D. 439, 12 A. & E. 629; *McCoy v. The State*, 3 Eng. 451; *Chapman v. Commonwealth*, 5 Whart. 427, 429.

<sup>4</sup> *Commonwealth v. Kneeland*, 20 Pick. 206, 220.

<sup>5</sup> *The State v. Gardner*, 2 Misso. 23; *Reg. v. Ellis*, Car. & M. 564; *United States v. Railroad Cars*, 1 Abb. U. S. 196; *The State v. Preston*, 34 Wis. 675. See *Trimble v. Commonwealth*, 2 Va.

<sup>7</sup> 1 Chitty Crim. Law, 243; Bouv. Law Dict., Malice Aforethought; *Rex v. Nicholson*, 1 East P. C. 346. But see, as to Arkansas, *Anderson v. The State*, 5 Pike, 444. And see *Crim. Proced. II.* § 497-502, 544-549.

<sup>8</sup> 4 Bl. Com. 198, 199; 3 Greenl. Ev. § 144; *Beauchamp v. The State*, 6 Blackf. 299; *Commonwealth v. Green*, 1 Ashm. 289, 296.

<sup>9</sup> *Reg. v. Griffiths*, 8 Car. & P. 248; *Anonymous*, s. c. 2 Moody, 40. And see *Wright v. The State*, 9 Yerg. 342. As to the meaning of the words “malice aforethought,” see *Reg. v. Tyler*, 8 Car. & P. 616, 620; *United States v. Cornell*, 2



never understood to denote general malevolence, or unkindness of heart, or enmity toward a particular individual; but it signifies rather the intent from which flows any unlawful and injurious act, committed without legal justification.<sup>1</sup> A Massachusetts case decides that the word "maliciously," in the statute against malicious mischief, is not sufficiently defined as "the wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse;" but it means more.<sup>2</sup> And the words "wilful and malicious" cover together a broader meaning than the word "wilful" alone.<sup>3</sup> Sometimes malice is a mere inference of law from facts proved.<sup>4</sup> Hence the distinction between expressed and implied malice.<sup>5</sup>

Mason, 60, 91; *The State v. Will*, 1 Dev. & Bat. 121, 163; *Beauchamp v. The State*, 6 Blackf. 299; *The State v. Simmons*, 3 Ala. 497; Vol. II. § 672 et seq.

<sup>1</sup> *Commonwealth v. Snelling*, 15 Pick. 337; *The State v. Crawford*, 2 Dev. 425, 428, 429; *Commonwealth v. Green*, 1 Ashm. 289, 296; *Bromage v. Prosser*, 4 B. & C. 247, 255; *Dexter v. Spear*, 4 Mason, 115; *Commonwealth v. Bonner*, 9 Met. 410; *The State v. Doig*, 2 Rich. 179; *Reg. v. Tivey*, 1 Den. C. C. 63; *Rex v. Salmon*, Russ. & Ry. 26; *Republica v. Teischer*, 1 Dall. 335; *Rex v. Reynolds*, Russ. & Ry. 465; *Rex v. Hunt*, 1 Moody, 98; *Griffin v. Chubb*, 7 Texas, 603, 615; 2 Greenl. Ev. § 453. And see *Taylor v. The State*, 4 Ga. 14; *McGurn v. Brackett*, 33 Maine, 331; *The State v.*

*Pierce*, 7 Ala. 728; *Dozier v. The State*, 26 Ga. 156; *United States v. Taylor*, 2 Sumner, 584.

<sup>2</sup> *Commonwealth v. Walden*, 3 Cush. 558. And see Stat. Crimes, § 434, 435, 437; *Reg. v. Pembliton*, Law Rep. 2 C. C. 119, 12 Cox C. C. 607; *Reg. v. Upton*, 5 Cox C. C. 298.

<sup>3</sup> *The State v. Alexander*, 14 Rich. 247.

<sup>4</sup> *Worley v. The State*, 11 Humph. 172; *Commonwealth v. Green*, 1 Ashm. 289, 296; *Beauchamp v. The State*, 6 Blackf. 299; *The State v. Town*, Wright, 75; 1 East P. C. 371.

<sup>5</sup> *Anthony v. The State*, 13 Sm. & M. 263; *Bromage v. Prosser*, 4 B. & C. 247, 255, 256; Vol. II. § 675.

## BOOK V.

THE ACT WHICH MUST COMBINE WITH THE EVIL  
INTENT TO CONSTITUTE CRIME.

## CHAPTER XXX.

## THE GENERAL NATURE OF THE REQUIRED ACT.

§ 430. **Act and Intent Combining.**—In a previous chapter<sup>1</sup> was considered the doctrine that only by a combination of act and intent is crime constituted. No amount of intent alone is sufficient; neither is any amount of act alone: the two must combine.<sup>2</sup>

§ 431. **The Sort of Act.**—Also, in the foregoing discussions, some further preliminary views relating to the act have appeared. There must be an act, else the public, which prosecutes, has not suffered, and has no occasion to complain,<sup>3</sup>—it must be of a nature injuring the public, in distinction from an individual, or such a private injury as the public protects the individual against, for public reasons,<sup>4</sup>—and, finally, it must be sufficient in amount of evil to demand judicial notice.<sup>5</sup>

**What for this Chapter.**—It is proposed, in this chapter, to present some further general views of the act required in crime. We shall look at it more in detail in chapters further on.

§ 432. **Conspiring as an Act.**—If two or more<sup>6</sup> persons conspire to do a wrong, this conspiring is an act rendering the transaction a crime, without any step taken in pursuance of the conspiracy.<sup>7</sup>

<sup>1</sup> Ante, § 204 et seq.

<sup>2</sup> And see *Chatfield v. Wilson*, 28 Vt. 49; *Morgan v. Bliss*, 2 Mass. 111; *Taylor v. Alexander*, 6 Ohio, 144; *Bancroft v. Blizzard*, 13 Ohio, 30. These are civil cases; yet, viewed together, they admirably illustrate the doctrine of the text.

<sup>3</sup> Ante, § 204, 406.

<sup>4</sup> Ante, § 230-254.

<sup>5</sup> Ante, § 212-214, 223-229.

<sup>6</sup> *Commonwealth v. Manson*, 2 Ashm. 31; *The State v. Tom*, 2 Dev. 569.

<sup>7</sup> *Commonwealth v. Judd*, 2 Mass. 329, 337; *Commonwealth v. Tibbetts*, 2 Mass. 536, 538; *Commonwealth v. Warren*, 6 Mass. 74; *People v. Mather*, 4 Wend. 229; *The State v. Cawood*, 2 Stew. 360; *The State v. Buchanan*, 5 Har. & J. 317; *Collins v. Commonwealth*, 3 S. & R. 220;

Statutes have modified this rule in some of the States ; as, in New York, where under the Revised Statutes the result is stated to be, that, "in all cases, except agreements to commit felony upon the person of another, or to commit arson or burglary, the indictment must contain a charge of one or more overt acts, one or more of which must be proved upon the trial to have been done to effect the object of the conspiracy."<sup>1</sup>

§ 433. **Neglect viewed as Act.**— There are cases in which men are indictable for what the law calls neglect.<sup>2</sup> A neglect is in the legal sense an act. It is a departure from the order of things established by law, — a checking of action. It is like a man's standing still while the company to which he is attached moves along, when we say, he leaves the company. On this principle, —

**Continuing Nuisance.**— One under legal obligation to remove a nuisance is indictable when he suffers it to continue.<sup>3</sup>

§ 434. **Injurious Nature of Act.**— An act may be in itself evil, or evil in consequence only of its tendency. And though the state does not punish a mere intent to do wrong, not developed into any thing done to the public injury, it often holds indictable an act which is indifferent in its nature, but of evil tendency, and prompted by an evil motive.<sup>4</sup> If a man were to go upon his own land, and, as a trial of skill, discharge loaded fire-arms at a mark, this would be in no sense harmful ; but if, with the intention to take the life of a human being, he aimed his gun at a man, and the charge accidentally hit the mark instead of the man, a grave offence would be committed ; though the thing accomplished was in both the supposed instances the same.

§ 435. **Attempt.**— Therefore, if a man intends to commit a particular crime, and does an act toward it, but is interrupted, or some accident intervenes, so that he fails to accomplish what he meant, he is still punishable. This is called a criminal attempt.<sup>5</sup>

Morgan v. Bliss, 2 Mass. 111, 112 ; O'Connell v. Reg., 11 Cl. & F. 155, 9 Jur. 25 ; Commonwealth v. Eastman, 1 Cush. 189 ; Commonwealth v. McKisson, 8 S. & R. 420 ; Sydserff v. Reg., 11 Q. B. 245 ; People v. Richards, 1 Mich. 216 ; The State v. Ripley, 31 Maine, 386 ; Reg. v. Turvy, Holt, 364 ; The State v. Noyes, 25 Vt. 415 ; Vol. II. § 192.

<sup>1</sup> People v. Chase, 16 Barb. 495, 498 ; Vol. II. § 192. And see People v.

Mather, 4 Wend. 229, 259 ; The State v. Norton, 3 Zab. 33.

<sup>2</sup> See ante, § 318 et seq.

<sup>3</sup> Indianapolis v. Blythe, 2 Ind. 75.

<sup>4</sup> "The intent may make an act, innocent in itself, criminal." Rex v. Scofield, Cald. 397, 400, by Lord Mansfield and by Buller, J. And see the cases cited ante, § 204, 206 ; also the chapter beginning at § 323.

<sup>5</sup> Post, § 723 et seq.

And by this name "attempt" every act of this sort, which the courts hold to be indictable, is, with us, known.<sup>1</sup> But, —

**Endeavor short of Attempt (Procuring Dies for Counterfeiting).** — In England, an indictable endeavor, not proximate to the substantive crime intended, appears not to be termed attempt. Thus the English judges sustained an indictment at the common law for simply procuring dies to make counterfeit half-dollars of the currency of Peru. The statute would have been violated only on the making of the coin; and they considered, that the mere procuring of the dies was not an act sufficiently proximate to this offence to constitute an attempt. Still they held it to be a sufficient wrong to be indictable. Said Jervis, C. J.: "This is not an indictment for an attempt to commit the statutable offence, as was the case in *Regina v. Williams*.<sup>2</sup> No doubt, if that were the case, this conviction must have failed, for here there has been no direct attempt to coin; but this is an indictment founded on the criminal intent, coupled with an act. I will not attempt to lay down any rule as to what is such an act done in furtherance of a criminal intent as will warrant an indictment for a misdemeanor, for I do not see the line precisely myself; but it is not difficult to say, that the act done in this case is one which falls within it. If a man intends to commit murder, the walking to the place where he purposes to commit it would not be a sufficient act to evidence the intent, to make it an indictable offence; but in this case no one can doubt, that the procuring of the dies and machinery was necessarily connected with the offence, and was for the express purpose of the offence, and could be used for no other purpose." And Parke, B., observed: "Had the prisoner, with the intent to coin, merely gone to Birmingham with the object of procuring the dies for coining, and had not procured them, the act, I agree, would have been too remote from the criminal purpose to have been the foundation of a criminal charge. An attempt to commit a felony is not the only misdemeanor connected with it. It is a misdemeanor to do any act sufficiently proximate to the offence, with the intent of committing it. Now, I do not see for what lawful purpose the dies and apparatus could have been made. The case of statutory attempts to commit felonies is very different; there, to support

<sup>1</sup> Post, § 724.

<sup>2</sup> *Reg. v. Williams*, 1 Den. C. C. 39.

the conviction, proof must be given of an attempt to do the very criminal act."<sup>1</sup>

§ 436. **Magnitude of Act — Proximity to Injury Intended.** — Here we come to one of the illustrations of the doctrine, that our law, in the criminal department the same as in the civil, does not take cognizance of things trifling and small.<sup>2</sup> Two questions concerning the act are always to be considered together, — first, whether it is of the sort which the criminal law takes cognizance of; secondly, whether, being such, it has proceeded far enough for the law's notice. And it must proceed more or less far — be nearer or less near to the end meant — according as it is more or less intensely criminal in its nature.

§ 437. **Substantive Offences in Nature of Attempt.** — There are some things which in law are technically substantive offences, while truly they are, in whole or in part, attempts only; and they fall within the principle of attempts. For example, —

**Uttering Forgery — (No Fraud accomplished).** — If a statute forbids the putting off of a forged bank-note, with intent to defraud the bank; and one with this intent puts off the note to an agent of the bank employed, unknown to him, to detect offenders, and so not imposed upon, — he commits the offence; because the law leaves it unimportant whether or not a fraud is effected, provided it is attempted, and the putting off is complete.<sup>3</sup> And, —

**Burglary.** — If a man in the night-time breaks into a dwelling-house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not.<sup>4</sup> Likewise, —

**Perjury.** — Perjury appears to be regarded as an attempt (to subvert justice in a judicial proceeding); for a man commits this offence who testifies to what he believes to be false, or what he knows nothing about,<sup>5</sup> though it turns out to be true.<sup>6</sup> So —

<sup>1</sup> Reg. v. Roberts, 33 Eng. L. & Eq. 553, Dears. 539, 25 Law J. n. s. M. C. 17. The language of the judges, quoted in the text, is copied from the English Law & Equity report, differing verbally from the report of Dearsly.

<sup>2</sup> Ante, § 212–214, 223–229.

<sup>3</sup> Rex v. Holden, 2 Taunt. 334, Russ. & Ry. 154, 2 Leach, 4th ed. 1019; Vol. II. § 605. And see, as illustrative, Casals v. The State, 4 Yerg. 149; Wright v. The State, 5 Yerg. 154.

<sup>4</sup> The State v. Wilson, Coxe, 439; Commonwealth v. Newell, 7 Mass. 245; Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex v. Knight, 2 East P. C. 510; Anonymous, Dalison, 22; Vol. II. § 90, 109–113.

<sup>5</sup> People v. McKinney, 3 Parker C. C. 510.

<sup>6</sup> Rex v. Edwards, 2 Russ. Crimes, 3d Eng. ed. 597, and the other authorities there cited; 1 Hawk. P. C. Curw. ed. p. 433, § 6; Vol. II. § 1043, 1044.

**Treason.** — It is not essential, in treason, that the treasonable purpose be successful; therefore, if letters to an enemy are intercepted, they may still constitute a sufficient overt act.<sup>1</sup>

§ 438. **Injurious Nature of Act, continued.** — But, unless the act is within some exceptional principle, as in the cases just stated, it must be in its own nature criminal, or tending to mischief, or prohibited by law; and no offence is committed when one, supposing himself to be executing some evil design, yet mistaking facts, accomplishes neither the wrong meant nor any thing else of a publicly injurious nature.<sup>2</sup> Thus, —

**Robbery** — (Fear, or not). — To constitute a robbery, if there is no violence, actual or constructive,<sup>3</sup> the party beset must yield through fear; and, when his fears are not excited, but his secret motive for parting with his money is to prosecute the offender, this crime is not committed.<sup>4</sup> But if there is an assault which would furnish a reasonable ground for fear, the robbery is complete, though the person assaulted relinquishes his money for the purpose of bringing to punishment the wrong-doer.<sup>5</sup> In like manner, —

**False Pretences** — (Collecting Debt — Pretence without Effect). — Under the statutes against false pretences, it is not indictable to induce one by the pretence to pay what he justly owes; because he is not thereby legally injured.<sup>6</sup> And nothing is a false pretence which has no tendency to, and does not, induce a man to part with his goods; since it neither harms nor tends to harm.<sup>7</sup>

§ 439. **What the Aim of this Discussion.** — The purpose of these illustrations is to help us to some general views, not to furnish that complement of doctrine which alone can be the safe guide for the practitioner: as, when we would examine a city, to become familiar with its streets, its buildings, and its people, we first look upon it from some eminence, and there gain a general

<sup>1</sup> *Rex v. Jackson*, 1 *Crawf. & Dix C.* 149. And see *Rex v. Gordon*, 2 *Doug.* 590; 1 *East P. C.* 58.

<sup>2</sup> And see ante, § 204, 320.

<sup>3</sup> 1 *Russ. Crimes*, 3d *Eng. ed.* 875, 879, 891, 892.

<sup>4</sup> *Rex v. Fuller*, *Russ. & Ry.* 408; *Reene's Case*, 2 *East P. C.* 734, 2 *Leach*, 4th *ed.* 616, 1 *Russ. Crimes*, 3d *Eng. ed.* 890; *Rex v. Jackson*, 1 *Russ. Crimes*, 3d

*Eng. ed.* 892, 1 *East P. C. Addenda* xxi.; Vol. II. § 1174, 1176.

<sup>5</sup> *Norden's Case*, *Foster*, 129, 1 *Russ. Crimes*, 3d *Eng. ed.* 880, 891, 892.

<sup>6</sup> *People v. Thomas*, 8 *Hill, N. Y.* 169; *Rex v. Williams*, 7 *Car. & P.* 354; Vol. II. § 466.

<sup>7</sup> *Commonwealth v. Davidson*, 1 *Cush.* 33; *Rex v. Dale*, 7 *Car. & P.* 352; *The State v. Little*, 1 *N. H.* 257, 258; Vol. II. § 433-436, 461-464.

idea of its situation, magnitude, and larger aspect ; then, descending, take our more exact observations, relying, for positive knowledge, mostly on the latter. One or two more illustrations of the doctrine of the last section may be helpful to this end.

§ 440. **Treason — (Mistaking Friends for Enemy).** — Even in treason, which, we have seen,<sup>1</sup> is an offence in the nature of an attempt, if a man intending to go over to the enemy mistakes some troops of his own country for the enemy's, and goes to them, he does not become thereby a traitor.<sup>2</sup> So, —

**Stealing Letters not Subject of Larceny.** — Under the English statutes against larceny of letters from the post-office, — construed to apply only to those deposited in the ordinary way, — if a letter is dropped in for the purpose of detecting a suspected carrier, and this carrier steals it, supposing it to have come in the usual course, he is not guilty.<sup>3</sup> Also, —

**Resisting Officer without Warrant.** — It appears, that, where one is justified in resisting an officer by reason of his having no warrant or an imperfect one, the justification is effectual equally whether the person resisting knew the fact or not.<sup>4</sup> Likewise, —

**Perjury when Proceedings Invalid.** — Perjury cannot be committed when the proceedings in court, in connection with which the false oath is taken, have no legal validity, but are simply void.<sup>5</sup>

§ 441. **Shooting in Ignorance of Justifying Fact.** — In England, a constable was indicted under a statute for shooting at a man with intent to do him grievous bodily harm. The man was committing what would be a misdemeanor if a first offence, or a felony if a second: in the former alternative, the shooting would be unlawful ; in the latter, lawful. In fact, this was a second offence, but the constable did not know it, therefore the judges held him to be guilty of the statutory crime.<sup>6</sup> This decision cannot be reconciled with the principle, believed to be sound, and sustained by various cases already cited in this chapter, that a defendant

<sup>1</sup> Ante, § 437.

<sup>2</sup> *Respublica v. Malin*, 1 Dall. 33.

<sup>3</sup> *Reg. v. Rathbone*, 2 Moody, 242, Car. & M. 220 ; *Reg. v. Gardner*, 1 Car. & K. 628. As to the statutes of the United States on this subject, see *United States v. Foye*, 1 Curt. C. C. 364. And see Vol. II. § 904, note, par. 5.

<sup>4</sup> See *Foster*, 311 et seq. ; 1 East P. C. 325 et seq.

<sup>5</sup> *Rex v. Cohen*, 1 Stark. 511.

<sup>6</sup> *Reg. v. Dadson*, 2 Den. C. C. 35, Temp. & M. 385, 14 Jur. 1051, 1 Eng. L. & Eq. 566.

may rely on any fact which justifies him in law, though he was ignorant of it when the transaction occurred. If one should go out and take the life of a wild monster, believed by him to be human, but a scientific examination should disclose that it was not, — would he be guilty of murder? No lawyer probably would so hold.<sup>1</sup>

§ 442. **Conclusion.** — If these general views concerning the nature of the act seem, at some places, to be indefinite, they are as exact as the adjudications at present existing will enable a writer to make them, and perhaps as exact as in the nature of things they can ever be made. The complications of human affairs are vast, and it is not possible that, in a brief chapter, the products of all their changeful forms — as well those which are to arise as those which have already transpired — should be, in perfect outline, presented.

<sup>1</sup> And see, for further illustrative matter, *Rex v. Ady*, 7 Car. & P. 140; *Reg. v. James*, 2 Den. C. C. 1, 12, note; *Rex v. Lovel*, 2 Moody & R. 39. Also, *The Abby*, 5 Rob. Adm. 251, 254, where Lord Stowell observed: "If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder,

and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favor; the criminal act intended has not been committed, and the man is innocent of the legal offence."



## CHAPTER XXXI.

### HOW THE SUBJECT OF THE CRIMINAL ACT MAY BE DIVIDED.

§ 443. **Scope of this Chapter.** — The object of this chapter is simply to look at the act which, in connection with the intent, constitutes crime, and inquire into what divisions this criminal thing may be separated, for the purposes of the minuter investigations which are to teach us what is, and what is not, indictable at the common law.

§ 444. **Blackstone's Division of Crime.** — Various divisions have been proposed or adopted; Blackstone's is as popular as any, thus: 1. Offences against God and religion; 2. Offences against the law of nations; 3. Offences against the king and government; 4. Offences against the commonwealth; as, against public justice, public peace, public trade, public health, public economy; 5. Offences against individuals; namely, against their persons, their habitations, and their property.

§ 445. **Purposes of Division.** — Whatever division of crime we make, it is arbitrary, — a mere device of an author to bring the subject aptly to the comprehension of his readers. The law itself is a seamless garment on the body politic. Perhaps, in the hands of Blackstone, his division was, for his book, the best. In the hands of the present author, and for this work, another will be better. In theory, there is no choice in divisions; the question is a mere practical one, and that is the best by which the particular author can convey the clearest and most exact idea to his readers.

§ 446. **Division in Present Work.** — In this work, we shall consider, in successive chapters: 1. The protection of the criminal law to the government, in its existence, authority, and functions; 2. Its protection to the relations of the government with other governments; 3. Its protection to the public revenue; 4. Its protection to the public health; 5. Its protection to the public morals, religion, and education; 6. Its protection to the public

wealth and to population; 7. Its protection to the public convenience and safety; 8. Its protection to the public order and tranquillity; 9. Its protection to individuals; 10. Its protection to the lower animals.

§ 447. **Observations on this Division.** — If the purpose of division were to make the chapters of equal length, this one would be unfortunate. But it will enable us to traverse the whole field, and keep constantly within the subjects indicated by the titles to the several chapters. Thus it will accomplish all that any divisions can do.

§ 448. **Uses of these Chapters on the Act.** — The question first presenting itself to a practitioner asked for advice in a criminal cause, on whichever side, is, whether or not the thing assumed to have been done is a crime. To enable him to answer this question is the purpose of this series of chapters. Their usefulness, in localities where there are common-law crimes, as there are in most of our States, is obvious. But they are almost as important in those States in which all crimes are statutory. This arises from the fact, that the statutes are to be construed by the rules of the common law, and so are never truly understood by one ignorant of it.<sup>1</sup>

§ 449. **What accomplished in these Chapters.** — No book can be so written as to enable persons unacquainted with the subject to decide, at a glance in it, on the indictability of a transaction in question. So many considerations enter into every inquiry of this sort, — it depends so much on technical reasoning, so much on specific precedent, so much on principles of law which no author can crowd into his index in a way to enable a reader to find them, so much on combinations of thought possible only to a trained mind, — that, unless one has studied, not merely law in general, but criminal law in particular, it is useless for him to consult a book in an emergency, however well it may be written. He must first study the book; and, if he will not do this, honesty demands that he withhold advice on a question of this nature. But, if he will first carefully read the whole of these elementary discussions, he can then investigate, in the usual methods, a particular topic with effect.

<sup>1</sup> Stat. Crimes, § 6, 7, 75 82, 88, 114, and many other places.

## CHAPTER XXXII.

## PROTECTION TO THE GOVERNMENT IN ITS EXISTENCE, AUTHORITY, AND FUNCTIONS.

§ 450. **People and Government inseparable.**—It was a cardinal doctrine with our English ancestors, that the king was for the people, and their interests and his were inseparable. Much more, in our country, where, in a higher sense, the government is of the people, a part of whom it is, are they and the government one in interest. Indeed, neither can exist without the other. Hence—

§ 451. **Protection to Government.**—There is nothing so directly and certainly injurious to the whole people as an act against the existence of the government, or its authority, or impeding any of its functions. Nothing, therefore, is more clearly indictable than such an act, even a minute one, if not too trivial<sup>1</sup> for the law's notice. Yet plain and undisputed as this proposition is, there are, apparently within it, acts which occupy disputable ground, others which were once indictable but are not now, and still others which are indictable now, yet formerly they were not. For the conditions of society, the views of mankind, and the positive enactments change in some degree from age to age, though in the main they are in all ages the same.

§ 452. **Popular Interests and Governmental blending.**—In an old book,<sup>2</sup> written for the people, and obnoxious to kings because conceding too little to them, the author, in praise of Edward III., says: "He had a rule upon his private expenses, a good gloss upon the public, and a platform for the augmenting of the treasure of the kingdom, as well for the benefit of the people as of the

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> "An Historical and Political Discourse of the Laws and Government of England, from the first times to the end of the Reign of Queen Elizabeth; with a

vindication of the ancient way of Parliaments in England. Collected from some manuscript notes of John Selden, Esq., by Nathaniel Bacon, of Gray's Inn, Esq., 5th ed. &c., London, 1760."

Crown." Although he "was a king of many taxes above all his predecessors, yet cannot this be interpreted as a blot to the honor of the law or liberty of the people; for the king was not so unwise as either to desire it without evident cause, or to spend it in secret, or upon his own private interests; nor so weak and irresolved as not to employ himself and his soldiers to the utmost to bring to pass his pretensions; nor so unhappy as to fail of the desirable issue of what he took in hand. So as, though the people parted with much money, yet the kingdom gained much honor and renown; and, becoming a terror to their neighbors, enjoyed what they had in fuller security, and so were no losers by the bargain in the conclusion."

§ 453. **Compelling to Work — Fixing Wages.** — And this good king, not only taxed the people, but compelled men to work, and fixed by law the wages. "A sick and very crazy time questionless it was, when the clergy were stately, and the poor idle. The priests' wages for this cause are now settled; and they that would get much must get many littles, and do much. But the greater sore was amongst the poorer sort; either they would not serve, or at such wages as could not consist with the price of the clothes, and the subsistence of the clothier. Laws, therefore, are made to compel them to work, and to settle their wages; so as now it is as beneficial to them to serve the meaner sort of clothiers as the richer sort: for the master must give no more, nor the servant take more; and thus became labor current in all places."<sup>1</sup>

§ 454. **Work and Wages, continued.** — In just principle, there is nothing which a government has more clearly the right to do than to compel the lazy to work, and nothing is more absolutely beyond its jurisdiction than to fix the price of labor. In the time of Edward III. it might have been in a sense pardonable to do the latter, while highly commendable to do the former. Even the former would not be tolerated by the sentiment of the present age, except as to paupers and criminals. Yet it ought to be, if necessary. And the reason is, that men are dependent on one another, and people and government are mutually dependent; while, at the basis of all prosperity, and even life itself, lies active industry. He who lazes his life away, or spends it in use-

<sup>1</sup> Discourse, ut sup. Part 2, p. 38-41.

less sports, lives, directly or indirectly, at the public expense, and pays no equivalent for what he eats, drinks, or wears. He does what is as intrinsically dishonest as to pilfer from door to door. If he has inherited money or lands, this inheritance has come to him through the laws of the country, and as such is the gift of the country; and, so far from its justifying him in pursuing a life of idleness or dissipation, it places him under a still greater obligation to work.

§ 455. **Idleness as a Crime.** — The English statutes thus referred to have probably all been repealed; but, if they had not, we should know, as a result of the altered opinions upon labor pervading the United States, that they are not to be deemed a part of the common law which our forefathers brought to this country from England. Yet we see also, that, in just principle, wilful idleness in any person, male or female, rich or poor, is criminal; and, if two things existed together which do not, — first, if just views on the subject of labor prevailed, and, secondly, if the punishment of idleness as crime were practically expedient, — then idleness should be indictable with us now. Hence, —

**As to what is Common-law Crime.** — If we would determine whether or not a particular thing is punishable by our unwritten law, we are not only to inquire whether it is competent for the government to punish it, but whether its punishment is expedient, and accords with the current understanding of the enlightened mind of the country, particularly as expressed in judicial decision.<sup>1</sup> If decision has pronounced neither one way nor the other in this country, we are to inquire what was the law of England when this country was settled, and whether any sufficient reason appears why such law should not be deemed to have traversed the ocean with our forefathers and become established here.

§ 456. **Treason.** — The heaviest offence known to the law is treason; because, with governments, as with individuals, self-preservation is the first duty, taking precedence of all others. In this country, treason is either against the United States or a particular State.<sup>2</sup> In England, the crime is of wide range;<sup>3</sup> but

<sup>1</sup> And see ante, § 42.

<sup>3</sup> See Vol. II. § 1205–1207.

<sup>2</sup> Ante, § 177.

in this country it has been greatly limited, treason against the United States consisting "only in levying war against them, or in adhering to their enemies, giving them aid and comfort."<sup>1</sup> And, in most of the States, the offence against the State has been restricted within nearly or quite as narrow limits.<sup>2</sup>

§ 457. **Obstructions of Government less than Treason.** — But it is not the whole duty of a subject to abstain from the overthrow of the government. He should avoid what tends to its overthrow; nor should he weaken it, or bring it into contempt, or obstruct its functions in any of its departments. And he should render to it his active aid whenever occasion demands. Therefore every act or neglect, in violation of what is thus pointed out as duty, is, when sufficient in magnitude,<sup>3</sup> criminal. Thus, —

**Sedition.** — In England, there are various misdemeanors, which, not amounting to treason, are of like nature with it, known under the general name of sedition; such as libels upon the government, oral slanders of it, riots to its disturbance, and the like.<sup>4</sup>

<sup>1</sup> Const. U. S. art. 3, § 3, cl. 1. And see Vol. II. § 1214–1222; Charge on Law of Treason, 1 Story, 614; United States v. Hoxie, 1 Paine, 265; Ex parte Bollman, 4 Cranch, 75; *Respublica v. McCarty*, 2 Dall. 86; *Respublica v. Malin*, 1 Dall. 33; *Respublica v. Carlisle*, 1 Dall. 35; United States v. Vigol, 2 Dall. 346; United States v. Burr, 4 Cranch, 469; United States v. Hanway, 2 Wal. Jr. 139; United States v. Mitchell, 2 Dall. 348.

<sup>2</sup> As to New York, see *People v. Lynch*, 11 Johns. 549. See also, as to several of the States, 3 Greenl. Ev. § 237.

<sup>3</sup> Ante, § 212 et seq.

<sup>4</sup> 1 Hale P. C. 77; 1 East P. C. 48, 49; Stroud's Case, 3 Howell St. Tr. 235; *Rex v. Frost*, 22 Howell St. Tr. 471; In re Crowe, 3 Cox C. C. 123. In Archbold it is said: "A man may lawfully discuss and criticise the measures adopted by the queen and her ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. See *Rex v. Lambert*, 2 Camp. 398. . . . If a man curse the queen, wish her ill, give out scandalous stories concerning her (see *Reg. v. Harvey*, 2 B. & C. 257, 3 D.

& R. 464), or do any thing that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people, . . . all these are sedition. In *Rex v. Tutchin*, 5 Harg. St. Tr. 527, 532, Holt, 424, Lord Holt said, that, if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished.' And Lord Ellenborough, in *Rex v. Cobbett*, Holt on Libel, 114, Stark. on Libel, 522, said, that, if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c., are punishable. And whether the defendant really intended, by his publication, to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. *Rex v. Burdett*, 4 B. & Ald. 95; *Rex v. Harvey*,

Offences of this sort against the United States could be punished only under a statute,<sup>1</sup> and there has been little occasion for pursuing like offences against the States. Moreover, with us, popular sentiment tolerates great latitude in the discussion of governmental affairs. We have, therefore, no cases informing us to what extent sedition is an offence at common law in our States.

§ 458. **Refusal to accept Office.** — The government can be carried on only by officers. Therefore, as already observed,<sup>2</sup> a refusal, without lawful excuse,<sup>3</sup> to accept a public office to which one has been elected, is indictable.<sup>4</sup> Happily there is in this country, widely diffused, a commendable willingness to do this duty; therefore indictments for the breach of it are rare. But though this doctrine is of little practical applicability with us, it plainly is a part of our common law. For a like reason, —

§ 459. **Breaches of Official Duty** — (**Ministerial distinguished from Judicial**). — Any act or omission, in disobedience of official duty, by one who has accepted public office, is, when of public concern,<sup>5</sup> in general, punishable as a crime.<sup>6</sup> This is particularly so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion.<sup>7</sup> But this doctrine has its exceptions and qualifications; thus, —

supra." Archb. Crim. Pl. & Ev. 13th Lond. ed. 631, 632. For sedition under the Scotch law, see *Sinclair's Case*, 23 Howell St. Tr. 778; *McLaren's Case*, 33 Howell St. Tr. 1.

<sup>1</sup> Ante, § 199.

<sup>2</sup> Ante, § 246; *Reg. v. Vincent*, 9 Car. & P. 91; *Rex v. Burder*, 4 T. R. 778.

<sup>3</sup> *Attorney-General v. Read*, 2 Mod. 299; *Rex v. Grosvenor*, 1 Wils. 18, 2 Stra. 1193; *Rex v. Denison*, 2 Keny. 259; *Rex v. Prigg, Aley, 78*; *The State v. McEntyre*, 3 Ire. 171.

<sup>4</sup> As to the form of the procedure, see *Crim. Proced. II.* § 820-822.

<sup>5</sup> Ante, § 232, 235, 243-246. A private person injured may have his action against the officer for damages. *Jenner v. Joliffe*, 9 Johns. 381. See ante, § 237 and note, 264.

<sup>6</sup> *The State v. McEntyre*, 3 Ire. 171, 174; *Reg. v. Neale*, 9 Car. & P. 431; *Respublica v. Montgomery*, 1 Yeates, 419; *Reg. v. James*, 1 Eng. L. & Eq. 552, 2 Den. C. C. 1, Temp. & M. 300, 14 Jur.

940; *Rex v. Howard*, 7 Mod. 307; *Rex v. Angell, Cas. temp. Hardw.* 124; *Anonymous*, 6 Mod. 96; *Crouther's Case*, Cro. Eliz. 654; *Smith v. Langham*, Skin. 60, 61; *W.'s Case*, Loft, 44; *Adams v. Terrentants*, Holt, 179; *The State v. Leigh*, 3 Dev. & Bat. 127; *Reg. v. Commings*, 5 Mod. 179; *Rex v. Hemmings*, 3 Salk. 187; *Smith's Case*, Syme, 185; *Wilkes v. Dinsman*, 7 How. U. S. 89; *Rex v. Harrison*, 1 East P. C. 382; *Reg. v. Buck*, 6 Mod. 306; *Mann v. Owen*, 9 B. & C. 595, 4 Man. & R. 449; *Rex v. Bootie*, 2 Bur. 864; s. c. nom. *Rex v. Booty*, 2 Keny. 575; *Rex v. Fell*, 1 Salk. 272, 1 Ld. Raym. 424; *Reg. v. Tracy*, 6 Mod. 30; *The State v. Buxton*, 2 Swan, Tenn 57.

<sup>7</sup> *Rex v. Osborn*, 1 Comyns, 240; *Commonwealth v. Genther*, 17 S. & R. 135; *People v. Norton*, 7 Barb. 477; *Anonymous*, Loft, 185; *Rex v. Seymour*, 7 Mod. 382; *The State v. Maberry*, 3 Strob. 144; *Taylor v. Doremus*, 1 Harrison, 473; *Stone v. Graves*, 8 Misso. 148; *The State*

§ 460. **Judicial — Ministerial, with Discretion.** — One serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of the law.<sup>1</sup> His act, to be cognizable criminally, or even civilly, must be wilful and corrupt.<sup>2</sup> And if it is strictly judicial, and he is, for instance, a justice of the peace, and has jurisdiction, he will not be liable to the suit of the party, however the law may be as to a criminal prosecution,<sup>3</sup> though corruption is alleged.<sup>4</sup> To allow such an action would be impolitic; and, since other remedies are open, needless.

§ 461. **Legislator — (Contempt — Impeachment — "Civil Officer").** — The king, according to English law, can do no wrong; that is, he is not punishable, in any form, for what he does.<sup>5</sup> In this country, there is no king, and no official person is so completely exempt as he.<sup>6</sup> But nearest to him, in this respect, is the legislator, acting officially.<sup>7</sup> If a legislator misbehaves himself, the leg-

*v. Stalcup*, 2 Ire. 50. And see *Arnold v. Commonwealth*, 8 B. Monr. 109; *Stoddard v. Tarbell*, 20 Vt. 321.

<sup>1</sup> Ante, § 299.

<sup>2</sup> *The State v. Porter*, 2 Tread. 694; *People v. Coon*, 15 Wend. 277; In re —, 14 Eng. L. & Eq. 151, 16 Jur. 995; *The State v. Odell*, 8 Blackf. 396; *Reg. v. Badger*, 6 Jur. 994; *Commonwealth v. Rodes*, 6 B. Monr. 171; *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385; *The State v. Gardner*, 2 Misso. 23; *The State v. Glasgow*, Conference, 38; *Cooper v. Adams*, 2 Blackf. 294; *People v. Norton*, 7 Barb. 477; *Rex v. Phelps*, 2 Keny. 570; *Rex v. Okey*, 8 Mod. 45; *Rex v. Allington*, 1 Stra. 678; *Garnett v. Ferrand*, 6 B. & C. 611, 9 D. & R. 657; *Rex v. Webb*, 1 W. Bl. 19; *Rex v. Halford*, 7 Mod. 193; *Rex v. Seaford*, Justices, 1 W. Bl. 432; *Rex v. Lediard*, Say. 242; *Cope v. Ramsey*, 2 Heisk. 197; *Downing v. Herrick*, 47 Maine, 462.

<sup>3</sup> See post, § 462.

<sup>4</sup> *Pratt v. Gardner*, 2 Cush. 63; *Floyd v. Barker*, 12 Co. 23, 25; *Cunningham v. Bucklin*, 8 Cow. 178; *Garnett v. Ferrand*, 6 B. & C. 611, 9 D. & R. 657; *Tyler v. Alford*, 38 Maine, 530; *Broom Leg. Max.* 2d ed. 61; *Furr v. Moss*, 7 Jones, N. C. 525; *Kelley v. Dresser*, 11 Allen, 31; *Weaver v. Devendorf*, 3 Denio, 117;

*Steele v. Dunham*, 26 Wis. 393. See *Cooper v. Adams*, 2 Blackf. 294; *Linford v. Fitzroy*, 13 Q. B. 240, 3 New Sess. Cas. 438; *Muse v. Vidal*, 6 Munf. 27; *Coleman v. Frazier*, 4 Rich. 146; *Sthreshley v. Fisher*, Hardin, 257; *Alexander v. Card*, 3 R. I. 145; *Bessell v. Wilson*, 1 Ellis & B. 489, 22 Law J. n. s. M. C. 94, 17 Jur. 684, 18 Eng. L. & Eq. 294; *Hill v. Sellick*, 21 Barb. 207. But see *Garfield v. Douglass*, 22 Ill. 100. **No Jurisdiction.** — If the magistrate has no jurisdiction, he is not protected. *Sullivan v. Jones*, 2 Gray, 570; *Piper v. Pearson*, 2 Gray, 120; *Clarke v. May*, 2 Gray, 410; *Tracy v. Williams*, 4 Conn. 107; *Grumon v. Raymond*, 1 Conn. 40; *Bradley v. Fisher*, 13 Wal. 335, 350; *Lange v. Benedict*, 48 How. Pr. 465. And so also of the members of a court-martial. *Wise v. Withers*, 3 Cranch, 381. And see *Macon v. Cook*, 2 Nott & McC. 379; *Shoemaker v. Nesbit*, 2 Rawle, 201. **Naval Commander.** — As to a naval commander, see *Wilkes v. Dinsman*, 7 Hcw. U. S. 89.

<sup>5</sup> *Broom Leg. Max.* 2d ed. 40.

<sup>6</sup> 1 Kent Com. 289.

<sup>7</sup> Story Const. § 795; 1 Kent Com. 235, note; Lord Brougham in *Ferguson v. Kinnoull*, 9 Cl. & F. 251, 289, 290; Mr. Justice Coleridge, in *Howard v. Gosset*, May Parl. Law, 2d ed. 151.



islative body can deal with him for the contempt.<sup>1</sup> Yet it is the better doctrine, that he is not a "civil officer," subject to impeachment, within the meaning of the Constitution of the United States;<sup>2</sup> and opinions of great weight have been expressed against his being impeachable on general principles.<sup>3</sup>

§ 462. **Indictable or not** — (**Legislators — Judges — Jurors — High Governmental Officers — Justices of Peace**). — It is sufficiently settled, that legislators,<sup>4</sup> the judges of our highest courts and of all courts of record acting judicially,<sup>5</sup> jurors,<sup>6</sup> and probably such of the high officers of each of the governments as are intrusted with responsible discretionary duties,<sup>7</sup> are not liable to an ordinary criminal process, like an indictment, for official doings however corrupt. There is some apparent authority for including with them justices of the peace, in respect of things judicial, and within their jurisdiction;<sup>8</sup> but the plain weight of authority, probably of reason also, excludes them; holding them liable to the ordinary criminal processes, though not to the civil as we have seen,<sup>9</sup> in cases of corruption, not of mere mistake or error.<sup>10</sup>

<sup>1</sup> May Parl. Law, 2d ed. 60, 70, 73, 102; 1 Kent Com. 235, 236; Anderson v. Dunn, 6 Wheat. 204. A Massachusetts case decides, that the House of Representatives of the Commonwealth has power to expel a member; and the courts can inquire neither why it expelled him, nor whether it gave him due opportunity for defence; but, when he claims a privilege as member before a judicial tribunal, the fact of his expulsion is conclusive against him. *Hiss v. Bartlett*, 3 Gray, 468. And see Vol. II. § 247.

<sup>2</sup> Story Const. § 793, 794.

<sup>3</sup> Story Const. § 795; 1 Kent Com. 235, note. Lord Coke says, that, "if any lord of Parliament, spiritual or temporal, have committed any oppression, bribery, extortion, or the like," he may be impeached. 4 Inst. 24.

<sup>4</sup> Ante, § 461, and authorities cited in the notes.

<sup>5</sup> 1 Hawk. P. C. Curw. ed. p. 447, § 6; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395; *Cunningham v. Bucklin*, 8 Cow. 178; *Hammond v. Howell*, 2 Mod. 218; *Floyd v. Barker*, 12 Co. 23, 25. **Judge, as to Civil Suit.** — Neither is the judge

liable to a civil suit. Ante, § 460; *Hamilton v. Williams*, 26 Ala. 527; *Yates v. Lansing*, 5 Johns. 282; *Taylor v. Doremus*, 1 Harrison, 473; *Stone v. Graves*, 8 Misso. 148; *Lenox v. Grant*, 8 Misso. 254; *Upshaw v. Oliver*, *Dudley*, Ga. 341; *Morrison v. McDonald*, 21 Maine, 550. Otherwise, if he knows he acts without jurisdiction. *Lange v. Benedict*, 48 How. Pr. 465; *Bradley v. Fisher*, 13 Wal. 335.

<sup>6</sup> 1 Hawk. P. C. Curw. ed. p. 447, § 5; *Yates v. Lansing*, 5 Johns. 282, 293; yet see *Rex v. Bynon*, 2 Show. 304. See *Wyld v. Cookman*, Cro. Eliz. 492.

<sup>7</sup> 4 Bl. Com. 121; 2 Woodd. Lect. 355.

<sup>8</sup> *The State v. Campbell*, 2 Tyler, 177; *Yates v. Lansing*, supra; *Floyd v. Barker*, 12 Co. 23, 25.

<sup>9</sup> Ante, § 460.

<sup>10</sup> *Wallace v. Commonwealth*, 2 Va. Cas. 130; *Commonwealth v. Alexander*, 4 Hen. & Munf. 522; *Rex v. Borron*, 3 B. & Ald. 432; *People v. Norton*, 7 Barb. 477, 480; *Rex v. Harrison*, 1 East P. C. 382; *Rex v. Seaford Justices*, 1 W. Bl. 432; *Rex v. Smith*, 7 T. R. 80; *Rex v. Fielding*, 2 Bur. 719; *Rex v. Allington*, 1 Stra. 678; *Lord Brougham*, in *Ferguson v. Kinnoull*, 9 Cl. & F. 251, 290; *Rex*

**Impeachable or not.** — Judges, not jurors, and the high officers mentioned other than legislative, are answerable in another form, impeachment.

§ 463. **Effect of Impeachment** — (Indictment afterward). — According to the English practice, the officer impeached may suffer, not only the forfeiture of his office, but also any other penalties known to the law, even the deprivation of life.<sup>1</sup> But the Constitution of the United States provides, as to the national officers, that “judgment in cases of impeachment shall not extend further than removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.”<sup>2</sup> As the United States courts have no common-law jurisdiction,<sup>3</sup> doubtless they cannot take up a case after judgment is rendered on the impeachment, and proceed to conviction, without the aid of a statute. But some of the State constitutions have similar provisions; and it would be an interesting question, whether, after a judgment by impeachment and removal from office, or before, a court of ordinary criminal jurisdiction could, without help from a statute, inflict for the crime the additional penalty which in England the House of Lords, on conviction under the impeachment, would impose.<sup>4</sup>

*v. Okey*, 8 Mod. 45; *Rex v. Phelps*, 2 Keny. 570; *Rex v. Davis*, Lofft, 62; *In re Fentiman*, 4 Nev. & M. 126, 2 A. & E. 127; *Rex v. Brooke*, 2 T. R. 190; *Rex v. Jones*, 1 Wils. 7; *Rex v. Cozens*, 2 Doug. 426; *Jacobs v. Commonwealth*, 2 Leigh, 709; *Rex v. Angell*, Cas. temp. Hardw. 124; *The State v. Gardner*, 2 Misso. 23; *Lining v. Bentham*, 2 Bay, 1; *The State v. Johnson*, 2 Bay, 385; *In re —*, 14 Eng. L. & Eq. 151; *People v. Coon*, 15 Wend. 277; *The State v. Porter*, 2 Tread. 694; *Rex v. Rye Justices*, Say. 25; *Rex v. Baylis*, 3 Bur. 1318; *Rex v. Jackson*, Lofft, 147; *Rex v. Wykes*, Andr. 238; *Rex v. Harries*, 13 East, 270; *Rex v. Bishop*, 5 B. & Ald. 612; *Reg. v. Jones*, 9 Car. & P. 401; *The State v. Porter*, 3 Brev. 175; and other cases cited ante, § 459, 460. In some States it is so by statute. *Wickersham v. People*, 1 Scam. 128. As to Texas, see *The State v. Bald-*

*win*, 39 Texas, 75; *The State v. Baldwin*, 39 Texas, 155.

<sup>1</sup> May Parl. Law, 2d ed. 474-476; 2 Woodd. Lect. 364, 365; Story Const. 784.

<sup>2</sup> Const. U. S. art. 1, § 3; Story Const. § 759, 760, 781.

<sup>3</sup> Ante, § 189 et seq.

<sup>4</sup> See, as helping at some of the steps in this inquiry, ante, § 14, note, 193; 1 Bishop Mar. & Div. § 680-682; 2 Ib. § 291, 292; Stat. Crimes, § 171. Relating to the subjects of this and accompanying sections, the following are some —

1. **Further Views** — (Executive Officer). — In our system of government, where the executive, legislative, and judicial functions are distinct, — see the discussion in the chapter concerning military and martial law, ante, § 43 et seq., — there seems to be no good reason why an executive officer should be required

§ 464. **Officer de Facto — De Jure.** — In the actual affairs of government, a man sometimes holds an office to which he has not been duly appointed. But if he does the duties of it, *under color of title*, he is called an officer *de facto*; and his official acts are binding on third persons,<sup>1</sup> though they are said not to be valid in

to answer, in the judicial tribunals, for a departure from duty, on any other principles than would prevail if he were a judicial officer, sued or indicted in respect of alleged error or corruption in that office.

2. It cannot be, that, under any circumstances, those who administer our government in one of its departments should be justly entitled to overrule what those of another department decide, or to inflict punishment on them when acting honestly and within the general scope of their official duties. If it were proper to extend this discussion, I should show, that the attempt to do this would be a palpable infraction of the Constitution; which, by dividing the governmental functions into separate departments, left each one free from the control of any other. And for a judge to punish, or amerce in damages, an executive officer, because differing from him in opinion as to his official duty, would be as palpable a usurpation of the office as it would be for the executive officer to undertake the same thing against the judge. But I cannot pause to trace the line of argument fully here. There are several popular errors on this subject, — popular as prevailing in the legal profession as well as out of it.

3. A digest of a few cases will be convenient, — to be consulted in connection with those cited to the last few sections. **Justice of Peace.** — If a justice of the peace, in the discharge of a ministerial or judicial duty, acts corruptly to the injury of a party, this is a breach of his official bond. *The State v. Flinn*, 3 Blackf. 72. And see *The State v. Jennings*, 4 Ohio State, 418. **Not Trespass in Party.** — If a judicial officer, of either general or special jurisdiction, acts erroneously or oppressively, he in whose suit this occurs is not therefore a trespasser. *Taylor v. Moffatt*, 2 Blackf. 305. See *Poult v. Slocum*, 3 Blackf. 421. What

is Judicial. — All that a justice of the peace is required to perform, from the commencement to the close of a suit, appears to be deemed judicial rather than ministerial, on a question of responsibility for his acts. Where a justice issued an execution, but by mistake made it returnable in sixty days, instead of ninety, as required by law, whereby the plaintiff lost his debt, he was held not liable for the loss. *Wertheimer v. Howard*, 30 Misso. 420. And see *The State v. Dunnington*, 12 Md. 340. **Officer's Fraud.** — An action lies against a public officer for a fraudulent representation in relation to property, made at a sale of it, in his official capacity. *Culver v. Avery*, 7 Wend. 380. **Inadequate Allegation.** — Where a magistrate issued a warrant, upon which one was arrested and fined, for a violation of the Sunday law, he was held not liable in an action of trespass, though the facts alleged may not have been an offence within the statute. Nor is the constable, executing such warrant, liable in trespass. The magistrate had jurisdiction over the subject-matter, and he is not responsible for consequences flowing from an error of judgment. *Stewart v. Hawley*, 21 Wend. 552. **Contradicting Record.** — In an action against a magistrate, he cannot defend himself by contradicting his record. *Kendall v. Powers*, 4 Met. 553. **Jurisdiction.** — A justice of the peace is liable for exercising authority where he has none. *Ely v. Thompson*, 3 A. K. Mar. 70.

<sup>1</sup> *Thompson v. The State*, 21 Ala. 48; *People v. Gilbert, Anthon*, 191; *McBee v. Hoke*, 2 Speers, 138; *The State v. Hill*, 2 Speers, 150; *Doty v. Gorham*, 5 Pick. 487; *Bucknam v. Ruggles*, 15 Mass. 180; *Nason v. Dillingham*, 15 Mass. 170; *Plymouth v. Painter*, 17 Conn. 585; *Hoagland v. Culvert, Spencer*, 387; *Farmers and Merchants Bank v. Chester*, 6 Humph. 458; *Fowler v. Bebee*, 9 Mass.

his own favor.<sup>1</sup> One duly appointed and commissioned, serving in the office, is called an officer *de jure*. Now, clearly, —

231; Commonwealth v. Fowler, 10 Mass. 290; People v. Cook, 4 Seld. 67; The State v. Perkins, 4 Zab. 409; The State v. Alling, 12 Ohio, 16; McInstry v. Tanner, 9 Johns. 135; Blackman v. The State, 12 Ind. 556; People v. Collins, 7 Johns. 549; Burke v. Elliott, 4 Ire. 355; Gilliam v. Reddick, 4 Ire. 368; Stokes v. Kirkpatrick, 1 Met. Ky. 138; Gilmore v. Holt, 4 Pick. 258; Pool v. Perdue, 44 Ga. 454; The State v. Carroll, 38 Conn. 449; Kelley v. Story, 6 Heisk. 202; Douglas v. Neil, 7 Heisk. 437; Diggs v. The State, 49 Ala. 311; Waller v. Perkins, 52 Ga. 233; McCahon v. Leavenworth, 8 Kan. 437; The State v. Lewis, 22 La. An. 33; Wayne v. Benoit, 20 Mich. 176; Schoharie v. Pindar, 3 Lans. 8; The State v. Tolan, 4 Vroom, 195; McCormick v. Fitch, 14 Minn. 252; Durrah v. The State, 44 Missis. 789; Laver v. McGlachlin, 28 Wis. 364; Moore v. Graves, 3 N. H. 408; Ex parte Strang, 21 Ohio State, 610, 618; Commonwealth v. McCombs, 6 Smith, Pa. 436; The State v. Beloit, 21 Wis. 280. As to who is an officer *de facto*, Howard, J., in the Supreme Court of Maine, said: "A mere claim to be a public officer, and exercising the office, will not constitute one an officer *de facto*; there must be, at least, a fair color of right; or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of appointment or election." Brown v. Lunt, 37 Maine, 423, 429; Wilcox v. Smith, 5 Wend. 231; Cummings v. Clark, 15 Vt. 653; Burke v. Elliott, supra; Cornish v. Young, 1 Ashm. 153. The Maine court held, that a deed of real estate sold for non-payment of taxes is void if issued by an acting collector of taxes who has not taken the oath of his office. Shepley, C. J., observed: "When constables or sheriffs perform acts by virtue of judicial precepts, it is usually sufficient to show that they were officers *de facto*, without producing proof that they were legally qualified to do so. A person injured by such acts has a remedy by action against the officer, and his rights are secured by a final resort to the

official bond. But one injured by the misconduct of a collector of taxes cannot be protected by a resort to his official bond for redress, that having been made for the security of the town alone." Payson v. Hall, 30 Maine, 319, 325. See Cavis v. Robertson, 9 N. H. 524. In Indiana, a town charter provided that the marshal should give bond in ten days after his election. And it was held that his failure to do this did not necessarily vacate the office. The State v. Porter, 7 Ind. 204. If a Governor holds his office after his term has expired, believing himself re-elected, and having received a certificate of election, he is Governor *de facto*, and his approval of a legislative act is valid. The State v. Williams, 5 Wis. 308. As to officers *de facto* in a State in rebellion, see Hawver v. Seldenridge, 2 W. Va. 274; Brown v. Wylie, 2 W. Va. 502; Cooke v. Cooke, Phillips, 583. One disqualified to hold office as having participated in the rebellion, may still be an officer *de facto*. Lockhart v. Troy, 48 Ala. 579.

<sup>1</sup> Rhodes v. McDonald, 24 Missis. 418; Neale v. The Overseers, 5 Watts, 538; Pearce v. Hawkins, 2 Swan, Tenn. 87. See Eldred v. Sexton, 5 Ohio, 215. Distinctions. — The acts of officers *de facto* are valid when they concern the public, or the rights of third persons who have an interest in what is done. Act for Officer's Benefit. — But a different rule prevails where the act is for the benefit of the officer, because he is not permitted to take advantage of his own wrong. Venable v. Curd, 2 Head, 582; Patterson v. Miller, 2 Met. Ky. 493; Gourley v. Hankins, 2 Iowa, 75. And see People v. Treman, 30 Barb. 198; People v. Albany, &c., Railroad, 55 Barb. 344. Evidence. — That one acts as an officer is *prima facie* evidence of authority to act. Rex v. Verelst, 3 Camp. 432; Eldred v. Sexton, 5 Ohio, 215; Commonwealth v. Tobin, 108 Mass. 426; Crim. Proc. II. § 885, 886. See United States v. Phelps, 4 Day, 469; Commonwealth v. McCue, 16 Gray, 226.

**Malfeasance of Officer de Facto.**—An officer *de facto*, indicted for malfeasance in office, cannot object that he is not such *de jure*; because his acting in the office estops him to deny his right to it.<sup>1</sup> And—

**Embezzlement.**—He is an officer, liable to punishment, within the statutes against embezzlement.<sup>2</sup> But,—

**Non-feasance.**—Having the right to cease to do wrong,—that is, to stop acting in the office to which he has no just title,—the mere officer *de facto* cannot be indicted for refusing to act in his office. Such is the general doctrine;<sup>3</sup> yet perhaps, in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to punishment.<sup>4</sup>

**Resisting or Assaulting Officer de Facto.**—The difficult question is, whether third persons are indictable for resisting, or for the aggravated offence of assaulting, a mere officer *de facto*. And, though the decisions on it are not harmonious,<sup>5</sup> the better opinion is, that they are; the law not permitting them to test in this way the claim to an office of one who exercises it under an apparent right. Other methods of testing the right are open.<sup>6</sup> So, also,—

<sup>1</sup> *Rex v. Borrett*, 6 Car. & P. 124; *Neale v. The Overseers*, 5 Watts, 538; *The State v. Maberry*, 3 Strob. 144; *The State v. Cansler*, 75 N. C. 442; *The State v. Long*, 76 N. C. 254; *Kitton v. Fag*, 10 Mod. 288, 290. But see *Commonwealth v. Rupp*, 9 Watts, 114. See *Rex v. Clay*, 2 East P. C. 580; *Williams v. Lunenburg*, 21 Pick. 75; *Miller v. Callaway*, 32 Ark. 666; *People v. Beach*, 77 Ill. 52.

<sup>2</sup> *Fortenberry v. The State*, 56 Missis. 286; *The State v. Goss*, 69 Maine, 22. And see *Rainey v. The State*, 8 Texas Ap. 62; *Burke v. The State*, 34 Ohio State, 79; *Hamilton v. The State*, 34 Ohio State, 82.

<sup>3</sup> *Olmsted v. Dennis*, 77 N. Y. 378, 387; *People v. Weber*, 89 Ill. 347; *Commonwealth v. Rupp*, 9 Watts. 114.

<sup>4</sup> This doctrine was expressed by *Rufin, C. J.*, in a North Carolina case, in terms which, it is submitted, are quite too broad. After admitting that such an officer cannot be indicted for not accepting the office, he adds: "A person who undertakes an office and is in office, though

he might not have been duly appointed, and therefore may have a defeasable title, or not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect." *The State v. McEntyre*, 3 Ire. 171, 174. Compare *People v. Staton*, 73 N. C. 546; *Kitton v. Fag*, 10 Mod. 288, 290.

<sup>5</sup> See *People v. Hopson*, 1 Denio, 574; *Commonwealth v. Dugan*, 12 Met. 233; *Rex v. Gordon*, 1 Leach, 4th ed. 515, 1 East P. C. 312; *United States v. Wood*, 2 Gallis. 361; *Bell v. Tooley*, 11 Ire. 605; *Muir v. The State*, 8 Blackf. 164; *Reg. v. Newton*, 1 Car. & K. 469; *The State v. Boies*, 34 Maine, 235; *People v. Cook*, 4 Seld. 67; 1 Hawk. P. C. Curw. ed. p. 432. See, as to the Scotch Law, *Gunn v. Procurator-Fiscal*, 2 Broun, 554; *Crim. Proced. II.* § 885, 886, 895.

<sup>6</sup> See *McKim v. Somers*, 1 Pa. 297; *Aulanier v. The Governor*, 1 Texas, 653;

**Assisting Officer de Facto.** — The command of an officer *de facto* will justify one who assists him to make an arrest or seizure.<sup>1</sup>

§ 464 *a*. **Office distinguished from Officer.** — One exercising an office which does not exist in matter of law is not an officer *de facto*. There must first be an office, of which there might be an incumbent *de jure*.<sup>2</sup>

§ 465. **Obstructing Officers.** — The public good requiring officers duly to perform their official functions, it results that persons who obstruct them therein, in any matter of public concern and of sufficient magnitude,<sup>3</sup> are punishable.<sup>4</sup> Thus, —

**Resisting Process, or Arrest.** — The resisting of judicial process “is at all times an offence of a very high and presumptuous nature; but more particularly so when it is an obstruction of an arrest upon a criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony and a principal in high treason.”<sup>5</sup> Still, as to the technical form in which the guilt of such person shall be viewed, the doctrine — at least, the better doctrine — appears to be, that, as in the case of a prison breach, a rescue, or an escape,<sup>6</sup> so in this, the offence is substantive, while in proper cases it is also accessorial. And where, by the rules which govern the law of principal and accessory, it may be treated as accessorial, it may equally also, at the election of the prosecuting power, be proceeded against as substantive.<sup>7</sup> If the indictment is on a statute, of course it must conform to the statutory terms, whatever they may be.<sup>8</sup> Again, —

In re Boyle, 9 Wis. 264; Morse v. Calley, 5 N. H. 222.

<sup>1</sup> Soudant v. Wadhams, 46 Conn. 218. And see Gunby v. Welcher, 20 Ga. 336. And see Crim. Proced. I. § 185, 186. So an execution issued by a *de facto* clerk of the court may be valid. Blount v. Wells, 55 Ga. 282; Threadgill v. Carolina Central Railway, 73 N. C. 178. Compare with Biggerstaff v. Commonwealth, 11 Bush, 169.

<sup>2</sup> Ex parte Snyder, 64 Misso. 58. See Smith v. Lynch, 29 Ohio State, 261.

<sup>3</sup> Ante, § 212 et seq.

<sup>4</sup> Vol. II. § 1009 et seq.

<sup>5</sup> 4 Bl. Com. 129; 1 Gab. Crim. Law, 281; 2 Hawk. P. C. Curw. ed. p. 445, § 26; The State v. Buchanan, 17 Vt. 573;

The State v. Caldwell, 2 Tyler, 212; The State v. Hailey, 2 Strob. 73; The State v. Downer, 8 Vt. 424, 429; Commonwealth v. Sheriff, 3 Brews. 343; Reg. v. Marsden, Law Rep. 1 C. C. 131, 11 Cox C. C. 90; United States v. Tinklepaugh, 3 Blatch. 425.

<sup>6</sup> Vol. II. § 1066–1069.

<sup>7</sup> Commonwealth v. Miller, 2 Ashm. 61. And see Rex v. Shaw, Russ. & Ry. 526; Reg. v. Allan, Car. & M. 295; Rex v. Fell, 1 Ld. Raym. 424; The State v. Murray, 15 Maine, 100; Rex v. Stokes, 5 Car. & P. 148; The State v. Buchanan, 17 Vt. 573. Contra, The State v. Cuthbert, T. U. P. Charl. 13.

<sup>8</sup> Horan v. The State, 7 Texas Ap. 183; Reg. v. Bailey, Law Rep. 1 C. C.

§ 466. **Rescue.**<sup>1</sup> — One is indictable at the common law who rescues another from an officer,<sup>2</sup> or from prison.<sup>3</sup> And —

**Prison Breach — Escape — Forging Discharge.**<sup>4</sup> — A prisoner who himself breaks away from an officer having him in custody,<sup>5</sup> or from prison,<sup>6</sup> whether before or after conviction, or gets released by forging his discharge,<sup>7</sup> is in like manner punishable. Even —

§ 467. **Obstructing Private Suit.** — Private justice administered in the courts is deemed to be of public concern; therefore it is a crime, at least under various circumstances, to obstruct civil proceedings.<sup>8</sup> Yet —

**Rescuing Goods — Resisting Civil Process.** — The South Carolina court held it not indictable to rescue goods in execution from a constable on whom no assault is made.<sup>9</sup> And in Alabama, there being a statute which probably did not alter the case, a warrant reciting that A opposed B, a constable, in the execution of civil process, by concealing property of C, was adjudged not to charge a crime.<sup>10</sup> In these cases, however, the real objection seems to be, not alone that the proceedings are civil, but that the act of obstruction is not sufficiently near and direct. Abundant analogies teach us that the criminal law regards private justice as within its protecting care.<sup>11</sup>

§ 468. **Other Obstructions of Justice.** — Doubtless, and in the nature of things, not all the possible forms of obstructing justice have been passed upon in specific adjudications reported in the

347, 12 Cox C. C. 129; Reg. v. Cumpston, 5 Q. B. D. 341; United States v. Fears, 3 Woods, 510; The State v. Putnam, 35 Iowa, 561; The State v. Welch, 37 Wis. 196; Woodworth v. The State, 26 Ohio State, 196; United States v. Lukins, 3 Wash. C. C. 335; Jones v. The State, 60 Ala. 99; The State v. Smith, 24 Texas, 285. And see The State v. Maloney, 12 R. I. 251.

<sup>1</sup> See Vol. II. § 1064 et seq.

<sup>2</sup> 2 Hawk. P. C. Curw. ed. p. 445, § 27; 4 Bl. Com. 131; Anonymous, Jenk. Cent. 171; Rex v. Stokes, 5 Car. & P. 148; The State v. Cuthbert, T. U. P. Charl. 13.

<sup>3</sup> The State v. Murray, 15 Maine, 100; Rex v. Martin, Russ. & Ry. 196; Reg. v. Allan, Car. & M. 295; Anonymous, 1 Dy. 99, pl. 60; People v. Tompkins, 9 Johns. 70.

<sup>4</sup> See Vol. II. § 1064 et seq.

<sup>5</sup> Commonwealth v. Farrell, 5 Allen, 180; Reg. v. Nugent, 11 Cox C. C. 64.

<sup>6</sup> Rex v. Haswell, Russ. & Ry. 458; People v. Duell, 3 Johns. 449; Commonwealth v. Miller, 2 Ashm. 61; The State v. Doud, 7 Conn. 384.

<sup>7</sup> Rex v. Fawcett, 2 East P. C. 862; Vol. II. § 149.

<sup>8</sup> Reg. v. Allan, Car. & M. 295; The State v. Buchanan, 17 Vt. 573; United States v. Lowry, 2 Wash. C. C. 169; The State v. Caldwell, 2 Tyler, 212; The State v. Hailey, 2 Strob. 73; The State v. Lovett, 3 Vt. 110; Rex v. Fawcett, 2 East P. C. 862. See Comfort v. Commonwealth, 5 Whart. 437.

<sup>9</sup> The State v. Sotherlen, Harper, 414. See ante, § 465; Vol. II. § 1012, 1013.

<sup>10</sup> Crompton v. Newman, 12 Ala. 199.

<sup>11</sup> As to Rescuing Cattle, — while being driven to pound, see The State v. Barrett, 42 N. H. 466.

books. And when new forms appear, the principles which controlled the former decisions should be applied to them. Among those already found to be indictable are —

**Preventing Attendance on Court — Bribery — Perjury — Less than Perjury — Tampering with Witness — Tampering with Judge or Juror — Preventing Coroner's Inquest — Burying Body — Personating Officer — Acting as Officer — Forging Records, &c.** — Preventing, or attempting to prevent, a witness, juror, or officer of the court from attending upon it;<sup>1</sup> bribery, actual or attempted, of a judicial or other like officer;<sup>2</sup> persuading a witness to take, in a judicial proceeding, a false oath, which he does, called in law subornation of perjury;<sup>3</sup> attempting to induce him to take such oath;<sup>4</sup> even tampering with him, short of this direct act,<sup>5</sup> as by undertaking to intimidate him;<sup>6</sup> endeavoring, by indirect means, to influence the judge or jury concerning the merits of a cause on trial or on the eve of trial,<sup>7</sup> as by circulating papers respecting its merits;<sup>8</sup> committing perjury;<sup>9</sup> making or publishing false affidavits, prejudicial to justice, or to the workings of the government, in cases not amounting technically to perjury;<sup>10</sup> preventing a coroner from holding an inquest, as by burying the body or otherwise, in a case where an inquest is required by law;<sup>11</sup> personating or falsely pretending to be an officer, or a jurymen,<sup>12</sup> or

<sup>1</sup> *The State v. Carpenter*, 20 Vt. 9; *The State v. Keyes*, 8 Vt. 57; *The State v. Early*, 3 Harring. Del. 562; *Rex v. Chaundler*, 2 Ld. Raym. 1368; s. c. nom. *Rex v. Chandler*, 1 Stra. 612, 8 Mod. 336, which last see; *Roberts's Case*, 3 Inst. 139; *Commonwealth v. Feeley*, 2 Va. Cas. 1; *Commonwealth v. Reynolds*, 14 Gray, 87, 89; *Martin v. The State*, 28 Ala. 71; *Crim. Proced. I.* § 556; *II.* § 897; *The State v. Ames*, 64 Maine, 386; *Reg. v. Hamp*, 6 Cox C. C. 167. As to the Pennsylvania statute against absconding witnesses, see *Commonwealth v. Phillips*, 3 Pittsb. 426; post, § 695.

<sup>2</sup> *Barefield v. The State*, 14 Ala. 603; *The State v. Carpenter*, 20 Vt. 9; 4 Bl. Com. 139; Vol. II. § 85 et seq.

<sup>3</sup> Vol. II. § 1197.

<sup>4</sup> 2 Russ. Crimes, 3d Eng. ed. 596; Vol. II. § 1197. And see *Ashley's Case*, 12 Co. 90.

<sup>5</sup> *Rex v. Johnson*, 2 Show. 1; *Reg. v. Darby*, 7 Mod. 100.

<sup>6</sup> *Reg. v. Loughran*, 1 Crawf. & Dix C. C. 79.

<sup>7</sup> 4 Bl. Com. 140.

<sup>8</sup> *Rex v. Burdett*, 1 Ld. Raym. 148; *Rex v. Jolliffe*, 4 T. R. 285; *Anonymous*, Lofft, 462; *Rex v. Lee*, 5 Esp. 123; *Rex v. Fisher*, 2 Camp. 563.

<sup>9</sup> 2 Russ. Crimes, 3d Eng. ed. 596; *Rex v. Aylett*, 1 T. R. 63; Vol. II. § 1015.

<sup>10</sup> *Omcally v. Newell*, 8 East, 364; *Rex v. De Beauvoir*, 7 Car. & P. 17; *Rex v. O'Brian*, 2 Stra. 1144, 7 Mod. 378; Vol. II. § 1014, 1029.

<sup>11</sup> *Rex v. Sologuard*, Andr. 231; *Anonymous*, 7 Mod. 10; *Rex v. Proby*, 1 Keny. 250.

<sup>12</sup> *Scarlet's Case*, 12 Co. 98; *Anonymous*, March, 81, pl. 132. **Usurping Office.** — By the Constitution of Kentucky, "no person shall be eligible to the office of commonwealth's or county attorney, unless he shall have been a licensed practising attorney for two years." And a



one having authority to discharge soldiers,<sup>1</sup> and acting as such; counterfeiting the processes, or altering the records, of a court;<sup>2</sup> — these and other like obstructions of public justice are indictable at the common law. Again, —

§ 468 *a*. **Corruptly neglecting or doing Official Duties.** — One who has assumed office is, within limits already appearing,<sup>3</sup> indictable at the common law, as well as under statutes which prevail in most of our States, if he wilfully or corruptly neglects or declines any official duty, equally whether prescribed by the written law or by the unwritten.<sup>4</sup> Even, —

**Not giving Bond — (Officer de Facto).** — It has been held, that an indictment lies against a constable for acting in his office without giving bond;<sup>5</sup> while still, the reader perceives, the exercise of the office under color of title made him a constable *de facto*.<sup>6</sup>

§ 469. **Refusing to assist Officer.** — From principles already laid down<sup>7</sup> it results, that, when the law permits, as in various circumstances it does, an officer to call upon private persons for assistance in the execution of his office,<sup>8</sup> one's refusal without lawful excuse to undertake the service, or to proceed therein in

statute makes it punishable, "if any person shall usurp any office established by the constitution or laws of this commonwealth." Consequently, if one who has not been a licensed practising attorney for two years accepts the office on being elected, and receives its emoluments, he commits the statutory offence. *Commonwealth v. Adams*, 3 Met. Ky. 6. And see *Wayman v. Commonwealth*, 14 Bush, 466. In Ohio, an officer who, after serving his time, in good faith holds over till his successor is qualified, believing this to be his duty, is not punishable under the statute for usurping office. *Kreidler v. The State*, 24 Ohio State, 22. And see *Daniel v. The State*, 3 Heisk. 257; *Lansing v. People*, 57 Ill. 241; *Commonwealth v. Connolly*, 97 Mass. 591; *Brown v. The State*, 43 Texas, 478; *The State v. Withers*, 7 Baxter, 16.

<sup>1</sup> *Serlested's Case*, Latch, 202. In this case, money was taken from the soldier for discharging him; so it would perhaps be more accurate to regard the offence as a cheat.

<sup>2</sup> 2 East P. C. 865, 866. And see

*Saunders v. People*, 38 Mich. 218; *The State v. Williams*, 30 Maine, 484.

<sup>3</sup> Ante, § 462, 464; *Lange v. Benedict*, 73 N. Y. 12.

<sup>4</sup> Vol. II. § 971 et seq.; *Reg. v. Wyat*, 1 Salk. 380; s. c. nom. *Reg. v. Wyatt*, 2 Ld. Raym. 1189; *The State v. Furguson*, 76 N. C. 197; *The State v. Halsted*, 10 Vroom, 402; *Ex parte Harrold*, 47 Cal. 129; *Anonymous*, Lofft, 285; *The State v. Laresche*, 28 La. An. 26; *The State v. Hawkins*, 77 N. C. 494; *Allison v. The State*, 60 Ala. 54; *Commonwealth v. Morrissey*, 5 Norris, Pa. 416; *Housh v. People*, 75 Ill. 487; *The State v. Wedge*, 24 Minn. 150; *The State v. Morse*, 52 Iowa, 509; *Watson v. Hall*, 46 Conn. 204; *Gordon v. The State*, 2 Texas Ap. 154; *Snowden v. The State*, 17 Fla. 386; *The State v. Ferriss*, 3 Lea, 700; *Jones v. Commonwealth*, 1 Bush, 34.

<sup>5</sup> *United States v. Evans*, 1 Cranch C. C. 149.

<sup>6</sup> Ante, § 464 and note; *Soudant v. Wadhams*, 46 Conn. 218.

<sup>7</sup> Ante, § 457.

<sup>8</sup> *Crim. Proced. I.* § 185, 186; ante, § 464.

good faith after undertaking it, will subject him to indictment. Thus, —

**In Arrest, &c.** — Of this nature is a declining to aid a constable or sheriff in arresting a person, or in otherwise serving process, civil or criminal, or in preventing an escape.<sup>1</sup> In like manner, says Mr. East, “the mere act of refusing personal assistance to the king, either against rebels or an invading army, . . . is a high misdemeanor.”<sup>2</sup> So, —

**Disobeying Statute or Judicial Order.** — Within this doctrine are the already-specified offences of disobeying statutes,<sup>3</sup> magistrates’ orders,<sup>4</sup> and the like.<sup>5</sup> At the common law and by statutes they are made crimes. Again, —

§ 470. **Oral Slander of Officer.** — Slanderous words, spoken of official persons, especially spoken to them, may be indictable when they would not be if uttered of or to a private individual.<sup>6</sup> Also —

**Assault on Officer.** — Assaults and other like offences are aggravated by being committed against persons in official station, particularly when in the actual discharge of official duties.<sup>7</sup>

§ 471. **Offences against Elections** — (**Preventing Election** — **Bribery** — **Double Voting** — **Buying Office**). — It is indispensable to the functions of the government that persons be designated to conduct its several departments, and in the highest degree important that the choice be free and wise. Therefore any act tending to

<sup>1</sup> Coyles v. Hurin, 10 Johns. 85; The State v. Deniston, 6 Blackf. 277, decided, however, upon a statute; Reg. v. Brown, Car. & M. 314; The State v. Hailey, 2 Strob. 73; Comfort v. Commonwealth, 5 Whart. 437.

<sup>2</sup> 1 East P. C. 80. And see 4 Bl. Com. 122.

<sup>3</sup> Ante, § 237; Reg. v. Walker, Law Rep. 10 Q. B. 355.

<sup>4</sup> Ante, § 240; Rex v. Kingston, 8 East, 41; Rex v. Gilkes, 8 B. & C. 439, 2 Man. & R. 454.

<sup>5</sup> The State v. Soragan, 40 Vt. 450; Drake v. The State, 60 Ala. 62; Avery v. The State, 52 Ala. 340; Commonwealth v. Chase, 127 Mass. 7; Thomas v. People, 19 Wend. 480.

<sup>6</sup> Vol. II. § 946; Rex v. Pocock, 2 Stra. 1157; Rex v. Revel, 1 Stra. 420; Rex v. Darby, 3 Mod. 139, Comb. 65; Ex

parte Chapman, 4 A. & E. 773; Reg. v. Nun, 10 Mod. 186, 187; Reg. v. Langley, 3 Salk. 190, 6 Mod. 124; Rex v. Spiller, 2 Show. 207, 209; Anonymous, Comb. 46, 65, 66; Rex v. Staples, Andr. 228; Reg. v. Wrightson, 11 Mod. 166; Rex v. Leafe, Andr. 226. Query, whether verbal slander of a justice of the peace is indictable, unless the words are spoken to him in his presence. Rex v. Weltje, 2 Camp. 142; 2 Stark. Slander, 194-197. But several of the above cited cases are opposed to this distinction. As to granting a criminal information, see Ex parte Marlborough, 5 Q. B. 955; Reg. v. Rea, 7 Ir. Com. Law, 584. As denying that verbal slander is indictable in this country, see The State v. Wakefield, 8 Misso. Ap. 11.

<sup>7</sup> Vol. II. § 42, 45, 49-51; Oldfield’s Case, 12 Co. 71.

defeat these objects—as, forcibly or unlawfully preventing an election from being held,<sup>1</sup> bribing or corruptly influencing an elector,<sup>2</sup> receiving as an elector a bribe,<sup>3</sup> casting more than one vote,<sup>4</sup> “the taking or giving of a reward for offices of a public nature,”<sup>5</sup> and the like—is punishable under the criminal common law. But offences of this class are now so fully defined and made punishable by statutes State and National, that seldom is an indictment for any of them brought at the common law. They are explained, both as to the law and the procedure, in “Statutory Crimes.”<sup>6</sup>

§ 472-476. **Spreading False News.**—One of the old common-law offences, confirmed by statutes early enough in date to be common law in this country, is termed the spreading of false news. It relates primarily, if not exclusively, to public affairs,—“to make discord,” as Blackstone expresses it, “between the king and nobility, or concerning any great man of the realm.”<sup>7</sup>

§ 477. **Continued.**—What were the precise limits of the doctrine in England, when our ancestors brought the common law

<sup>1</sup> Reg. v. Soley, 11 Mod. 115.

<sup>2</sup> Rex v. Cripland, 11 Mod. 387; Rex v. Plympton, 2 Ld. Raym. 1377; Rex v. Pitt, 3 Bur. 1335, 1338; Rex v. Jolliffe, 1 East, 154, note; Commonwealth v. Callaghan, 2 Va. Cas. 460. And see 1 Gab. Crim. Law, 164, note, 165; 1 Russ. Crimes, 3d Eng. ed. 154; Vol. II. BRIBERY.

<sup>3</sup> Commonwealth v. Callaghan, 2 Va. Cas. 460.

<sup>4</sup> Commonwealth v. Silsbee, 9 Mass. 417; The State v. Bailey, 21 Maine, 62; The State v. Williams, 25 Maine, 561. See also Walker v. Winn, 8 Mass. 248; Clark v. Binney, 2 Pick. 113. **Personating Voter at Municipal Election.**—It has been held in England (Rex v. Bent, 1 Den. C. C. 157), and in Canada (Reg. v. Hogg, 25 U. C. Q. B. 66), that falsely to personate a voter at a municipal election is not indictable at the common law. The Canada case does not explain why, but it purports to proceed simply on the authority of the English. In the English case, the election was for counsellors; and, before the Municipal Corporations Act was passed, no such election could be had. But that Act made provision for the exact offence; therefore, as it could

not exist at common law before, it could not now, the statute having occupied the place of the common law. **Voting at Municipal Election.**—In The State v. Liston, 9 Humph. 603, the Tennessee court, not referring to any authorities, held, that for a person to vote at a municipal election, without being qualified, is not indictable at the common law. We may doubt whether, as general doctrine, this decision should be elsewhere followed. See ante, § 246.

<sup>5</sup> 1 Hawk. P. C. 6th ed. c. 67, § 3; Rex v. Taggart, 1 Car. & P. 201.

<sup>6</sup> Stat. Crimes, § 802-843.

<sup>7</sup> 4 Bl. Com. 149. In the fifth edition of the present work, § 472-476, as above, this subject is explained at length. In § 473, Stat. Westm. 1 (3 Edw. 1) c. 34 is given; in § 474, 475, are Lord Coke's comments upon it, from 2 Inst. 226, 227; and, in § 467, is given the statute of 2 Rich. 2, stat. 1, c. 5. I do not think it necessary to encumber the later editions with this matter in full. There are also Stats. 1 & 2 Phil. & M. c. 3, and 1 Eliz. c. 6; but they concern merely the Crown, and do not therefore appear important in this connection.

to this country, we may not be able to state; and this branch of the inquiry is left here, with a simple reference to some sources of authority.<sup>1</sup>

**How with us.**—This old doctrine of the English law belongs to a class<sup>2</sup> which, if received by us, are by the courts shaped to our institutions and times. But whether, under any modifications, it shall be deemed law in our States is a question upon which judges may differ. Plainly enough, properly limited, it is adapted to our institutions, circumstances, and needs. But it has long been practically unused. Lying in print and with the naked tongue, to the detriment alike of individuals and the public, lying in every possible pernicious form, has been so long and with so great *éclat* practised among us, and so immense would seem the scandal of requiring writers and speakers to confine themselves to the truth, that judges might well hesitate to enforce the doctrine. And since there can be no common-law offences against our national government,<sup>3</sup> it can have effect only in the States. An application of prime importance would be to—

<sup>1</sup> During the trial of a cause, in 1680, Scroggs, C. J., said: "It is not long since that all the judges met by the king's command, as they did some time before too, and they both times declared unanimously, that all persons that do write or print or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the person punished by law; that all books which are scandalous to the government may be seized, and all persons so exposing them may be punished. And, further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or the state, yet, if they are writers (as there are few others) of false news, they are indictable and punishable upon that account." *Rex v. Harris*, 7 Howell, St. Tr. 925, 929, 930. And see the marginal notes and references in Ruffhead and the other printed editions of the above-mentioned statutes; 2 Inst. 225 et seq.; 3 Inst. 198; 4 Bl. Com. 149. **Mistake of Fact.**—**Form of Indictment.**—In 1778, Alexander Scott was indicted at the Old Bailey "for that he, on the 23d of April last, unlawfully, wickedly, and maliciously did pub-

lish false news, whereby discord, or occasion of discord, might grow between our lord the king and his people, or the great men of the realm, by publishing a certain printed paper, containing such false news; which said printed paper is of the tenor following: 'In pursuance of His Majesty's order in council to me directed, these are to give public notice, that war with France will be proclaimed on Friday next, the 24th instant, at the palace royal, St. James's, at one of the clock, of which all heralds and pursuivants at arms are to take notice, and give their attendance accordingly. Given under my hand this 22d day of April, 1778. Effingham, D. M.'" The defendant was a bill-sticker; and, it appearing on the trial that he had been imposed upon, and induced to stick up the bill containing the false matter believing it to be true, whereas it was a forgery, he was acquitted. There does not seem to have been any doubt that the act with which he was charged was indictable. *Scott's Case*, 5 New Newgate Calendar, 284.

<sup>2</sup> Ante, § 92, 97.

<sup>3</sup> Ante, § 189 et seq.

§ 478. **Political Slanders, &c.** — On principle, and as matter addressing itself to the legislative discretion, if not to the judicial, the political falsehoods, as they are called, whereby official persons and candidates for office, and those who seek to influence voters, are made to speak, do, and intend what they never dreamed of, and their real views and purposes are perverted, and all other falsehoods with respect to the views and purposes and declarations of men regarding public affairs, are among the highest crimes, next to treason itself, of which any person can be guilty.

§ 479. **Counterfeiting Coin.** — Counterfeiting the coin<sup>1</sup> appears to be regarded, in England, as an offence against the king, or government. It used there to be treason,<sup>2</sup> though now it is only felony.<sup>3</sup> Perhaps this was hardly the just view of it in England; for East aptly observes, that it “is in truth a species of the *crimen falsi*, or forgery.”<sup>4</sup> It touches at several points the forbidden ground; but is analogous to forgery, which is a peculiar species of attempt, successful or otherwise, to defraud individuals.<sup>5</sup> It is indictable at the common law.<sup>6</sup>

§ 480. **In Conclusion.** — The foregoing illustrations of the general doctrine of this chapter are not meant to be exhaustive. Not even, at all points, are its exact bounds known. And many of the wrongs set down under the other heads in the following chapters are likewise, in a measure, governmental obstructions properly enough belonging also to the present division.

<sup>1</sup> Discussed Vol. II. § 274 et seq.

<sup>4</sup> 1 East P. C. 158.

<sup>2</sup> 4 Bl. Com. 99; 1 Hawk. P. C. 6th ed. c. 17, § 54; 1 East P. C. 158.

<sup>5</sup> Post, § 572.

<sup>3</sup> 1 Russ. Crimes, 3d Eng. ed. 54 et seq.

<sup>6</sup> Yet see, as to this country, Vol. II.

§ 281, 283-287.

## CHAPTER XXXIII.

PROTECTION TO THE RELATIONS OF THE GOVERNMENT WITH  
OTHER GOVERNMENTS.

§ 481. **Scope of this Chapter.** — The principal doctrines on the subject of this chapter will be stated in it; but they will be less expanded, because less important, than if it were not understood that our national tribunals have no jurisdiction of offences under the common law of nations.<sup>1</sup>

**Leading Doctrine.** — The leading doctrine is, that nations should conduct uprightly in their intercourse with one another; and each should abstain from acts justly offensive to other nations, or injurious to them, or to their subjects, according to the common understanding of mankind as expressed in the law of nations. And the subject who violates this duty, due from his government to another nation, is by his government punishable.

§ 482. **Neutrality.** — One of the most important duties of a nation, recognized in modern times, is to forbear taking sides against a friendly power, in its quarrel with another power. Hence our neutrality laws.<sup>2</sup> But as these are of infrequent application, it will be sufficient simply to refer to some cases under them and the like English statute.<sup>3</sup> Enactments of this sort are not in affirmance of an unwritten law; but are aids to the government in preserving the peace with friendly governments, and dealing with them in harmony with the modern law of nations.

§ 483. **Law of Nations.** — Governments are no more capable than individuals<sup>4</sup> of existing together without law to regulate

<sup>1</sup> Ante, § 199-202.

<sup>2</sup> R. S. of U. S. § 5281-5291.

<sup>3</sup> *The Estrella*, 4 Wheat. 298; *The Gran Para*, 7 Wheat. 471; *United States v. Reyburn*, 6 Pet. 352; *United States v. Quincy*, 6 Pet. 445; *Ex parte Needham*, Pet. C. C. 487; *United States v. Kazinski*, 2 Sprague, 7; *United States v.*

*Lumsden*, 1 Bond, 5; *Attorney-General v. Sillim*, 3 Fost. & F. 646; s. c. nom. *Attorney-General v. Sillem*, 2 H. & C. 431; *Reg. v. Jones*, 4 Fost. & F. 25; *Reg. v. Rumble*, 4 Fost & F. 175; *Reg. v. Corbett*, 4 Fost. & F. 555.

<sup>4</sup> Ante, § 5, 14; *Bishop First Book*, § 43-45.

their mutual relations. This law is called the law of nations. It is in truth common law;<sup>1</sup> or, rather, the common law has appropriated the law of nations, making it a part of itself.

§ 484. **What punishable under Law of Nations.** — Any conduct, therefore, in one of our citizens, or in a foreigner within our borders, tending to involve our government in difficulty with a foreign power, is an offence for which, on general principles and according to English doctrine, an indictment can be maintained. Thus, —

**Excite to Revolt — Libel on Foreign Prince.** — Endeavors to create a revolt against a government in amity with ours,<sup>2</sup> libelling a foreign prince<sup>3</sup> or other person in official station abroad,<sup>4</sup> and the like, are offences against the law of nations.

**Passports — Food for Prisoners of War.** — The same, in a time of war between our government and another, are the violation of safe conducts or passports given under authority of ours to an enemy;<sup>5</sup> and the deceitfully, maliciously, and wilfully supplying of prisoners of war with unwholesome food, not fit to be eaten by man.<sup>6</sup>

§ 485. **Conclusion.** — Such is the general scope of the law of nations as to crime. This law has provided rules to determine the jurisdiction, on the high seas and elsewhere, of the several governments; and the classes of persons who are subject to, and exempt from, the municipal regulations of each; but these questions were treated of in the early chapters of this volume.

<sup>1</sup> 4 Bl. Com. 67.

<sup>2</sup> Phillim. International Law, 416, 417; 124 Hansard Parl. Deb. 1046.

<sup>3</sup> Phillim. International Law, 417; Vint's Case, 27 Howell St. Tr. 627; Peltier's Case, 28 Howell St. Tr. 529.

<sup>4</sup> Rex v. Gordon, 1 Russ. Crimes, 3d Eng. ed. 246; Rex v. Vint, 1 Russ. Crimes, 3d Eng. ed. 246.

<sup>5</sup> 4 Bl. Com. 68.

<sup>6</sup> Treeve's Case, 2 East P. C. 821

## CHAPTER XXXIV.

## PROTECTION TO THE PUBLIC REVENUE.

§ 486. **In General of the Revenue.** — As governments cannot be conducted without revenue, protection to it becomes of prime importance. And separate revenues are required by the United States and the States. But the State governments are not permitted to levy duties on imports; therefore their revenues come exclusively from internal taxation and other sources of this kind. The United States government has both sources of revenue; though, till of late, it has come mainly from the sale of public lands, and from duties laid on imports.

§ 487. **Continued.** — But the emergencies of a civil war and the debt following have compelled the United States to add to her other sources of revenue what comes from internal taxation.

§ 488. **Common Law of Revenue.** — There do not appear to be any offences, at the common law, founded distinctly and separately on the duty to protect the governmental revenues. But—

**Statutes.** — The statutes on this subject are numerous. In general, they are not classed as criminal laws.<sup>1</sup> Their primary object is the collection of duties<sup>2</sup> and other taxes. Still, by these laws, some crimes have been constituted.<sup>3</sup>

<sup>1</sup> *United States v. Hodson*, 10 Wal. 395; *United States v. Three Tons of Coal*, 6 Bis. 379.

<sup>2</sup> Stat. Crimes, § 195.

<sup>3</sup> As to **Smuggling**, see *United States v. Nolton*, 5 Blatch. 427; *United States v. Bettilini*, 1 Woods, 654; *United States v. Cases of Books*, 2 Bond, 271; *United States v. Thomas*, 4 Ben. 370, 2 Abb. U. S. 114; *The Missouri*, 4 Ben. 410. **Illicit Distilling.** — *United States v. Chaffee*, 2 Bond, 110; *United States v. Spirits*, 4 Ben. 471; *United States v. Fox*, 1 Lowell, 199; *United States v. Boyden*, 1 Lowell, 266; *United States v. Three Hundred, &c. Pipes*, 5 Saw. 421; *Dobbins's Distillery v. United States*, 96 U. S. 395. **Other Cases on United States Internal Revenue.**

— *United States v. Jacoby*, 12 Blatch. 491; *United States v. Page*, 2 Saw. 353; *United States v. One Case*, 6 Ben. 493; *United States v. Foster*, 2 Bis. 453; *Fein v. United States*, 1 Wy. Ter. 246; *United States v. Harries*, 2 Bond, 311; *United States v. Smith*, 2 Bond, 323; *United States v. Feigelstock*, 14 Blatch. 321; *Boyd v. United States*, 14 Blatch. 317; *United States v. Two Hundred Barrels of Whiskey*, 95 U. S. 571; *United States v. Buzzo*, 18 Wal. 125. **Kentucky Tax Laws.** — *Olds v. Commonwealth*, 3 A. K. Mar. 465; *Taylor v. Commonwealth*, 15 B. Monr. 11. **South Carolina.** — *The State v. Chapeau*, 4 S. C. 378. **Illinois.** — *Faulds v. People*, 66 Ill. 210.



## CHAPTER XXXV.

## PROTECTION TO THE PUBLIC HEALTH.

§ 489. **Indictable to endanger Public Health.** — The public health is an interest of supreme regard. Therefore every thing of sufficient magnitude,<sup>1</sup> calculated to impair it, is indictable at the common law. Thus, —

§ 490. **Exposing to Contagious Disease.** — It is no crime for a man to be sick of a contagious disease in his own house, even in a populous locality, or for his friends to decline removing him;<sup>2</sup> yet, if he goes into a public way carrying the infection to the danger of the public, or if one so takes out an infected child,<sup>3</sup> or a horse having a disease communicable by infection to man,<sup>4</sup> an offence indictable at the common law is committed. And, —

**Filthy Houses — Unhealthful Manufactories — (Private Abatement of Nuisance).** — As observed in a New York case: “It is a common nuisance, indictable, to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in time of sickness and infection of the plague.<sup>5</sup> So manufactures, lawful in themselves, may become nuisances, if erected in parts of towns where they cannot but greatly incommode the inhabitants, and destroy their health.” Therefore, when cholera was supposed to be contagious, — a consideration, however, which does not directly appear to have influenced the decision, — a dwelling-house, divided into small apartments, thickly inhabited, and kept in a filthy condition, during the cholera time, was adjudged to be a nuisance, even abatable by persons residing near.<sup>6</sup> Again, —

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> *Boom v. Utica*, 2 Barb. 104.

<sup>3</sup> *Rex v. Vantandillo*, 4 M. & S. 73; *Rex v. Burnett*, 4 M. & S. 272; 1 East P. C. 226.

<sup>4</sup> *Reg. v. Henson*, Dears. 24, 18 Eng. L. & Eq. 107.

<sup>5</sup> Referring to 2 Rol. Abr. 139.

<sup>6</sup> *Meeker v. Van Rensselaer*, 15 Wend. 397. See *The State v. Purse*, 4 McCord, 472; *People v. Townsend*, 3 Hill, N. Y. 479; and as to the abatement of the nuisance, *Welch v. Stowell*, 2 Doug. Mich. 332, and *Moffett v. Brewer*, 1 Greene, Iowa, 348; *Barclay v. Commonwealth*, 1 Casey, 503.

§ 491. **Unwholesome Food and Drink.** — It is indictable at the common law to corrupt a fountain of water which is to be drank,<sup>1</sup> or to render unwholesome any food which is to be consumed in the community,<sup>2</sup> or to sell or cause to be used for food<sup>3</sup> what is injurious to the health. Indeed the mere exposure for sale, as food, of unwholesome provisions, in an open market, or the sending of them there for the purpose, constitutes the complete offence at common law.<sup>4</sup> And even the common carrier who brings them to market, with knowledge, is indictable.<sup>5</sup> But the act is not indictable if the unwholesome provisions are not intended to be used for food.<sup>6</sup> And the mere private administering, to a single individual, of what is unwholesome is not an indictable public nuisance, however it may be viewed as an assault or battery.<sup>7</sup>

**Old Statutes — Modern.** — If this were not so under the ancient common law, still there are English statutes to this effect, so old as to be common law with us.<sup>8</sup> And there are modern

<sup>1</sup> *The State v. Buckman*, 8 N. H. 203. And see *Commonwealth v. Lyons*, 1 Pa. Law Jour. Rep. 497; *Stein v. The State*, 37 Ala. 123.

<sup>2</sup> *Rex v. Dixon*, 3 M. & S. 11, 4 Camp. 12; *Rex v. Haynes*, 4 M. & S. 214.

<sup>3</sup> *The State v. Smith*, 3 Hawks, 378; *The State v. Norton*, 2 Ire. 40; *Rex v. Treeve*, 2 East P. C. 821; *The State v. Buckman*, 8 N. H. 203; *Hunter v. The State*, 1 Head, 100; *People v. Parker*, 38 N. Y. 85; *Goodrich v. People*, 3 Parker C. C. 622, 19 N. Y. 574.

<sup>4</sup> *Reg. v. Stevenson*, 3 Fost. & F. 106.

<sup>5</sup> *Reg. v. Jarvis*, 3 Fost. & F. 108.

<sup>6</sup> *Reg. v. Crawley*, 3 Fost. & F. 109.

<sup>7</sup> **Administering as Assault.** — In the jury case of *Reg. v. Hanson*, 2 Car. & K. 912, 4 Cox C. C. 138; it was held, by two judges, not to be even an assault. But the correctness of this decision is, in principle, more than doubtful. And in Massachusetts such an act is held to be assault and battery. *Commonwealth v. Stratton*, 114 Mass. 303. The noxious thing was a force put in motion by the party administering it, and it inflicted an intended physical injury, — why, then, was not the act an assault? And see Vol. II. § 32 and note. Afterward the defect, if such there was, in the law, was in England cured by legislation. Stat. 23 Vict. c. 8, § 2, re-

enacted in 24 & 25 Vict. c. 100, § 24, provides (I copy from the latter) that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and," &c. And it has been held, that the administering of cantharides to a woman, in order to excite her sexual passions, and thus obtain a criminal connection with her, is an offence within the statute. *Reg. v. Wilkins, Leigh & C.* 89, 9 Cox C. C. 20. The same was held in Michigan, at an earlier date, on a similar statute. *People v. Carmichael*, 5 Mich. 10. Where the ulterior object is to obtain, by stealth, the property of the person injured, it is the same. *People v. Edwards*, 5 Mich. 22. The principle is, that, since the defendant meant to inflict the injury which the statute pointed out, this intent, with the act, filled the statutory terms; and, though he had also another intent, and it was the principal one, still a surplusage of intent could not take away what, without it, was fully within the statute. And see ante, § 339.

<sup>8</sup> *Burnby v. Rollitt*, 11 Jur. 827; 4 Bl. Com. 162, where this learned commentator says: "A second offence against pub-

statutes, English and American, in affirmance of the ancient law.<sup>1</sup>

**Noxious Trade.** — Injury to the public health is one ground on which the carrying on of noxious trades in thickly settled neighborhoods is held to be a crime.<sup>2</sup>

§ 492. **Quarantine, &c.** — Considerations of public health enter into the regulations of quarantine<sup>3</sup> and others of a like nature.<sup>4</sup>

§ 493. **Selling Liquors — Lotteries — Gaming, &c.** — Considerations of public health lie, in part, at the foundation of statutory regulations and prohibitions, existing in most of the States, concerning the sale of intoxicating liquor, concerning lotteries, gaming, and various other like things. They are discussed in "Statutory Crimes." The wisdom of this sort of legislation is for the legislature; the constitutional right to adopt it is generally conceded by the courts.<sup>5</sup>

§ 494. **Conclusion.** — There are offences besides these, into which a regard for the public health enters as one of the considerations; but they are reserved for other connections.

lic health is the selling of unwholesome provisions. To prevent which the statute 51 Hen. 3, stat. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. 2, c. 25, § 11, any brewing or adulteration of wine is punished with the forfeiture of £100 if done by the wholesale merchant; and £40 if done by the vintner or retail trader."

<sup>1</sup> Pope v. Tearle, Law Rep. 9 C. P. 499; Roberts v. Egerton, Law Rep. 9 Q. B. 494; Fitzpatrick v. Kelly, Law Rep. 8 Q. B. 337; Commonwealth v. Raymond, 97 Mass. 567; The State v. Taylor, 29 Ind. 517; Vason v. Augusta, 33 Ga. 542.

<sup>2</sup> Rex v. Davey, 5 Esp. 217; Rex v. Neil, 2 Car. & P. 485.

<sup>3</sup> See Rex v. Harris, 4 T. R. 202, 2 Leach, 4th ed. 549; The State v. Patterson, 14 La. An. 46.

<sup>4</sup> See Commonwealth v. Fahey, 5 Cush. 408; Harrison v. Baltimore, 1 Gill, 284. As to Importing Infected Cattle. — Yeazel v. Alexander, 58 Ill. 254; Somerville v. Marks, 58 Ill. 371. Noxious Trades in Cities. — Taunton v. Taylor, 116 Mass. 254; Watertown v. Mayo, 109 Mass. 315. Other Nuisances in Cities. — Underwood v. Green, 3 Rob. N. Y. 86; Reed v. People, 1 Parker C. C. 481. Selling Adulterated Milk. — Stat. Crimes, § 358, 385, 561.

<sup>5</sup> And see, in illustration, The State v. Fisher, 52 Misso. 174. Cattle Guards. — So the Vermont court has held, that the railroads may be compelled by legislative act to maintain cattle guards at the crossings. Thorpe v. Rutland and Burlington Railroad, 27 Vt. 140.

## CHAPTER XXXVI.

## PROTECTION TO RELIGION, PUBLIC MORALS, AND EDUCATION.

- § 495. Introduction.  
496-499. Religion.  
500-506. Public Morals.  
507, 508. Public Education.

§ 495. **General Doctrine.** — Upon religion, morals, and education society and the state itself rest. Therefore, within practical limits, yet not to the full extent which mere theory might indicate, the law protects them, and holds to be indictable acts wrongfully committed to their detriment.

**How the Chapter divided.** — But the protection given to one of these interests is not necessarily the measure of that awarded to another. Therefore we shall consider them separately, as respects, I. Religion ; II. Public Morals ; III. Public Education.

I. *Religion.*

§ 496. **Religion as distinguished from its Forms.** — The mind of man consists of many faculties and propensities, on the harmonious action of which his happiness depends. And among these, is the faculty which takes cognizance of a Higher Power, and the propensity to look to that Power, in conscious feebleness, for help. Such is what we witness of man, in all ages, in all countries, and in all grades of civilization and of barbarism. If there are individual instances in which this seems not to be so, it is because the religious part is apparently hidden by an unnatural and deformed growth of some other ; and it may be equally observed of parts not religious. But in most men, of whatever class, age of the world, or country, a religious part distinctly appears. And this is a thing quite separate from the multitudinous forms of religion in which it manifests itself.

**Form established by Law.** — When this country was settled, there was in England, as now, a form of religion established by law. But it was not brought hither, in a way to become a part of our common law ; for the early emigrants deemed, that religion, in its essence and spirit, flourishes best when left to its own forms.

**Simony — Non-conformity, &c.** — In England, therefore, growing out of its church establishment, there are statutory and common-law offences unknown in the United States. Such are simony, being a corrupt presentation to an ecclesiastical benefice ;<sup>1</sup> non-conformity to the worship of the church ;<sup>2</sup> beating a clerk in orders, as an offence higher than an ordinary battery ;<sup>3</sup> and some others.

§ 497. **Christianity a part of our Common Law.** — Yet, in a more general sense, while religion, as above explained, is a part of universal law, Christianity is a part of our common law.<sup>4</sup> But —

**Apostasy, &c. — Imposture — Pretended Prophecies.** — Whether it follows from this, that apostasy, which is a total renunciation of Christianity by those who have embraced it ;<sup>5</sup> those darker heresies which tend to overturn Christianity itself, and not merely some form of it ;<sup>6</sup> religious imposture,<sup>7</sup> false and pretended prophecies,<sup>8</sup> and the like, — were ever subjects of indictment here, as they were in England when our forefathers came to this country, we have probably no adjudications. Practically they have dropped silently out of the catalogue of crimes even on the other side of the Atlantic. And the good sense of the present age has taught, that opinions should not be restrained by law, unless developed in some injurious act. This, indeed, we have seen to be fundamental in the common law itself.<sup>9</sup>

§ 498. **Profaneness and Blasphemy.** — Public profane swearing and blasphemy are in this country indictable at the common law ; yet less, according to some views, as tending to sap the founda-

<sup>1</sup> 4 Bl. Com. 62 ; 1 East P. C. 35.

<sup>2</sup> 4 Bl. Com. 51.

<sup>3</sup> 4 Bl. Com. 217.

<sup>4</sup> Updegraph v. Commonwealth, 11 S. & R. 394 ; People v. Ruggles, 8 Johns. 290 ; Shover v. The State, 5 Eng. 259 ; 1 Bancroft Hist. U. S. 243 ; Vol. II. § 74.

See Cincinnati Board of Education v. Minor, 23 Ohio State, 211.

<sup>5</sup> 4 Bl. Com. 43.

<sup>6</sup> 4 Bl. Com. 44. And see Reg. v. Gathercole, 2 Lewin, 237.

<sup>7</sup> 4 Bl. Com. 62.

<sup>8</sup> 4 Bl. Com. 149.

<sup>9</sup> Ante, § 204, 206, 430, 431.

tions of Christianity, than as disturbing the peace and corrupting the morals of the community.<sup>1</sup>

§ 499. *Lord's Day.* — The observance of the Lord's day is, both here and in England, so fully enforced by statutes that it is of little consequence to inquire what the law would be without them.<sup>2</sup> One of our State courts<sup>3</sup> has deemed that its violation is not a common-law offence in this country. Yet if we reflect, that its observance contributes to the public repose, health, morals, and convenience, as well as religion; that our ancestors were a Sabbath-keeping people; and that the law in both countries rests on exactly the same reasons, — we shall see room for at least the doubt, whether this part of the English system did not come to us with the great body of English law. If it should be found to have originated in ancient acts of Parliament, rather than in immemorial usage, the result would not therefore be different.<sup>4</sup>

## II. *Public Morals.*

§ 500. *How protected by Law.* — But however uncertain may be the extent to which the common law protects Christianity, plainly it cherishes fully the public morals. And every act which it deems sufficiently evil and direct,<sup>5</sup> tending to impair them, it punishes as crime. Thus, —

*Bawdy-house — Open Obscenity, &c.* — The keeping of bawdy-houses; <sup>6</sup> the public exhibiting or publishing of obscene pictures

<sup>1</sup> *People v. Ruggles*, 8 Johns. 290; *The State v. Jones*, 9 Ire. 38; *The State v. Chandler*, 2 Harring. Del. 553; *Updegraph v. Commonwealth*, 11 S. & R. 394. And see *The State v. Kirby*, 1 Murph. 254; *Commonwealth v. Kneeland*, 20 Pick. 206; *The State v. Ellar*, 1 Dev. 267; Vol. II. § 74.

<sup>2</sup> 1 East P. C. 5; *The State v. Brooksbank*, 6 Ire. 73; *Nabors v. The State*, 6 Ala. 200; *The State v. Schnierle*, 5 Rich. 299. And see *The State v. Williams*, 4 Ire. 400.

<sup>3</sup> *The State v. Brooksbank*, 6 Ire. 73.

<sup>4</sup> It is a mistake to suppose, that Sabbath-keeping is a thing only of religious observance, or a mere tenet of a sect. There are, indeed, views as to the manner of the observance, or the particular

day, peculiar to sect; yet the setting apart, by the whole community, of one day in seven, wherein the thoughts of men and their physical activities shall be turned into another than their accustomed channel, is a thing as much pertaining to the law of nature as is the alternation of night with day, and the rest and restoring influence of sleep. Those who, out of dislike to sect or party in religion, seek to abolish the Sabbath, are as unwise as he who, to destroy a bird of prey, should aim his gun where the ball would take effect on his nearest friend.

<sup>5</sup> Ante, § 212 et seq.

<sup>6</sup> 4 Bl. Com. 163; *Reg. v. Williams*, 10 Mod. 63, 1 Salk. 384; *Smith v. The State*, 6 Gill, 425; *The State v. Evans*,

and writings;<sup>1</sup> the public utterance of obscene words;<sup>2</sup> the indecent and public exposure of one's person, or the person of another;<sup>3</sup> and, generally, all acts of gross and open lewdness;<sup>4</sup> are indictable at the common law. But,—

§ 501. **Adultery — Fornication — Private Exposure of Person — Solicitations.** — For reasons already considered,<sup>5</sup> the same things, — as adultery and fornication,<sup>6</sup> though committed with many persons,<sup>7</sup> solicitations to permit these offences,<sup>8</sup> exposure of a man's person to one female only,<sup>9</sup> — done in a more private manner, are not punishable criminally, except indeed under statutes, which exist in many of the States.

**Open Adultery.** — In South Carolina, an open living in adultery has been held not to be indictable at the common law, though charged as an offence against public decency.<sup>10</sup> The courts of some of our other States recognize the better doctrine in principle, that adultery and fornication may be so notorious and gross as to be common-law crimes. The line may not easily be drawn, yet, in a just view, some things of this general class should be deemed punishable, others not.<sup>11</sup>

5 Ire. 603; *Smith v. Commonwealth*, 6 B. Monr. 21; *Ross v. Commonwealth*, 2 B. Monr. 417; *People v. Erwin*, 4 Denio, 129; *Commonwealth v. Harrington*, 3 Pick. 26; *Reg. v. Pierson*, 1 Salk. 382; *Jennings v. Commonwealth*, 17 Pick. 80; *Warren v. People*, 3 Parker C. C. 544. And see *The State v. Bailey*, 1 Fost. N. H. 343.

<sup>1</sup> *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Sharpless*, 2 S. & R. 91; *Willis v. Warren*, 1 Hilton, 590; *Reg. v. Grey*, 4 Fost. & F. 73; *Commonwealth v. Landis*, 8 Philad. 453.

<sup>2</sup> *Bell v. The State*, 1 Swan, Tenn. 42.

<sup>3</sup> *Britain v. The State*, 3 Humph. 203; *The State v. Roper*, 1 Dev. & Bat. 208; *Reg. v. Webb*, 1 Den. C. C. 338, 2 Car. & K. 933, Temp. & M. 23, 13 Jur. 42; *Miller v. People*, 5 Barb. 203; *The State v. Rose*, 32 Misso. 560; *People v. Bixby*, 4 Hun, 636; *Reg. v. Reed*, 12 Cox C. C. 1, 2 Eng. Rep. 157; *Reg. v. Saunders*, 1 Q. B. D. 15, 19, 13 Cox C. C. 116.

<sup>4</sup> 4 Bl. Com. 64; *Brooks v. The State*, 2 Yerg. 482.

<sup>5</sup> Ante, § 235, 236, 243–246.

<sup>6</sup> *Reg. v. Pierson*, 1 Salk. 382; *Gali-*

*zard v. Rigault*, 2 Salk. 552; s. c. nom. *Galliland v. Rigaud*, 2 Ld. Raym. 809; *The State v. Brunson*, 2 Bailey, 149; *Anderson v. Commonwealth*, 5 Rand. 627; *Commonwealth v. Isaacs*, 5 Rand. 634; *Commonwealth v. Jones*, 2 Grat. 555; *The State v. Cooper*, 16 Vt. 551; *The State v. Foster*, 31 Texas, 578; *The State v. Rahl*, 33 Texas, 76; *The State v. Smith*, 32 Texas, 167; ante, § 38.

<sup>7</sup> *The State v. Evans*, 5 Ire. 603; *Reg. v. Pierson*, 1 Salk. 382; *The State v. Moore*, 1 Swan, Tenn. 136.

<sup>8</sup> *Reg. v. Pierson*, 1 Salk. 382. **Solicitation an Attempt.** — Where a statute makes adultery an indictable felony, the solicitation is punishable as an attempt. *The State v. Avery*, 7 Conn. 266. See *Shannon v. Commonwealth*, 2 Harris, Pa. 226; post, § 767.

<sup>9</sup> *Rex v. Webb*, 1 Den. C. C. 338, 2 Car. & K. 933; *Reg. v. Watson*, 2 Cox C. C. 376, 20 Eng. L. & Eq. 599; *Reg. v. Holmes*, 20 Eng. L. & Eq. 597; ante, § 244.

<sup>10</sup> *The State v. Brunson*, 2 Bailey, 149.

<sup>11</sup> *The State v. Moore*, 1 Swan, Tenn. 136; *Anderson v. Commonwealth*, 5

**Night-walking.** — Common night-walking may be classed among the offences against morality. There are, in many of our States, statutes against it, and it is also indictable at the common law, Night-walkers are persons who make themselves a common nuisance by going about nights, committing bawdry, or other petty offences, or annoyances.<sup>1</sup>

§ 502. **Public selling and buying Wife.** — The public selling and buying of a wife has been held, in England, to be a common-law crime.<sup>2</sup>

**Incest.** — Incest is punished by statutes in a large number of the States;<sup>3</sup> but it seems not to be otherwise an indictable offence.<sup>4</sup>

**Polygamy.** — Polygamy — that is, simple polygamy, as distinguished from open and notorious cohabitation — was not an offence in the temporal courts until 1 Jac. 1, c. 11, made it such when committed “within his majesty’s dominions of England and Wales”;<sup>5</sup> consequently in this country its criminality rests only on our own statutes.<sup>6</sup>

Rand. 627; Commonwealth v. Isaacs, 5 Rand. 634; Commonwealth v. Jones, 2 Grat. 555. And see Rex v. Johnson, Comb. 377; Rex v. Talbot, 11 Mod. 415; Claxton’s Case, 12 Mod. 566; The State v. Cagle, 2 Humph. 414; Stat. Crimes, § 654.

<sup>1</sup> In The State v. Dowers, 45 N. H. 543, it was said to be indictable as well at the common law as under the statute to be a common night-walker. And Bel- lows, J., gave the following exposition of the offence: “In Watson v. Carr, 1 Lewin, 6, Bayley, J., laid it down, that by night-walkers were meant such persons as are in the habit of being out at night for some wicked purpose. See Roscoe Crim. Ev. 745, where this case is cited. In 1 Burn’s Justice, 765, night-walkers are said to be those who eave-drop men’s houses, cast men’s gates, carts, and the like, into ponds, or commit other outrages or misdemeanors in the night, or shall be suspected to be pilfering or otherwise like to disturb the peace, or that be persons of ill-behavior or of evil fame or report generally, or that shall keep company with any such, or with other suspicious persons in the night.

In other places night-walkers are said to be those who are abroad during the night and sleep by day, and of suspicious appearance and demeanor. [Referring to Bouv. Law Dict. tit. Night-walkers, and Haunters of Bawdy-houses; 2 Hawk. P. C. c. 8, § 38; c. 10, § 84 and 35; § 12, § 20.] From these authorities, it is obvious, we think, that, to constitute this offence, the habit should exist of being abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrongful or wicked act. If some crime is actually committed, that is the subject of a separate indictment; but the power to arrest and punish for the offence of night-walking is conferred for the preservation of the peace, and to prevent the commission of crime.” p. 544, 545.

<sup>2</sup> Rex v. Delaval, 3 Bur. 1484, 1488; 4 Bl. Com. 64, note; Commonwealth v. Sharpless, 2 S. & R. 91, 102.

<sup>3</sup> See Commonwealth v. Goodhue, 2 Met. 193; United States v. Hiler, Morris, 330; Stat. Crimes, § 727-736.

<sup>4</sup> 4 Bl. Com. 64.

<sup>5</sup> 1 Bishop Mar. & Div. § 297.

<sup>6</sup> Stat. Crimes, § 577-618.



§ 503. **Sodomy.** — For other reasons, as well as to protect the public morals, sodomy — called sometimes buggery, sometimes the offence against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast — is, though committed in secret, highly criminal. Hawkins says, it “was felony by the ancient common law”;<sup>1</sup> yet Blackstone remarks, that, in the times of popery, it was subject only to ecclesiastical censures.<sup>2</sup> Stat. 25, Hen. 8, c. 6, sufficiently early in date to be common law in this country, made it felony;<sup>3</sup> and either by the adoption of early English enactments, or the earlier English common law, we have received it into the catalogue of our common-law crimes.<sup>4</sup>

**Attempt at Sodomy — (Divorce).** — An attempt to commit sodomy, much more the offence itself, is, in that body of the English unwritten law which was formerly administered in the ecclesiastical courts, a ground of divorce.<sup>5</sup>

§ 504. **Immoral Public Shows.** — But chastity is not the only form of morality protected by the common law. It has been laid down that the erection of a mountebank’s stage is indictable;<sup>6</sup> and more broadly, that so is “every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals.”<sup>7</sup>

**Gaming and other Disorderly Houses.** — And the keeping of a common gaming-house,<sup>8</sup> or of a disorderly ale-house or inn,<sup>9</sup> or of any other disorderly house,<sup>10</sup> is a common-law offence, on account,

<sup>1</sup> 1 Hawk. P. C. 6th ed. c. 4, p. 9, Curw. ed. p. 357.

<sup>2</sup> 4 Bl. Com. 216. And see *Rex v. Mulreaty*, 1 Russ. Crimes, 3d Eng. ed. 698.

<sup>3</sup> Hawk. P. C. ut sup.; 1 Russ. Crimes, 3d Eng. ed. 698; 1 Hale P. C. 669; 1 East P. C. 480.

<sup>4</sup> *Commonwealth v. Thomas*, 1 Va. Cas. 307; *Davis v. The State*, 3 Har. & J. 154.

<sup>5</sup> 1 Bishop Mar. & Div. § 739; 2 Ib. 640.

<sup>6</sup> *Rex v. Bradford*, Comb. 304. And see *Hall’s Case*, 1 Mod. 76.

<sup>7</sup> *Knowles v. The State*, 3 Day, 103. See *Jacko v. The State*, 22 Ala. 73; *Reg. v. Grey*, 4 Fost. & F. 73; *Reg. v. Saunders*, 1 Q. B. D. 15, 19, 13 Cox C. C. 116.

“The common law, which sanctions prudent theatrical performances, denounces as unlawful such as are demoralizing, licentious, or obscene.” Robertson, J., in *Pike v. Commonwealth*, 2 Duvall, 89.

<sup>8</sup> 1 Russ. Crimes, 3d Eng. ed. 323; *Rex v. Dixon*, 10 Mod. 335; *People v. Jackson*, 3 Denio, 101; *United States v. Dixon*, 4 Cranch C. C. 107; *The State v. Haines*, 30 Maine, 65; *Vanderworker v. The State*, 8 Eng. 700; *Rex v. Medlor*, 2 Show. 36; *The State v. Savannah*, T. U. P. Charl. 285; *The State v. Doon*, R. M. Charl. 1; *Commonwealth v. Tilton*, 8 Met. 232, 235.

<sup>9</sup> *Stephens v. Watson*, 1 Salk. 45; *Hall v. The State*, 4 Harring. Del. 132, 145.

<sup>10</sup> *The State v. Bailey*, 1 Fost. N. H.

among other reasons, of its evil influence on the public morals. But, —

**Gaming — Cock-fighting.** — In the absence of statutes, gaming alone is not cognizable criminally; <sup>1</sup> though perhaps some kinds of games are, from their peculiar nature, such as the cruel game of cock-fighting.<sup>2</sup> And, —

§ 505. **Ale-house.** — At the common law, an ale-house, if not disorderly, was lawful; no license being required to keep it.<sup>3</sup> But early English legislation regulated considerably this subject,<sup>4</sup> and the example of our ancestors has been widely followed by us during all periods of our history.<sup>5</sup>

§ 506. **Offences against Sepulture.** — As corrupting to the public morals, and disturbing to the sensibilities, are such acts as casting a human dead body into a river without the rites of sepulture;<sup>6</sup> the stealing of a corpse;<sup>7</sup> the digging of it up, when buried, or conveying of it from the burial-ground for sale<sup>8</sup> or dissection;<sup>9</sup> and the selling, for dissection, of the dead body of one executed when the death sentence did not so direct.<sup>10</sup> These acts are severally indictable at the common law.<sup>11</sup>

### III. *Public Education.*

§ 507. **Ecclesiastical Cognizance in England.** — When our country was settled from England, the public education was there a thing

343; *Commonwealth v. Stewart*, 1 S. & R. 342; *Hunter v. Commonwealth*, 2 S. & R. 289; *The State v. Mathews*, 2 Dev. & Bat. 424; *The State v. Bertheol*, 6 Blackf. 474; *Wilson v. Commonwealth*, 12 B. Monr. 2; *Smith v. Commonwealth*, 6 B. Monr. 21; *Bloomhuff v. The State*, 8 Blackf. 205; *The State v. Mullikin*, 8 Blackf. 260. See *Rex v. McDonald*, 3 Bur. 1645; post, § 1083-1097, 1106-1121, 1185-1187.

<sup>1</sup> *West v. Commonwealth*, 3 J. J. Mar. 641; *The State v. Cotton*, 6 Texas, 425; *People v. Sergeant*, 8 Cow. 189; *Reg. v. Ashton*, 16 Eng. L. & Eq. 346, 1 Ellis & B. 286. And see *The State v. Pember-ton*, 2 Dev. 281; *People v. Jackson*, 3 Denio, 101; *Dunman v. Strother*, 1 Texas, 89, 92. For a discussion of the statutory offence, see *Stat. Crimes*, § 844-930.

<sup>2</sup> *Commonwealth v. Tilton*, 8 Met. 232, 234; *Squires v. Whisken*, 3 Camp. 140. As to wages, see *Ball v. Gilbert*, 12 Met. 397; *McElroy v. Carmichael*, 6 Texas, 454.

<sup>3</sup> *Rex v. Iyves*, 2 Show. 468.

<sup>4</sup> *Stephens v. Watson*, 1 Salk. 45. And see *Rex v. Holland*, 1 T. R. 692.

<sup>5</sup> The unlicensed selling of intoxicating drinks is discussed, *Stat. Crimes*, § 982-1070.

<sup>6</sup> *Kanavan's Case*, 1 Greenl. 226.

<sup>7</sup> 2 East P. C. 652.

<sup>8</sup> *Rex v. Gilles*, Russ. & Ry. 367, note.

<sup>9</sup> *Rex v. Lynn*, 2 T. R. 733, 1 Leach, 4th ed. 497; *Commonwealth v. Cooley*, 10 Pick. 37; *Kanavan's Case*, 1 Greenl. 226.

<sup>10</sup> *Rex v. Cundick*, D. & R. N. P. 13.

<sup>11</sup> See Vol. II. SEPULTURE.

of ecclesiastical cognizance. There were some acts of Parliament upon the subject, as on others within the ecclesiastical jurisdiction.<sup>1</sup> And,—

**License to Schoolmaster.**—To teach a school, one must have had a license from the authorities of the church.<sup>2</sup> But disobedience of this requirement was punished only ecclesiastically, it was not indictable.<sup>3</sup> This ecclesiastical offence, therefore, was never recognized by our unwritten law.<sup>4</sup> And,—

**In General.**—Though the common law seems, in various ways, to recognize the benefits of education, considered as a public good, separate from morality and religion, no common-law crimes, resting solely on this basis, have, it is believed, come to us from the mother-country.

**Statutes.**—Nor have we many statutes resting solely on this foundation. But they are not quite unknown.<sup>5</sup>

§ 508. **In Part as to Public Education.**—There were, in England, some common-law offences founded in part on the interest of the government in the public education. As to the principal ones of these, an American judge has said:—

**Regulations of Trade — Wages — Apprenticeships.**—“All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers,<sup>6</sup> the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship<sup>7</sup>—not being adapted to the circumstances of our colonial condition—were not [by us] adopted, used, or approved.”<sup>8</sup>

<sup>1</sup> Burn Ec. Law, Schools.

<sup>5</sup> Commonwealth v. Sheffield, 11 Cush.

<sup>2</sup> *Ib.*; Rex v. York, 6 T. R. 490; Rex v. Litchfield, 2 Stra. 1023.

178.

<sup>3</sup> Matthews v. Burdett, 3 Salk. 318; Rex v. Douse, 1 Ld. Raym. 672.

<sup>6</sup> Ante, § 453–455.

<sup>7</sup> Anonymous, 2 Show. 155; Rex v. Fox, 12 Mod. 251; Stat. Crimes, § 196.

<sup>4</sup> And see ante, § 38.

<sup>8</sup> Shaw, C. J., in Commonwealth v. Hunt, 4 Met. 111, 122.

## CHAPTER XXXVII.

## PROTECTION TO THE PUBLIC WEALTH AND TO POPULATION.

§ 509. **In General.** — By the public wealth, is meant the personal wealth of the individuals constituting the public at large. The revenue of the government depends on it, and the government on population. To promote this wealth, our civil laws secure to every man the enjoyment of his own acquisitions, and to promote population, they provide such rules as that the husband may hold the lands of his deceased wife during his life, if, while the connection continued, a living child was born, but not otherwise, thus in effect offering a reward for issue.<sup>1</sup> The criminal laws protect both wealth and population by various means, only the more direct of which will be specified in this chapter. Thus, —

**Abortion.** — Though matrimony is not compelled, because this would infringe private rights, the criminal law punishes abortion.<sup>2</sup>

§ 510. **Homicide.** — The destruction of a human being born into the world is a still graver offence against population. While it is a crime also against the individual whose life is taken,<sup>3</sup> it is such against all who compose the state; since it deprives each of a support on which he is entitled to rest. For it is neither possible nor desirable that men should be independent of one another.<sup>4</sup> Therefore, —

**Taking Life of one requesting — Persuading to Suicide.** — If a man voluntarily deprives of life another, who even requests it; or stands by persuading him to take his own life, which is done, — he thereby commits murder.<sup>5</sup>

<sup>1</sup> 1 Bishop Mar. Women, § 473 et seq.

<sup>2</sup> See 1 Russ. Crimes, 3d Eng. ed. 671; Stat. Crimes, § 740-762, where this offence is discussed.

<sup>3</sup> Post, § 547.

<sup>4</sup> "The crime of homicide partly con-

cerned the king, whose peace was infringed, and partly, as Bracton expresses it, the person who was killed." 2 Reeves Hist. Eng. Law, 3d ed. 9.

<sup>5</sup> 1 East P. C. 228, 229; Rex v. Hughes, 5 Car. & P. 126; Reg. v. Alison,

§ 511. **Suicide.** — So, by the English common law, suicide is felony;<sup>1</sup> but our law does not, like the English, allow, in felony, those forfeitures<sup>2</sup> which alone can be inflicted on one whose life is ended; therefore self-murder is not practically an offence with us. Yet we recognize it as criminal when the opportunity arises indirectly.<sup>3</sup> There are writers who have maintained, that men are naturally entitled to end their own lives at pleasure;<sup>4</sup> but this view accords neither with our instincts nor with our better reason, as certainly it does not with our law.

§ 512. **Leaving Country.** — Leaving the country, to take up a residence abroad, is not regarded by the law as equivalent to suicide. In most civilized countries, it is deemed to be the right of the government, if it will, to prevent emigration to foreign countries. In practice, this right is not generally exercised, except in emergencies; and then it is. And in England it is laid down, even in a very old case, that a man may lawfully depart from the realm “solely with the intent that he might live there free from the laws of this realm here, and not for any cause of traffic,” when no “express prohibition or restraint by proclamation or writ” stands in his way.<sup>5</sup> In our country, there are no restraints on expatriation, which is free to all. Yet it is believed that a special emergency may justify a temporary restraint here, the same as in England; and, on this idea, our government in some instances acted during the late civil war.

**Changing Allegiance — Calling Home Citizens.** — On the question whether a man may cast off allegiance to one government and take another, there has been some judicial discussion and a great deal of diplomatic, and of late the subject has become in a measure regulated by treaties. It would seem, that, according to the American doctrine, anterior to the treaties, though a citizen cannot lawfully leave his country when it needs his services and makes demand for them, yet, if, not forbidden, he goes to another country and there contracts a new allegiance, the new discharges

8 Car. & P. 418; *Rex v. Dyson*, Russ. & Ry. 523; ante, § 259; Vol. II. § 1187. There is some diversity of judicial opinion as to the legal liability of a party at whose persuasion another, in his absence, kills himself. See *Vaux's Case*, 4 Co. 44; *Rex v. Russell*, 1 Moody, 356; *Reg. v. Liddington*, 9 Car. & P. 79; *Commonwealth v. Bowen*, 13 Mass. 356.

<sup>1</sup> 1 East P. C. 219; *Rex v. Russell*, 1 Moody, 356; *Reg. v. Clerk*, 7 Mod. 16; *Hales v. Petit*, 1 Plow. 253, 260, 261; *Rex v. Ward*, 1 Lev. 8; Vol. II. § 1187.

<sup>2</sup> Post, § 615, 616, 970.

<sup>3</sup> Vol. II. § 1187.

<sup>4</sup> *Dawes on Crimes*, 72.

<sup>5</sup> Anonymous, 3 Dy. 296, pl. 19.

him from the old. Doubtless, according to both American and English doctrine, if, while no intent to cast off the old allegiance has been manifested, a citizen is abroad, and his country demands his services, he may be called home, — though this is a question not much discussed among us. But, according to what has hitherto been generally understood to be the English and perhaps the prevailing European law in the absence of a treaty, contrary to what the American publicists maintain, no native-born subject can ever so change his allegiance, by going abroad and taking upon himself the obligations of a new one, as to free him from the claims of the government under which he was born, provided it chooses to exercise its right.<sup>1</sup>

§ 513. **Injuring or Neglecting Self.** — For the same reason that a man may not deprive the community of what he might do for it by taking his own life, he may not deprive it of the equivalent of his life in another form. And the reason would seem to carry us still further; namely, that he may not be idle, or waste his goods, or neglect opportunities for self-improvement. Practically, however, to conduct the doctrine to this extent would be unwise, and it would trench on personal rights. Let us see, in a few examples, how far it is carried. Thus, —

**Mayhem.** — We have already seen, that a man is answerable to the criminal law who inflicts on himself a mayhem.<sup>2</sup> But —

§ 514. **Injuries to One's own Property.** — The law gives men full control over their own property,<sup>3</sup> to do what they will with it, only not to the injury of their neighbors. They may, for instance, burn it. This rule promotes public wealth, by stimulating private industry. Also —

§ 515. **Vagrancy, Idleness, &c.** — Men may ordinarily dispose of their time as they will. And it is not clear that the ancient common law of England took notice of mere idleness and vagrancy as criminal; indeed, one case lays it down that a vagrant, as such, is not indictable.<sup>4</sup> But we find, from early times, statutes authoriz-

<sup>1</sup> I have stated the doctrine in a general way, but I trust with reasonable accuracy, for the benefit merely of the student. It would be out of place here to collect the multitudes of authorities relating to the question.

<sup>2</sup> Ante, § 250. See Vol. II. § 1001 et seq.

<sup>3</sup> See ante, § 260; *United States v. Johns*, 1 Wash. C. C. 363.

<sup>4</sup> *Reg. v. Branworth*, 6 Mod. 240; it being added: "But, if he be an *idle and loose person*, you may take him up as a vagrant, and bind him to his good behavior, by the common law." See *Rex v. King's Langley*, 1 Stra. 631; *Reg. v.*

ing summary proceedings against idlers, vagabonds, and rogues; to be regarded perhaps by us as regulations concerning paupers, not therefore belonging to our common law.<sup>1</sup> Generally, in our States, vagrancy has been legislated upon to such an extent as to leave it unimportant what is the anterior, or common law, on the subject.<sup>2</sup>

§ 516. *Wandering Mariners, &c. — Gypsies.* — There are old English enactments against wandering mariners and soldiers,<sup>3</sup> and against gypsies,<sup>4</sup> probably never accepted as common law in any of the States.

*Game Laws.* — The same may be said of the game laws of England,<sup>5</sup> though some of the older States have statutory regulations of their own for the preservation of game.<sup>6</sup> And we have statutes for the protection of domestic animals and fish.

§ 517. *Owling.* — Owling is an old offence, both at the common law and under statutes; consisting, says Blackstone, of “transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture.” It ceased by 5 Geo. 4, c. 47, § 2, to be indictable in England;<sup>7</sup> and probably no one considers that it was ever a crime in this country.<sup>8</sup>

§ 518. *Forestalling, Regrating, and Engrossing:*<sup>9</sup> —

*In General.* — These are kindred offences, indictable both under

Egan, 1 Cawf. & Dix C. C. 338; Anonymous, 11 Mod. 3; Rex v. Miller, 2 Stra. 1108; Rex v. Talbot, 11 Mod. 415; Claxton's Case, 12 Mod. 566; Rex v. Brown, 8 T. R. 26; Rex v. Patchett, 5 East, 339; Soldier's Case, 1 Wils. 331; Rex v. Rhodes, 4 T. R. 220; Rex v. Hall, 3 Bur. 1636; 4 Bl. Com. 169; Dawes on Crimes, 81.

<sup>1</sup> For a comparison of the English and Irish statutes, see 1 Gab. Crim. Law, 908. And see ante, § 508.

<sup>2</sup> In *The State v. Maxcy*, 1 McMullan, 501, the court held the South Carolina statute of 1836, concerning vagrants, to be constitutional. Likewise the New York statutes are constitutional. *People v. Forbes*, 4 Parker C. C. 611. For several points under the statutes, see this case; also, *People v. Gray*, 4 Parker C. C. 616; *Commonwealth v. Holloway*, 5 Binn. 516; *Commonwealth v. Murray*, 14 Gray, 397; *Commonwealth v. Carter*, 108 Mass. 17; *The State v. Custer*, 65

N. C. 339; *Boulo v. The State*, 49 Ala. 22; *Allen v. The State*, 51 Ga. 264; *Walters v. The State*, 52 Ga. 574.

<sup>3</sup> 4 Bl. Com. 165.

<sup>4</sup> 4 Bl. Com. 165.

<sup>5</sup> 2 Bl. Com. 419, note; 4 Ib. 143, 173.

See *Reg. v. Nickless*, 8 Car. & P. 757; *Rex v. Passey*, 7 Car. & P. 282; *Rex v. Lockett*, 7 Car. & P. 300; *Rex v. Caradice*, Russ. & Ry. 205; *Reg. v. Uezzell*, 2 Den. C. C. 274, 4 Eng. L. & Eq. 568; *Rex v. Southern*, Russ. & Ry. 444; *Rex v. Smith*, Russ. & Ry. 368; *Reg. v. Hale*, 2 Car. & K. 326.

<sup>6</sup> *Deer-killing.* — A statute of Vermont, forbidding, for ten years, the killing of deer found running at large, has been adjudged constitutional. *The State v. Norton*, 45 Vt. 258.

<sup>7</sup> 4 Bl. Com. 164 and note.

<sup>8</sup> See ante, § 452 et seq.

<sup>9</sup> For the procedure connected with these offences, see *Crim. Proced.* II. § 348-350, 396, 397.

the ancient common law and by early English statutes, yet seldom made the subject of a criminal prosecution in modern times. And in England they were abolished, in 1844, by 7 & 8 Vict. c. 24, both as common-law offences and statutory.

§ 519. **How defined.** — To define these offences, as recognized by the old common law, would be difficult; because, in England, the early statutes practically took the place of the unwritten rule. Blackstone gives us the definitions furnished by 5 & 6 Edw. 6, c. 14, as follows: —

**Forestalling** — is “the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there.”

**Regrating** — is “the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place.”

**Engrossing** — is “the getting into one’s possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again.” He adds: “And so the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and finable at the common law.”<sup>1</sup> But in a late English case it is said that the common-law offences of engrossing and regrating extend only to the necessities of life.<sup>2</sup>

§ 520. **Under our Common Law.** — It is reasonably plain that the common law of our States has not adopted these offences in terms as thus defined. Yet, under modifications, they are, in legal principle, criminal misdemeanors with us. Thus, —

§ 521. **Hoarding to defraud.** — If men, to enrich themselves by losses or sufferings which they contemplate bringing upon others, knowing that an article of commerce, especially one pertaining to the necessities of life, is in sufficient supply, buy in large quantities and hoard the article for a higher price, — stimulating, therefore, production unduly, and compelling consumers to pay, while the stimulant is on, too much for it, — they do a wrong alike to producer, to consumer, and to the honest retail trader who is obliged to keep it in stock for his customers. The hoarder,

<sup>1</sup> 4 Bl. Com. 158. And see *Rex v. v. Rusby*, Peake Add. Cas. 189, and post, Davies, 1 Rol. 11; *Rex v. Waddington*, § 528, note.

<sup>2</sup> *Pettamberdass v. Thackoorseydass*, 1 East, 143; *Rex v. Webb*, 14 East, 406; 7 Moore P. C. 239, 262.



in this instance, would, in the end, be heavily punished, though not so heavily as he deserves, by the pecuniary loss suffered when the crash came, if he did not, foreseeing its coming, succeed in working off his goods in season to save himself by casting the ruin on others. Now, he who uses the power which money or credit gives him to play a prank like this upon the community is an enemy to the race, and as deserving of punishment as the thief or the robber.

§ 522. *Under our Common Law, continued.* — What is thus said is suggestive of the form which these offences must be deemed to assume in this country, if accepted as pertaining to our common law. And, modified to our circumstances, they would seem, in reason, to have been as well adapted to our country, when it was settled, as to England. Our own Mr. Dane observes: "The common law against these offences of forestalling, engrossing, regrating, and monopolies, has borne the test of ages, and has been wise and useful. The fault has not been in this law in the United States, but in the non-execution of it. Its notorious violations have often been complained of, but scarcely in any instance prosecuted; partly owing to the difficulty there has ever been in defining and proving these offences, and therefore the possible failure of prosecutions when commenced; but not wholly to this cause, for this difficulty is nearly the same in every country; yet in many countries in Europe, and in which there is a tolerable share of freedom, this kind of law has usually been tolerably well executed. But the principal cause to which the inexecution of this portion of the common law is owing, in the United States, is the easy and indulgent temper and character of the people generally, who have ever been disposed to suffer themselves to be cheated and imposed upon in these ways, by these kinds of offenders, in hundreds of instances, complaining generally, but never prosecuting."<sup>1</sup> Let us now see more exactly what, under the English common and statutory law, these several offences were, in England, when our country was settled.

§ 523. *Forestalling, &c.* — In Russell on Crimes,<sup>2</sup> we have the following: "Every practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise,

<sup>1</sup> 7 Dane Abr. 89, and see to the end of the chapter. See also *Louisville v. Roupe*, 6 B. Monr. 591.

<sup>2</sup> See *Crim. Proced.* II. § 396.

<sup>3</sup> 1 Russ. Crimes, 8d Eng. ed. 165.

has been held to be unlawful ; as being prejudicial to trade and commerce, and injurious to the public in general.<sup>1</sup> Practices of this kind come under the notion of forestalling ; which anciently comprehended, in its signification, regrating and engrossing, and all other offences of the like nature.<sup>2</sup> Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind.<sup>3</sup> Also if a person within the realm buy any merchandise in gross, and sell the same again in gross, it has been considered to be an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavor to make his profit of it.<sup>4</sup> So the bare engrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at the common law ; for, if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit.<sup>5</sup> And so jealous is the common law of all practices of this kind, that it has been held contrary to law to sell corn in the sheaf ; upon the supposition, that, by such means, the market might be in effect forestalled.”<sup>6</sup>

§ 524. *Continued.* — The author then proceeds to say, that, “ the offences of forestalling, regrating, and engrossing were for a considerable period prohibited by statutes ; and chiefly by the 3 & 4 Edw. 6, c. 21, and 5 & 6 Edw. 6, c. 14 ; altered by 5 Eliz. c. 5, § 13, 5 Eliz. c. 12, and 13 Eliz. c. 25, § 13. But the beneficial tendency of such statutes was doubted ; and, at length, by the 12 Geo. 3, c. 71, they were repealed,<sup>7</sup> as being detrimental to the supply of the laboring and manufacturing poor of the kingdom.”<sup>8</sup> This repealing statute of 12 Geo. 3, c. 71, A. D. 1772, is too recent to have any force in our States. But those of Edw. 6 and Eliz. are of dates to render them common law with us. So is

<sup>1</sup> 3 Inst. 196 ; Bac. Abr. tit. Forestalling, A.

<sup>2</sup> *Ib.*

<sup>3</sup> 1 Hawk. P. C. c. 80, § 1.

<sup>4</sup> 3 Inst. 196 ; Bac. Abr. tit. Forestalling, A ; 1 Hawk. P. C. c. 80, § 3. But it was held, that any merchant, whether subject or foreigner, bringing victuals or other merchandise into the realm, may sell it in gross. 3 Inst. 196.

<sup>5</sup> 1 Hawk. P. C. c. 80, § 8 ; 3 Inst. 196.

<sup>6</sup> 3 Inst. 197 ; Bac. Abr. tit. Forestalling, A.

<sup>7</sup> The acts repealed are 3 & 4 Edw. 6, c. 21 ; 5 & 6 Edw. 6, c. 14 ; 3 Phil. & M. c. 3 ; 5 Eliz. c. 5 ; 15 Car. 2, c. 8 ; and so much of 5 Anne, c. 34, as relates to butchers selling cattle alive or dead in London or Westminster, or within ten miles thereof ; and all the acts made for the better enforcement of the same.

<sup>8</sup> 1 Russ. Crimes, 3d Eng. ed. 168.

3 & 4 Edw. 6, c. 21, but it relates merely to the sale of butter and cheese. The statutes of Eliz. are unimportant, except perhaps a single section. The only old statute, therefore, which much concerns us, is 5 & 6 Edw. 6, c. 14, which must be deemed common law with us, as far as it was found applicable.<sup>1</sup>

§ 525. *Continued.* — Russell proceeds: "It has been sometimes contended, that forestalling, regrating, and engrossing were punishable only by the provisions of these statutes;<sup>2</sup> but that doctrine has not been admitted, and they still continue offences at common law;<sup>3</sup> though their precise extent and definition at the present day may perhaps admit of some doubt."<sup>4</sup> Where, in this country, 5 & 6 Edw. 6, c. 14, has not been repealed, we have not the same doubt whether these are common-law offences; but we have the doubt as to their precise extent and nature.

§ 526. *Forestalling, what, in Principle.* — In reason, forestalling, considered distinct from engrossing and regrating, seems to be committed whenever a man, by false news, or by any kind of deception, gets into his hands a controlling amount of any one article of merchandise, and holds it for an undue profit, thereby creating a perturbation in what pertains to the public interests. If he circulates the false news, or uses the other deception, to enable others to operate in this way, or to operate himself, but fails, still he has committed, if not the full offence, at least the criminal attempt.<sup>5</sup>

<sup>1</sup> In the fifth edition, the first nine sections of this act were copied here; but I do not deem it essential to repeat them.

<sup>2</sup> *Rex v. Maynard*, Cro. Car. 231; *Rex v. Waddington*, 1 East, 143.

<sup>3</sup> 1 Hawk. P. C. c. 80, § 15.

<sup>4</sup> 1 Russ. Crimes, 3d Eng. ed. 168, 169; see ante, § 518.

See both the foregoing and the subsequent sections, and the authorities there cited. Also 2 Chit. Crim. Law, 527 et seq.; Gordon on Patents, 16 et seq. Lord Coke says, that, on one occasion, the judge had in consideration a case, which he seems to approve, "where it was presented that a Lombard did proceed to promote and enhance the price of merchandise, and showed how. The Lombard demanded judgment of the presentment for two causes. 1. That it did

not sound in forestalling; 2. That of his endeavor or attempt by words no evil was put in ure, that is, no price was enhanced, *et non allocatur*, and thereupon he pleaded not guilty. Whereby it appeareth, that the attempt by words to enhance the price of merchandise was punishable by law, and did sound in forestallment; and it appeareth by the book, that the punishment was by fine and ransom. And in that case Knivet reported, that certain people (and named their names) came to Cateswold in Herefordshire, and said, in deceit of the people, that there were such wars beyond the seas as no wool could pass or be carried beyond sea, whereby the price of wools was abated; and, upon presentment hereof made, they appeared, and upon their confession they were put to fine and ransom." 3 Inst. 196.

§ 527. **Engrossing.**<sup>1</sup>—Engrossing, with us, must doubtless be deemed of kin to forestalling, as it was in the English common law. And whenever a man, to put things, as it were, out of joint, and obtain an undue profit, purchases large quantities of an article of merchandise, holding it, not for a fair rise, but to compel buyers to pay what he knows to be much more than can be regularly sustained in the market, he may, on principle, be deemed, with us, to be guilty of the common-law offence of engrossing.<sup>2</sup>

§ 528. **Regrating.**—It is not easy to see how regrating, simply, as defined by Blackstone,<sup>3</sup> and distinguished from forestalling and engrossing, can be a common-law offence in this country. We may expand the definition, and thus make it such; but the terms forestalling and engrossing would seem to cover all practical forms of the offence, as properly understood in this country.<sup>4</sup>

<sup>1</sup> See *Crim. Proc.* II. § 348-350.

<sup>2</sup> 1. In 1801, two cases against the same defendant—*Rex v. Waddington*, 1 East, 143; *Rex v. Waddington*, 1 East, 167—came before the Court of King's Bench, wherein the substance of the charge seems to have been engrossing, though there was no effort to give name to the crime. They grew out of a villanous speculation in hops, and the defendant was held to be rightly convicted. These cases will repay an attentive examination. And see 1 *Russ. Crimes*, 3d Eng. ed. 168-174; *Rex v. Gilbert*, 1 East, 583.

2. The doctrine of the text, the reader perceives, tones down the ancient common law greatly in favor of trade and speculation. For Lord Coke says: "It was upon conference and mature deliberation resolved by all the justices, that any merchant, subject, or stranger, bringing victuals or merchandise into this realm, may sell them in gross; but that vendor cannot sell them again in gross, for then he is an engrosser according to the nature of the word, for that he buy in gross and sell in gross, and may be indicted thereof at the common law, as for an offence that is *malum in se*. 2. That no merchant or any other may buy within the realm any victual or other mer-

chandise in gross, and sell the same in gross again, for then he is an engrosser, and punishable *ut supra*: for by this means the prices of victuals and other merchandise shall be enhanced to the grievance of the subject; for, the more hands they pass through, the dearer they grow, for every one thirsteth after gain." 3 *Inst.* 196.

<sup>3</sup> *Ante*, § 519.

<sup>4</sup> 1. The last English case of regrating at the common law, of which I have knowledge, is *Rex v. Rusby*, Peake Add. Cas. 189, A.D. 1800. I have also before me a pamphlet report of the trial, somewhat more full. Lord Kenyon presided, Mr. Erskine was the leading counsel for the prosecution, Mr. Law for the defence. The learned judge observed to the jury (I quote from the pamphlet), that, "although all the acts of Parliament which had been on the statute-book a hundred and fifty years had in an evil hour been done away, notwithstanding the ravages made by the Conqueror and some other princes of the Norman line it had been discovered, in some Saxon laws which had been found since, that this was an offence at common law, and there could be no doubt but by the law of the land these offences are provided against." After some discussion concerning the

§ 529. **Conspiracies to Forestall, &c.** — A conspiracy to commit any of the acts formerly punishable in England under the name

evidence, the case was submitted to the jury, and they returned a verdict of guilty. Whereupon his lordship said: "Gentlemen, you have conferred as great benefit on your country as, I believe, almost any jury did confer." I am not able to draw from this case the precise limit which Lord Kenyon would have given to the offence. "The defendant," says the pamphlet report, "stood indicted for having, on the 8th of November last, at the Corn Exchange, purchased thirty quarters of oats, which he had exposed to sale and sold again on the same day." Nothing is thus said about any enhancement of the price; but the title-page of the pamphlet describes the trial as having been "for regrating in buying corn at Mark Lane, and afterwards selling it on the same day at an advanced price." Mr. Erskine said: "The crime of regrating was that of buying any commodity in a market, and selling it again in the same market on the same day." Lord Kenyon gave, in his address to the jury, his views of the reason of the law as follows: "When provisions arrive at a high price, they become a mighty injury and oppression to the poor. All must have the necessities of life; and, when they become enhanced, the consequences are dreadful in the extreme. In speculations it has been said that nobody can be hurt. I deny it: that great writer and learned man, Dr. Smith, had said that monopoly is no more to be dreaded than witchcraft. If that great writer was here now, he would tell me that it does exist. In a county which I know, all the butter, cheese, fresh provisions, &c., were bought up by the large consumer, and resold to the poor and indigent at a profit of near fifty per cent. I would ask Dr. Smith if this is not more to be dreaded than witchcraft."

2. According to a note in Peake, this is the same case which Chitty mentions under the name of *Rex v. Rushby*, 2 Chit. Crim. Law, 536; where the form of the indictment appears. The first count, from which the others vary but slightly, charges that the defendant, on a day

mentioned, "at London aforesaid, that is to say, at the parish of Allhallows Barking, in the ward of Tower in London aforesaid, in a certain market, there called the Corn Exchange, unlawfully did buy, obtain, and get into his hands and possession, of and from J. S., J. G., and J. H., a large quantity of oats, of the growth and produce of this kingdom of Great Britain, to wit, ninety quarters of oats, of the growth and produce of the kingdom of Great Britain, at and for the price or sum of forty-one shillings for each and every of the said ninety quarters of oats, part of the said oats, by way of sample of the said ninety quarters of oats, then being brought to the said market by the said J. S., J. G., and J. H., for the sale of the said ninety quarters of oats in the same market; and afterwards, to wit, on the same, &c., he the said Rushby, at, &c., in the same market there called the Corn Exchange, unlawfully did regrate a large quantity, to wit, thirty quarters of the said oats, and sell the said thirty quarters of the said oats again to one W. H. at and for the price or sum of forty-three shillings for each and every of the said thirty quarters of the said oats, in contempt, &c., to the evil example, &c., and against the peace, &c." And Mr. Chitty adds, that, after conviction, "and after an ineffectual application for a new trial, Mr. Law (the late Lord Ellenborough), Mr. Sergeant Best (the now chief justice of the Common Pleas), and Mr. Marryatt, moved in arrest of judgment," &c., on the ground, that, since the repeal of the statutes, the acts alleged against the defendants were not punishable. "Upon this suggestion, the court granted a rule to show cause why judgment should not be arrested; and, after argument, the court were divided in opinion, and no judgment was passed upon the defendant." 2 Chit. Crim. Law, 537 and note. And see 4 Bl. Com. Chit. ed. 168, note; Godson on Patents, 33. Lord Campbell, who was not an admirer of Kenyon, comments, in his *Lives of the Chief Justices* (iv. 84 et seq. of Am. ed.), very disparagingly

of forestalling, engrossing, or regrating, is, of course, indictable with us if the acts themselves are. But it may be so, even though we should hold that these are not common-law offences in our States.<sup>1</sup>

upon this case and *Rex v. Waddington*, cited to the last section. But he admits that the doctrines "were at the time highly popular," and contributed to enhance Kenyon's "reputation as a great judge." His pages are very racy where he states what the judges held; and, if they really laid down exactly what he says they did, we may doubt whether

their expositions were true to any law ever prevailing in any country. And still we should be at liberty to agree or not with the biographer as to the cause which he assigns; namely, Kenyon's lack of an early classical and general education in the schools. Campbell cites no authorities against these cases.

<sup>1</sup> See Vol. II. CONSPIRACY.

## CHAPTER XXXVIII.

### PROTECTION TO THE PUBLIC CONVENIENCE AND SAFETY.

§ 530. **In General.** — All unjustifiable disturbances of the public convenience and safety, sufficient in degree,<sup>1</sup> are indictable at the common law. Therefore —

§ 531. **Nuisances** — (**Ways** — **Other Public Places** — **Trades** — **Noises** — **Gunpowder, &c.**). — Obstructions of highways,<sup>2</sup> public squares,<sup>3</sup> harbors,<sup>4</sup> navigable rivers,<sup>5</sup> and the like ;<sup>6</sup> injuries done to such ways and places ;<sup>7</sup> neglect or refusal, by those whose duty it is, to keep them in repair ;<sup>8</sup> the carrying on, in populous localities or near a highway, of trades which render the air either unwholesome or disagreeable to the senses ;<sup>9</sup> making great noises,

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> Commonwealth v. Milliman, 13 S. & R. 403; Reg. v. Scott, 2 Gale & D. 729; Rex v. Cross, 3 Camp. 224; Rex v. Jones, 3 Camp. 230; Rex v. Morris, 1 B. & Ad. 441; People v. Cunningham, 1 Denio, 524; Reg. v. Scott, 3 Q. B. 543; Rex v. Russell, 6 East, 427; The State v. Duncan, 1 McCord, 404; The State v. Spainhour, 2 Dev. & Bat. 547; Rex v. Moore, 3 B. & Ad. 184; Reg. v. Watts, 1 Salk. 357; Justice v. Commonwealth, 2 Va. Cas. 171; Commonwealth v. Wilkinson, 16 Pick. 175; The State v. Pollok, 4 Ire. 303; The State v. Hunter, 5 Ire. 369; Commonwealth v. Gowen, 7 Mass. 378; Rex v. Carlile, 6 Car. & P. 636; Rex v. West Riding of Yorkshire, 2 East, 342; Commonwealth v. King, 13 Met. 115; Reading v. Commonwealth, 1 Jones, Pa. 196; Rex v. Sarmon, 1 Bur. 516; Rex v. Webb, 1 Ld. Raym. 737; Rex v. Dobbins, 11 Mod. 317; Reg. v. Derbyshire, 2 Q. B. 745; The State v. Knapp, 6 Conn. 415; Reg. v. Sheffield Gas Co., 22 Eng. L. & Eq. 200; Vol. II. § 1272 et seq.

<sup>3</sup> The State v. Commissioners, Riley, 146; Rung v. Shoneberger, 2 Watts, 23;

The State v. Commissioners, 3 Hill. S. C. 149; Commonwealth v. Rush, 2 Harris, Pa. 186.

<sup>4</sup> Rex v. Tindall, 1 Nev. & P. 719, 6 A. & E. 143. And see Commonwealth v. Alger, 7 Cush. 53.

<sup>5</sup> Commonwealth v. Church, 1 Barr, 105; The State v. Thompson, 2 Strob. 12; Rex v. Trafford, 1 B. & Ad. 874, 887; Rex v. Watts, 2 Esp. 675; Renwick v. Morris, 7 Hill, N. Y. 575; Rex v. Russell, 6 B. & C. 566; Cummins v. Spruance, 4 Harring. Del. 315.

<sup>6</sup> See Vol. II. § 1266-1271.

<sup>7</sup> Rex v. Edgerly, March, 131; Reg. v. Leach, 6 Mod. 145; Rex v. Stanton, 2 Show. 30; Commonwealth v. Eckert, 2 Browne, Pa. 249.

<sup>8</sup> Rex v. Hendon, 4 B. & Ad. 628; Rex v. Stoughton, 2 Saund. 157; Reg. v. Wilts, Holt, 339; Rex v. Dixon, 12 Mod. 198; Waterford and Whitehall Turnpike v. People, 9 Barb. 161; Payne v. Partridge, 1 Show. 256; The State v. Murfreesboro', 11 Humph. 217; Vol. II. § 1280-1283.

<sup>9</sup> Rex v. White, 1 Bur. 333; Commonwealth v. Brown, 13 Met. 365; Rex v.

to the disquiet of the neighborhood;<sup>1</sup> keeping large quantities of gunpowder in populous places, to the danger of the public safety;<sup>2</sup> and other acts of a similar tendency;<sup>3</sup>—being, with some which were mentioned under previous heads,<sup>4</sup> termed in legal language nuisances, are severally common-law offences. Statutes have more or less confirmed or enlarged them, or added to their number. Thus,—

**Railways.**—Though the obstruction of a railway track is indictable at the common law,<sup>5</sup> there are statutes making it specially so, and more particularly if endangering life.<sup>6</sup> And,—

**Railway causing Death.**—Where through negligent management a railway causes the death of a passenger, there are statutes under which the corporation is indictable therefor, and the fine imposed in punishment is payable to the representatives of the deceased person.<sup>7</sup> In these cases, the rules applicable to civil actions, which in essence they are, prevail in a good measure.<sup>8</sup>

§ 532. **Inns—Refusing Travellers.**—Since inns<sup>9</sup> are for the public convenience, and the keepers have certain privileges given in return for the public good they do,—“an indictment,” says

Watts, *Moody & M.* 281, 2 Car. & P. 486; *Rex v. Neville, Peake*, 91; *Ray v. Lynes*, 10 Ala. 63; *The State v. Hart*, 34 Maine, 36; post, § 1138–1144.

<sup>1</sup> *Rex v. Smith*, 1 Stra. 704; *The State v. Haines*, 30 Maine, 65. And see *Commonwealth v. Smith*, 6 Cush. 80.

<sup>2</sup> Anonymous, 12 Mod. 342; *Cheat-ham v. Shearon*, 1 Swan, Tenn. 213; *Rex v. Taylor*, 2 Stra. 1167; *Bradley v. People*, 56 Barb. 72; *People v. Sands*, 1 Johns. 78; post, § 1097–1100. And see *Williams v. Augusta*, 4 Ga. 509. **Duty of Licensed Seller.**—One licensed to sell gunpowder, if he sells it to one whom he knows to be incapable of taking proper care of it, is civilly liable for the consequences. *Carter v. Towne*, 98 Mass. 567.

<sup>3</sup> *Rex v. Wharton*, 12 Mod. 510; *Reg. v. Wigg*, 2 Salk. 460, 2 Ld. Raym. 1163; *Commonwealth v. Webb*, 6 Rand. 726; *Commonwealth v. Chapin*, 5 Pick. 199.

<sup>4</sup> Ante, § 490, 500, 502, 504; post, § 1071 et seq.

<sup>5</sup> Vol. II. § 1266, 1270.

<sup>6</sup> *Reg. v. Upton*, 5 Cox C. C. 298; *Reg. v. Monaghan*, 11 Cox C. C. 608; *Reg. v. Hadfield*, Law Rep. 1 C. C. 258,

11 Cox C. C. 574; *Reg. v. Hardy*, Law Rep. 1 C. C. 278, 11 Cox C. C. 656; *Reg. v. Bradford*, Bell C. C. 268, 8 Cox C. C. 309; *Reg. v. Sanderson*, 1 Fost. & F. 37; *Roberts v. Preston*, 9 C. B. n. s. 208; *Reg. v. Court*, 6 Cox C. C. 202; *Reg. v. Bowray*, 10 Jur. 211; *McCarty v. The State*, 37 Missis. 411; *Allison v. The State*, 42 Ind. 354; *Commonwealth v. Killian*, 109 Mass. 345.

<sup>7</sup> *The State v. Grand Trunk Railway*, 59 Maine, 189; *The State v. Grand Trunk Railway*, 60 Maine, 145; *The State v. Grand Trunk Railway*, 61 Maine, 114; *The State v. Maine Central Railroad*, 60 Maine, 490; *Commonwealth v. Sanford*, 12 Gray, 174; *The State v. Manchester and Lawrence Railroad*, 52 N. H. 528; *Commonwealth v. Metropolitan Railroad*, 107 Mass. 236; *Commonwealth v. Vermont and Massachusetts Railroad*, 108 Mass. 7.

<sup>8</sup> *The State v. Grand Trunk Railway*, 58 Maine, 176; post, § 1074–1076.

<sup>9</sup> See *Hall v. The State*, 4 Harring. Del. 132, 141. As to what is an “Inn,” “Tavern,” “Hotel,” &c., see *Stat. Crimes*, § 297.



Coleridge, J., "lies against an innkeeper who refuses to receive a guest, he having at the time room in his house, and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender;"<sup>1</sup> though, from a later case, it would appear that the tender is always necessary.<sup>2</sup> So if, having received the guest, he refuses to find for the guest food and lodging, he is indictable.<sup>3</sup> But, to produce these consequences, the person applying as guest must be a traveller.<sup>4</sup> Such is the clear English doctrine; and it is affirmed in a dictum of the North Carolina court.<sup>5</sup> Coleridge, J., seemed to put the liability on the ground that "innkeepers are a sort of public servants;"<sup>6</sup> and in this view perhaps we should have discussed the topic under a previous title.<sup>7</sup> Another view is, that the innkeeper who allures a traveller to his house by holding himself out as ready to entertain him, and then refuses, assumes toward the traveller an unfair ground; in which aspect the question pertains to our chapter after the next.<sup>8</sup> But, unless we call in the aid of principles like these, we do not readily find a foundation for the indictment, where the refusal is not general; because the traveller is merely an individual, and the public sustains no separate injury.<sup>9</sup> Perhaps, however, the wrong may be likened to an obstruction in a public way. At all events, the law on this subject is probably as above stated; because no sufficient reason appears for discarding the old doctrine. Yet it has little practical effect at this time, being rather a relic of the past than a living thing of the present.

<sup>1</sup> *Rex v. Ivens*, 7 Car. & P. 213, 218. See *Newton v. Trigg*, 1 Show. 268, 269.

<sup>2</sup> *Fell v. Knight*, 8 M. & W. 269, 5 Jur. 554.

<sup>3</sup> 1 Hawk. P. C. Curw. ed. p. 714, § 2.

<sup>4</sup> *Rex v. Luellin*, 12 Mod. 445.

<sup>5</sup> *The State v. Mathews*, 2 Dev. & Bat. 424.

<sup>6</sup> In *Rex v. Ivens*, 7 Car. & P. 213, 219.

<sup>7</sup> Ante, § 458 et seq.

<sup>8</sup> And see ante, § 232.

<sup>9</sup> **Offences by Innkeepers enumerated.** — Hawkins says: "It seems to be agreed, that the keeper of an inn may, by the common law, be indicted and fined, as being guilty of a public nuisance, if he usually harbor thieves, or persons of scandalous reputation, or suf-

fer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. And it seems also to be clear, that, if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals, or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king." 1 Hawk. P. C. Curw. ed. p. 714, § 1, 2. And see *Reg. v. Rymer*, 2 Q. B. D. 136, 13 Cox C. C. 378.

## CHAPTER XXXIX.

## PROTECTION TO THE PUBLIC ORDER AND TRANQUILLITY.

§ 533. **In General.** — Whatever, of sufficient magnitude for the law's notice,<sup>1</sup> one wilfully does to the disturbance of the public order or tranquillity, is indictable at the common law. Thus, —

§ 534. **Riot — Rout — Unlawful Assembly.** — Riots, routs, and unlawful assemblies, three allied disturbances of the public tranquillity, are thus punishable. They severally require, says Blackstone,<sup>2</sup> “ three persons, at least, to constitute them. An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, or the game therein ; and part without doing it, or making any motion towards it.”<sup>3</sup> A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way ; and make some advances towards it.<sup>4</sup> A riot is where three or more actually do an unlawful act of violence, either with or without common cause or quarrel : as, if they beat a man ; or hunt and kill game in another's park, chase, warren, or liberty ; or do any other unlawful act with force and violence ; or even do a lawful act, as removing a nuisance, in a violent or tumultuous manner.”<sup>5</sup>

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> 4 Bl. Com. 146.

<sup>3</sup> And see *The State v. Stalcup*, 1 Ire. 30 ; *Reg. v. Vincent*, 9 Car. & P. 91 ; *Reg. v. Neale*, 9 Car. & P. 431 ; *Rex v. Hunt*, 1 Russ. Crimes, 3d Eng. ed. 273 ; *Rex v. Blisset*, 1 Mod. 13 ; *Rex v. Birt*, 5 Car. & P. 154. For other definitions, see Vol. II. § 1256 and note.

<sup>4</sup> And see *The State v. Sumner*, 2 Speers, 599. For other definitions, see Vol. II. § 1188 and note.

<sup>5</sup> And see *The State v. Connolly*, 8 Rich. 337 ; *The State v. Snow*, 18 Maine, 346 ; *The State v. Straw*, 23 Maine, 554 ;

*Williams v. The State*, 9 Misso. 270 ; *Scott v. United States*, Morris, 142 ; *The State v. Brooks*, 1 Hill, S. C. 361 ; *Turpin v. The State*, 4 Blackf. 72 ; *The State v. Calder*, 2 McCord, 462 ; *The State v. Jackson*, 1 Speers, 13 ; *The State v. Cole*, 2 McCord, 117 ; *Pennsylvania v. Cribbs*, Addison, 277 ; *Pennsylvania v. Morrison*, Addison, 274 ; *Rex v. Scott*, 3 Bur. 1262, 1 W. Bl. 350 ; *Reg. v. Vincent*, 9 Car. & P. 91 ; *Rex v. Sudbury*, 12 Mod. 282 ; *Rex v. Hunt*, 1 Keny. 108 ; *Commonwealth v. Runnels*, 10 Mass. 518 ; *Pennsylvania v. Craig*, Addison, 190 ; *Anonymous*, 6 Mod. 43 ; *Reg. v. Soley*, 2

There are some English statutes, ancient as well as comparatively modern, making the riotous assembling of twelve or more persons, under certain circumstances and for certain specific purposes, a heavier offence ;<sup>1</sup> but we have no reported instances of attempts to give them a common-law force in this country.

§ 535. *Affray*. — Of a similar nature to riot and the like is affray ; being the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people. It is indictable at the common law.<sup>2</sup>

Salk. 594, 595 ; Reg. v. Ellis, Holt, 636 ; The State v. Russell, 45 N. H. 83. For other definitions, see Vol. II. § 1143 and note.

<sup>1</sup> 4 Bl. Com. 142. The following is what Blackstone says in the place thus referred to : "The riotous assembling of twelve persons, or more, and not dispersing upon proclamation. This was first made high treason by Statute 3 & 4 Edw. 6, c. 5, when the king was a minor, and a change in religion to be effected : but that statute was repealed by Statute 1 Mary, c. 1, among the other treasons created since the 25 Edw. 3 ; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by Statute 1 Mar. stat. 2, c. 12, which made the same offence a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress, as, for example, such as were set on foot with intention to offer violence to the Privy Council, or to change the laws of the kingdom, or for certain other specific purposes : in which cases, if the persons were commanded by proclamation to disperse ; and they did not, it was by the statute of Mary made felony, but within the benefit of clergy ; and also the fact indemnified the peace officers and their assistants, if they killed any of the mob in endeavoring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was like to produce great discontents : but at first it was made only for a year, and was afterwards continued for that queen's life. And, by Statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life

also ; and then expired. From the accession of James the First to the death of Queen Anne, it was never once thought expedient to revive it : but, in the first year of George the First, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the Statute 1 Geo. 1, c. 5, enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy : and all persons to whom such proclamation ought to have been made, and knowing of such hindrance, and not dispersing, are felons without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavor to disperse them ; being copied from the act of Queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy."

<sup>2</sup> Vol. II. § 1 ; 4 Bl. Com. 145 ; The State v. Sumner, 5 Strob. 53 ; Simpson v.

**Private Fighting together.** — Fighting in a private place is either no offence<sup>1</sup> or an assault and battery, according to the circumstances.

**Public — (Prize-fight).** — Of course, a public prize-fight is indictable.<sup>2</sup>

§ 536. **Breaches of Peace.** — These offences are also known as breaches of the peace, — a term of indefinite yet larger meaning, sometimes greatly expanded, but commonly it signifies in the law a criminal act of the sort which disturbs the public repose. There are still other forms of indictable breaches of the peace.<sup>3</sup> Thus, —

**Forcible Detainer — (Defence of Self and Property).** — While all reasonable and necessary force may lawfully be used by one to defend his real or personal estate, of which he is in the actual possession, against another who comes to dispossess him without right;<sup>4</sup> yet, if a man undertakes to retain what he knows<sup>5</sup> to be a wrongful possession, by a force or by numbers reasonably exciting terror, he is indictable. This offence is called in law a forcible detainer.<sup>6</sup> So —

**Forcible Entry — Forcible Trespass.** — A man is indictable for a forcible entry or trespass, who, by strong hand, awakening fear, wrests from another's peaceable possession either personal<sup>7</sup> or

The State, 5 Yerg. 356; *Curlin v. The State*, 4 Yerg. 143; *O'Neill v. The State*, 16 Ala. 65; *Cash v. The State*, 2 Tenn. 198; *Klum v. The State*, 1 Blackf. 377; *The State v. Heflin*, 8 Humph. 84; *The State v. Allen*, 4 Hawks, 356; *Commonwealth v. Perdue*, 2 Va. Cas. 227; *Duncan v. Commonwealth*, 6 Dana, 295; *Hawkins v. The State*, 13 Ga. 322.

<sup>1</sup> Ante, § 260 and note; Vol. II. § 35.

<sup>2</sup> *Reg. v. Brown*, Car. & M. 314; ante, § 260, note; Vol. II. § 35.

<sup>3</sup> And see *The State v. Hanley*, 47 Vt. 290; *The State v. Matthews*, 42 Vt. 542; *The State v. Warner*, 34 Conn. 276; *The State v. Lunn*, 49 Misso. 90; post, § 548.

<sup>4</sup> *Weaver v. Bush*, 8 T. R. 78; *Harrington v. People*, 6 Barb. 607; *Commonwealth v. Kennard*, 8 Pick. 133; *The State v. Godsey*, 13 Ire. 348; *The State v. Johnson*, 12 Ala. 840; *The State v. Morgan*, 3 Ire. 186; *Monroe v. The State*, 5 Ga. 85; *Rex v. Ford*, J. Kel. 51; *Mc-*

*Daniel v. The State*, 8 Sm. & M. 401; *The State v. Zellers*, 2 Halst. 220; *The State v. Smith*, 3 Dev. & Bat. 117; *Moore v. Hussey*, Hob. 93, 96; *Semayne's Case*, 5 Co. 91 a; *Holloway's Case*, Palmer, 545; s. c. nom. *Halloway's Case*. Cro. Car. 131; *Commonwealth v. Drew*, 4 Mass. 391; *Rex v. Longden*, Russ. & Ry. 228; *United States v. Wiltberger*, 3 Wash. C. C. 515; *The State v. Briggs*, 3 Ire. 357; *The State v. Clements*, 32 Maine, 279; *The State v. Lazarus*, 1 Mill, 33; 1 East P. C. 402. And see, for a full discussion of the right to defend one's self or property, post, § 836-877.

<sup>5</sup> Ante, § 303.

<sup>6</sup> Vol. II. § 489 et seq.; *The State v. Godsey*, 13 Ire. 348; *Commonwealth v. Rogers*, 1 S. & R. 124; *Commonwealth v. Lakeman*, 4 Cush. 597; *Milner v. Maclean*, 2 Car. & P. 17.

<sup>7</sup> Vol. II. § 517; *The State v. Armfield*, 5 Ire. 207; *The State v. McDowell*, 1 Hawks, 449; *The State v. Watkins*, 4

real<sup>1</sup> property, even though he is proceeding under a just claim.<sup>2</sup> But this doctrine does not apply where one, having lawful right, immediately recaptures what has been wrongfully taken from him.<sup>3</sup> When the property is personal, the demonstration must be in the presence of the possessor, from whom it is taken away.<sup>4</sup>

§ 537. **Riotous Injuries and Enforcements of Rights.**—In like manner, the riotous entry into a house by the landlord, on the termination of a lease, or for the enforcement of a forfeiture;<sup>5</sup> the riotous pulling down of enclosures, even under a claim of right;<sup>6</sup> the breaking, with wood and stones, of the windows of a dwelling-house in the night, to the terror of the occupants;<sup>7</sup> the unlawful throwing down of the roof and chimney of a dwelling-house in the peaceable possession and actual occupancy of another, who is put in fear;<sup>8</sup> the riotous breaking into another's dwelling-house, and making a great noise, whereby a woman in it miscarries,<sup>9</sup>—are severally indictable at the common law, as either forcible entries, or other breaches of the peace.

§ 538. **Limits of Doctrine.**—In these cases, the trespass is not alone indictable, for the thing done must go further;<sup>10</sup> while the

Humph. 256; *The State v. Bennett*, 4 Dev. & Bat. 43; *The State v. Mills*, 2 Dev. 420; *The State v. Ray*, 10 Ire. 39; *The State v. Phipps*, 10 Ire. 17; *The State v. Flowers*, 1 Car. Law Repos. 97.

<sup>1</sup> Vol. II. § 489; *Commonwealth v. Shattuck*, 4 Cush. 141; *Burt v. The State*, 3 Brev. 413; *The State v. Speirin*, 1 Brev. 119; *The State v. Pollok*, 4 Ire. 305; *The State v. Pridgen*, 8 Ire. 84; *Reg. v. Newlands*, 4 Jur. 322; *Rex v. Nicholls*, 2 Keny. 512; *The State v. Toliver*, 5 Ire. 452; *Rex v. Smyth*, 5 Car. & P. 201; *Harding's Case*, 1 Greenl. 22; *The State v. Morris*, 3 Misso. 127.

<sup>2</sup> *The State v. Bennett*, 4 Dev. & Bat. 43; *Rex v. Marrow*, Cas. temp. Hardw. 174; *The State v. Pearson*, 2 N. H. 650; *People v. Leonard*, 11 Johns. 504; *Beauchamp v. Morris*, 4 Bibb, 312; *Rex v. Storr*, 3 Bur. 1698, 1699.

<sup>3</sup> *The State v. Elliot*, 11 N. H. 540.

<sup>4</sup> Vol. II. § 517; *The State v. McDowell*, 1 Hawks. 499; *The State v. Watkins*, 4 Humph. 256; *The State v. Mills*, 2 Dev. 420; *The State v. Farnsworth*, 10 Yerg. 261; *Reg. v. Harris*, 11 Mod. 113. And see *Rex v. Gardiner*, 1

Russ. Crimes, 3d Eng. ed. 53; *The State v. Flowers*, 1 Car. Law Repos. 97. See, as to real estate, *The State v. Fort*, 4 Dev. & Bat. 192.

<sup>5</sup> *Rex v. Stroude*, 2 Show. 149.

<sup>6</sup> *Rex v. Wyvill*, 7 Mod. 236. And see *The State v. Tolever*, 5 Ire. 452; *Reg. v. Harris*, 11 Mod. 113.

<sup>7</sup> *The State v. Batchelder*, 5 N. H. 549.

<sup>8</sup> *The State v. Wilson*, 3 Misso. 125; *The State v. Morris*, 3 Misso. 127.

<sup>9</sup> *Commonwealth v. Taylor*, 5 Binn 277.

<sup>10</sup> *The State v. Phipps*, 10 Ire. 17; *Henderson v. Commonwealth*, 8 Grat. 708; *Commonwealth v. Keeper of Prison*, 1 Ashm. 140; *Rex v. Bake*, 3 Bur. 1731; *Rex v. Smyth*, 5 Car. & P. 201, 1 Moody & R. 155; *The State v. Pollok*, 4 Ire. 305; *The State v. Ray*, 10 Ire. 39; *The State v. Mills*, 2 Dev. 420; *The State v. Watkins*, 4 Humph. 256; *The State v. Armfield*, 5 Ire. 207; *Rex v. Gardiner*, 1 Russ. Crimes, 3d Eng. ed. 53; 6 Mod. 175, note; 2 Mod. 306, note; *Kilpatrick v. People*, 5 Denio, 277; *Rex v. Storr*, 3 Bur. 1698; *Rex v. Atkins*, 3 Bur. 1706; *Rex v. Gil-*

terror may be excited as well by numbers<sup>1</sup> as by other means. Therefore, for example, —

**Excessive Distress — Abusing Family.** — A landlord does not commit crime by taking an excessive distress;<sup>2</sup> nor does any one by merely going often to the house of another, and in words so abusing his family as to make their lives uncomfortable; the injury being only of a civil nature.<sup>3</sup>

§ 539. **Peace actually broken — Tending to Breach.** — To lay the foundation for a criminal prosecution the peace need not be actually broken. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Thus, —

§ 540. **Challenge to Duel — Going dangerously armed. — Libel — Words to stir Quarrels — Eavesdropping — Common Scold.** — Sending a challenge, verbal or written, to fight a duel;<sup>4</sup> going about armed, with unusual and dangerous weapons, to the terror of the people;<sup>5</sup> riotously driving in a carriage through the streets of a populous city, to the hazard of the safety of the inhabitants;<sup>6</sup> publishing libels,<sup>7</sup> even in some extreme cases uttering words<sup>8</sup> calculated to stir up resentments and quarrels; eavesdropping;<sup>9</sup> being a common scold;<sup>10</sup> and the like; are cognizable criminally by the common law. For —

**The Reason.** — The criminal law is as well preventive as vindic-

let, 3 Bur. 1707; *The State v. Flowers*, 1 Car. Law Repos. 97.

<sup>1</sup> *The State v. Simpson*, 1 Dev. 504; *Milner v. Maclean*, 2 Car. & P. 17; *Commonwealth v. Shattuck*, 4 Cush. 141; *Rex v. Jopson*, cited 3 Bur. 1702. And see *The State v. Wilson*, 3 Misso. 125.

<sup>2</sup> *Rex v. Lesingham*, T. Raym. 205; s. c. nom. *Rex v. Leginham*, 1 Mod. 71.

<sup>3</sup> *Commonwealth v. Edwards*, 1 Ashm. 46. See *The State v. Caldwell*, 2 Jones, N. C. 408; *The State v. Bordeaux*, 2 Jones, N. C. 241.

<sup>4</sup> 4 Bl. Com. 150; *Rex v. Newdigate*, Comb. 10; *Reg. v. Langley*, 2 Ld. Raym. 1020, 1031, 6 Mod. 124; *Smith v. The State*, 1 Stew. 506.

<sup>5</sup> *The State v. Huntly*, 3 Ire. 418; *Sir John Knight's Case*, 3 Mod. 117, Comb. 38.

<sup>6</sup> *United States v. Hart*, Pet. C. C. 390. **Fast Driving.** — As to fast driving contrary to a city ordinance, see *Com-*

*monwealth v. Worcester*, 3 Pick. 462; *Stat. Crimes*, § 20.

<sup>7</sup> *Commonwealth v. Clap*, 4 Mass. 163, 168, 169; *Commonwealth v. Chapman*, 13 Met. 68; *Rex v. Topham*, 4 T. R. 126; *Reg. v. Collins*, 9 Car. & P. 456; *Rex v. Kinnersley*, 1 W. Bl. 294; *Reg. v. Lovett*, 9 Car. & P. 462; *Rex v. Pain*, Comb. 358; *The State v. Burnham*, 9 N. H. 34.

<sup>8</sup> *Reg. v. Taylor*, 2 Ld. Raym. 879; *Ex parte Marlborough*, 1 New Sess. Cas. 195, 13 Law J. N. S. M. C. 105, 8 Jur. 664; ante, § 470.

<sup>9</sup> *The State v. Williams*, 2 Tenn. 108; 4 Bl. Com. 168; *Commonwealth v. Lovett*, 4 Pa. Law Jour. Rep. 5; post, § 1122 et seq.

<sup>10</sup> 4 Bl. Com. 168; *Reg. v. Foxby*, 6 Mod. 11; *James v. Commonwealth*, 12 S. & R. 220; *United States v. Royall*, 3 Cranch C. C. 620; *Commonwealth v. Mohn*, 2 Smith, Pa. 243; post, § 943 1101 et seq.

tive.<sup>1</sup> And a threatened danger demands correction the same as an actual one. Moreover, the community is disturbed when it is alarmed. Attempts are indictable,<sup>2</sup> and the before-mentioned acts are in the nature of attempt.

§ 541. **Barratry — Maintenance — Champerty.** — We have a triangle of analogous offences known as barratry,<sup>3</sup> maintenance, and champerty;<sup>4</sup> which are rather actual than attempted disturbances of the repose of the community. The gist of them severally is, that they embroil men in lawsuits and other like quarrels. Blackstone defines barratry to be the “frequently exciting and stirring up of suits and quarrels between his majesty’s subjects, either at law or otherwise;”<sup>5</sup> maintenance, “an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it;”<sup>6</sup> champerty, “a bargain with a plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party’s suit at his own expense.”<sup>7</sup>

**Selling Land in Adverse Possession.** — The sale of real estate, of which another holds an adverse seisin, is usually a species of champerty.<sup>8</sup>

§ 542. **Disturbing Meetings.** — When people assemble for worship,<sup>9</sup> or in their town meetings,<sup>10</sup> or in others of the like sort,<sup>11</sup> or probably always when they come together in an orderly way for

<sup>1</sup> Ante, § 210.

<sup>2</sup> Ante, § 434, 435; post, § 723 et seq.

<sup>3</sup> Discussed Vol. II. § 63 et seq.

<sup>4</sup> Discussed Vol. II. § 121 et seq.

<sup>5</sup> 4 Bl. Com. 134; Case of Barrettry, 8 Co. 36*b*, 37*b*; Rex v. —, 3 Mod. 97; The State v. Chitty, 1 Bailey, 379; Commonwealth v. McCulloch, 15 Mass. 227.

<sup>6</sup> 4 Bl. Com. 134; Brown v. Beauchamp, 5 T. B. Monr. 413.

<sup>7</sup> 4 Bl. Com. 135; Thurston v. Percival, 1 Pick. 415; Rust v. Larue, 4 Litt. 411, 417; Douglass v. Wood, 1 Swan, Tenn. 393; Knight v. Sawin, 6 Greenl. 361; Byrd v. Odem, 9 Ala. 755; Key v. Vattier, 1 Ohio, 132; McMullen v. Guest, 6 Texas, 275; Lathrop v. Amherst Bank, 9 Met. 489; Holloway v. Lowe, 7 Port. 488.

<sup>8</sup> Vol. II. § 136–140; Cockell v. Taylor, 15 Eng. L. & Eq. 101; Hoyt v.

Thompson, 1 Seld. 320; Van Dyck v. Van Beuren, 1 Johns. 345, 363; Whitesides v. Martin, 7 Yerg. 384; Williams v. Hogan, Meigs, 187; Wellman v. Hickson, 1 Ind. 581; Michael v. Nutting, 1 Ind. 481; Truax v. Thorn, 2 Barb. 156; Tuttle v. Hills, 6 Wend. 213, 224; Anderson v. Anderson, 4 Wend. 474. Whether Stat. 32 Hen. 8, c. 9, is common law in this country, see Brinley v. Whiting, 5 Pick. 348, 353; Hall v. Ashby, 9 Ohio, 90; People v. Sergeant, 8 Cow. 139; Sessions v. Reynolds, 7 Sm. & M. 130; Vol. II. § 137, 138.

<sup>9</sup> Bell v. Graham, 1 Nott & McC. 278, 280; The State v. Jasper, 4 Dev. 323.

<sup>10</sup> Commonwealth v. Hoxey, 16 Mass. 385.

<sup>11</sup> Campbell v. Commonwealth, 9 Smith, Pa. 266.

a purpose not unlawful, the common law holds any disturbance of the meeting to be a crime. In England, statutes were passed to protect dissenters in their worship,<sup>1</sup> said to be necessary, because their assembling was unlawful. In this country, where all forms of worship are favored,<sup>2</sup> it is admitted that such statutes are not required.<sup>3</sup> And opposed to this view, even of the English law, is a strong dictum by Lord Mansfield, who said: "I would have it understood in general, that Methodists have a right to the protection of this court, if interrupted in their decent and quiet devotions; and so have dissenters from the established church likewise, if so disturbed."<sup>4</sup> What amounts to disturbance varies with the nature and objects of the meeting.<sup>5</sup>

§ 543. **Conclusion.**—There are statutory offences within the scope of this chapter, but they are sufficiently explained in "Statutory Crimes." And those which are mentioned here are discussed more fully in other connections in the present work; the nuisances, in the closing chapters of this volume, and the others in the second volume.

<sup>1</sup> *Rex v. Hube, Peake*, 132, 5 T. R. 542. And see *Rex v. Richardson*, 6 Car. & P. 335; *Rex v. Warren, Cowp.* 371.

<sup>2</sup> Ante, § 496.

<sup>3</sup> *The State v. Jasper*, 4 Dev. 323.

<sup>4</sup> *Rex v. Wroughton*, 3 Bur. 1683.

<sup>5</sup> As to religious meetings, see 1 Russ.

*Crimes*, 3d Eng. ed. 299. As to the rights of an audience at a theatre, *Rex v. Forbes*, 1 Crawf. & Dix C. C. 157; Vol. II. § 308, note. And see the subject of this section further discussed, Vol. II. § 301-310.



## CHAPTER XL.

## PROTECTION TO INDIVIDUALS.

§ 544-546. Introduction.

547-564. Offences against Personal Preservation and Comfort.

565-590. Against acquiring and retaining Property.

591. Against Personal Reputation.

592, 593. Combinations to commit Private Injuries.

§ 544. **Scope of this Chapter.** — We have already seen something of the principles on which the criminal law casts its protection over the individual, and of the extent of such protection.<sup>1</sup> The purpose of this chapter is to lead that topic into minuter detail, in connection with a general survey of the part of the criminal field to which it relates.

§ 545. **Fair Ground.** — The main proposition, already explained, is, that, while one occupies what the law deems fair ground, assumes no unequal position, toward another in any controversy or fraud, he is not indictable, however deep the wrong he may inflict. And, on the other hand, he is indictable if he assumes unfair ground, and thus does an injury to the individual. Now, when we descend to the minuter discussion, we must call to our aid a distinction of another sort; namely, —

§ 546. **Two Kinds of Force — (Mental — Physical).** — There are two kinds of force known among men, — mental and physical. The physical force has its just uses, but it should never be wielded aggressively by one private person against another. If one, therefore, does wield it thus to another's injury, he disturbs the order of the community; and, violating its repose, assumes toward his victim an unfair ground. But it is otherwise with mental force. Though, through it, a wrong is often done to an individual, its employment is, within certain limits, deemed on the whole a public benefit. Still there is an unfair ground, which

<sup>1</sup> Ante, § 231-233, 250-253.

one may occupy, in the employment even of this force; and when, from such ground, he injures an individual by it, he is indictable. In other words, the use of physical force, to the injury of a private person, is of itself an assumption of unfair ground toward him; but the use of mental force is not such of itself, yet it may become such from the manner of its use, or from special circumstances attending the particular instance. Carrying these distinctions in our minds, —

**How the Chapter divided.** — We shall consider, I. Offences against the Right of Personal Preservation and Comfort; II. Offences against the Right of Acquiring and Retaining Property; III. Offences against Personal Reputation; IV. Combinations to commit Private Injuries.

### *I. Offences against the Right of Personal Preservation and Comfort.*

§ 547. **Homicide.** — The heaviest offence against the individual is the unjustifiable taking away of his life, called felonious homicide. The common law divides it into murder and manslaughter; that is, what in this country is termed the common law does, though the division proceeded from an early English statute.<sup>1</sup> And there are in many of the States other divisions also, introduced by statutes.<sup>2</sup> We have seen,<sup>3</sup> that it is likewise a crime against the public.

**Mayhem.** — Another like offence, but less grave, is mayhem.<sup>4</sup> It is an injury to a man by which he is rendered less able, in fighting, to defend himself or annoy his adversary.<sup>5</sup>

§ 548. **Assault and Battery.** — Two offences against the person and personal security, usually existing in the facts of cases together, and practically regarded by the law as one, are assault<sup>6</sup> and battery.<sup>7</sup> A battery is any unlawful beating, or other wrongful physical violence or constraint,<sup>8</sup> inflicted on a human being without his consent;<sup>9</sup> an assault is less than a battery, where the

<sup>1</sup> Vol. II. § 623-628; Crim. Proced. II. § 498 et seq.

<sup>2</sup> Ante, § 409; Vol. II. § 728-731.

<sup>3</sup> Ante, § 510.

<sup>4</sup> Ante, § 257, 259, 513.

<sup>5</sup> Vol. II. § 1001.

<sup>6</sup> Vol. II. § 22 et seq.

<sup>7</sup> Vol. II. § 70 et seq.

<sup>8</sup> Long v. Rogers, 17 Ala. 540; Reg. v. Cotesworth, 6 Mod. 172; Edsall v. Russell, 6 Jur. 996; Pike v. Hanson, 9 N. H. 491.

<sup>9</sup> Ante, § 258-260.

violence is cut short before actually falling; being committed whenever a reasonable apprehension of immediate physical injury, from a force already partly or fully put in motion, is created.<sup>1</sup> An assault is included in every battery.<sup>2</sup>

§ 549. **Noise to injure Sick Person.** — In like manner, if one knows that another is sick, and that the discharge of a gun near him will make him worse, yet discharges the gun producing the effect, this is indictable at the common law.<sup>3</sup>

§ 550. **Reason why — (Assault and Battery).** — These offences are generally spoken of in the books as breaches of the peace,<sup>4</sup> which in a qualified sense they are. But they are more. For the common law deems, that one assumes toward another unfair ground, and gives occasion for public interposition, when wrongfully undertaking to injure him by any kind of physical force.<sup>5</sup> There are, indeed, passages in the books in effect denying this, by maintaining that, in these cases, the liability to indictment rests solely on the disturbance to the public repose. But that such is not the doctrine of the law is plain; because, in considering these offences, it never inquires whether the act was committed under circumstances to create a public tumult. If the accused person inflicted unjustifiable blows, however privately, even on an infant<sup>6</sup> a day old, having no power to create a tumult or to revenge them, and no knowledge of the wrong, it holds him to be guilty of the offence.<sup>7</sup>

§ 551. **Further of Reasons — Erroneous Old Dicta, &c.** — Nothing so embarrasses the progress of true legal learning as the tenacity with which judges and text-writers adhere to such ancient forms of expression as, falling inadvertently from the lips of some old

<sup>1</sup> Vol. II. § 23; *Stephens v. Myers*, 4 Car. & P. 349; *The State v. Davis*, 1 Ire. 125; *The State v. Crow*, 1 Ire. 375; *The State v. Morgan*, 3 Ire. 186; *The State v. Cherry*, 11 Ire. 475; *Commonwealth v. Eyre*, 1 S. & R. 347; *The State v. Sims*, 3 Strob. 137; *United States v. Hand*, 2 Wash. C. C. 435; *The State v. Blackwell*, 9 Ala. 79; *Reg. v. St. George*, 9 Car. & P. 483; *Blake v. Barnard*, 9 Car. & P. 626; *The State v. Smith*, 2 Humph. 457.

<sup>2</sup> 1 Hawk. P. C. 6th ed. c. 62, § 1. And see, on this, and as additional to the above notes, *Reg. v. Case*, 1 Den. C. C. 580, 1 Eng. L. & Eq. 544, Temp. & M.

318, 4 Cox C. C. 220; *Anonymous*, 1 East P. C. 305; *Reg. v. Button*, 8 Car. & P. 660; *Forde v. Skinner*, 4 Car. & P. 289; *Rex v. Nichol*, Russ. & Ry. 130; *Evans v. The State*, 1 Humph. 394; *The State v. Freels*, 3 Humph. 228; *Rex v. Ridley*, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653; *Reg. v. Miles*, 6 Jur. 243; *Rex v. Rosinski*, 1 Moody, 19; *Keay's Case*, 1 Swinton, 543

<sup>3</sup> *Commonwealth v. Wing*, 9 Pick. 1.

<sup>4</sup> Ante, § 536.

<sup>5</sup> Ante, § 252, 545, 546.

<sup>6</sup> *Commonwealth v. Stoddard*, 9 Allen, 280.

<sup>7</sup> See ante, § 232, 258, 274.

judge, or erroneously reported to have done so, have come to us conveying no correct legal meaning. The language in which a judicial opinion is clothed constitutes no part of the law of the case; and, though mere words transmitted to us from the bench are, if words of wisdom, properly regarded with respect, yet when they are inconsiderate and inaccurate, they should not be permitted to disfigure the pages of books in after times.

§ 552. *Continued.* — These observations are applicable, not only to the foregoing offences, but also to most of the others mentioned in this chapter. And it is not easy to see how lawyers, from generation to generation, could be so deluded by a form of inaccurate and careless words as to hold these various offences to be indictable solely as wrongs to the community.

§ 553. *Other Physical Wrongs.* — There are other physical wrongs, indictable on the same ground with those already mentioned. To some of these, as well as to those, the law has given specific names; as —

**Kidnapping — False Imprisonment.** — Kidnapping<sup>1</sup> and false imprisonment,<sup>2</sup> two offences against the individual, of which the latter is included in the former,<sup>3</sup> are punishable by the common law.

**Robbery.** — Robbery, another common-law offence, is a violent larceny from the person (or from the immediate presence, which is termed in law the person<sup>4</sup>) of one usually,<sup>5</sup> not always,<sup>6</sup> assaulted. Or, in more apt legal phrase, it is larceny committed by violence from the person of one put in fear.<sup>7</sup>

<sup>1</sup> 4 Bl. Com. 219; 1 East P. C. 429; *The State v. Rollins*, 8 N. H. 550; *Rex v. Baily*, Comb. 10.

<sup>2</sup> 4 Bl. Com. 218; *Floyd v. The State*, 7 Eng. 43. And see *Breck v. Blanchard*, 2 Fost. N. H. 303; *Pike v. Hanson*, 9 N. H. 491; Vol. II. § 746 et seq.

<sup>3</sup> *Click v. The State*, 3 Texas, 282; Vol. II. § 750.

<sup>4</sup> *Rex v. Peat*, 1 Leach, 4th ed. 228; *Rex v. Lapier*, 1 Leach, 4th ed. 320, 321; Vol. II. § 1177, 1178.

<sup>5</sup> *Kit v. The State*, 11 Humph. 167; *Commonwealth v. Snelling*, 4 Binn. 379; *Rex v. Mason*, Russ. & Ry. 419; *Rex v. Edwards*, 5 Car. & P. 518; s. c. nom. *Rex v. Edward*, 1 Moody & R. 257; *United States v. Jones*, 3 Wash. C. C. 209, 216; *Rex v. Fallows*, 5 Car. & P. 508; *Rex v.*

*Simons*, 2 East P. C. 731; 2 East P. C. 707; *Rex v. Moore*, 1 Leach, 4th ed. 335; *Rex v. Knewland*, 2 Leach, 4th ed. 721.

<sup>6</sup> *Rex v. Donnally*, 1 Leach, 4th ed. 193; 2 East P. C. 713, 783; *Rex v. Elmstead*, 1 Russ. Crimes, 3d Eng. ed. 894; *Rex v. Jones*, 2 East P. C. 714, 715, 1 Leach, 4th ed. 139; *Rex v. Harrold*, 2 East P. C. 715; *Rex v. Hickman*, 1 Leach, 4th ed. 278, 2 East P. C. 728; *Rex v. Astley*, 2 East P. C. 729; *Rex v. Brown*, 2 East P. C. 731; *Rex v. Reane*, 2 East P. C. 734, 2 Leach, 4th ed. 616; *Rex v. Gardner*, 1 Car. & P. 479; *Britt v. The State*, 7 Humph. 45; *Rex v. Egerton*, Russ. & Ry. 375; *Rex v. Fuller*, Russ. & Ry. 408; *Reg. v. Stringer*, 2 Moody, 261; *People v. McDaniels*, 1 Parker C. C. 198.

<sup>7</sup> Vol. II. § 1156.

§ 554. **Rape.** — There is no form of violence more odious either in law or in morals than rape. It is the having of unlawful carnal knowledge, by a man of a woman, forcibly and against her will,<sup>1</sup> or when she does not consent;<sup>2</sup> and it is committed only by a male person (that is, as principal in the first degree), arrived at his age of legal puberty, which is conclusively fourteen years.<sup>3</sup> Puberty in the female is not essential.<sup>4</sup>

§ 555. **Forcible Marriage (or Abduction).** — Every form of unlawful physical constraint being indictable, it is particularly so to carry off forcibly a woman to marry her against her will.<sup>5</sup> For the force is greatly aggravated by this intent. An old English statute, 3 Hen. 7, c. 2, made such forcible abduction, if for lucre, the woman being an heiress, felony;<sup>6</sup> but whether this statute is common law with us is a question not settled by adjudication.<sup>7</sup>

§ 556. **Further of Physical Force.** — Let us proceed to further illustrations, — the doctrine being, it is remembered,<sup>8</sup> that one is indictable for every wrongful act of physical force, whereby he injures another.

**Acting through Agent — Physical Elements.** — It is not necessary the force should be immediate and direct; we have already seen, that a crime may be committed through the instrumentality of a third person, innocent or guilty;<sup>9</sup> so may it be equally through the agency of the physical elements. Thus, —

§ 557. **Abandoning Child or Servant — Neglect to provide — (Assault — Homicide).** — If one exposes or abandons a child, incapable of taking care of itself, to cold or wet, whereby it receives an injury, he is indictable for misdemeanor;<sup>10</sup> or, if the child dies,

<sup>1</sup> Vol. II. § 1113; 4 Bl. Com. 210; 1 Hale P. C. 628; 1 East P. C. 434; 1 Russ. Crimes, 3d Eng. ed. 675; The State v. Jim, 1 Dev. 142; Reg. v. Camplin, 1 Car. & K. 746, 1 Den. C. C. 89, 1 Cox C. C. 220; Reg. v. Hallet, 9 Car. & P. 748; Rex v. Jackson, Russ. & Ry. 487; The State v. Shepard, 7 Conn. 54.

<sup>2</sup> Vol. II. § 1114, 1115.

<sup>3</sup> Ante, § 373, it appearing, however, that some courts allow evidence of actual puberty in boys under fourteen. See Vol. II. § 1117.

<sup>4</sup> Vol. II. § 1118.

<sup>5</sup> **Attempt.** — So the attempt is indictable at common law. Rex v. Pigot, Holt, 758; Stat. Crimes, § 619.

<sup>6</sup> 4 Bl. Com. 208; 1 Hawk. P. C. 6th ed. c. 42; 1 East P. C. 452; Reg. v. Swanson, 7 Mod. 101, 102; Reg. v. Whistler, 7 Mod. 129, 132.

<sup>7</sup> Stat. Crimes, § 618. We have statutes of our own against this and analogous offences, as see Stat. Crimes, § 614-652.

<sup>8</sup> Ante, § 546, 548.

<sup>9</sup> Ante § 310; post, § 564, 631, 673, 677.

<sup>10</sup> Reg. v. Renshaw, 11 Jur. 615, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Reg. v. Mulróy, 3 Crawford & Dix C. C. 318; Reg. v. Cooper, 1 Den. C. C. 459, Temp. & M. 125, 13 Jur. 502; Reg. v. Hogan, 5 Eng. L. & Eq. 553, 2 Den. C. C. 277, 15 Jur.

for a felonious homicide.<sup>1</sup> And the same consequence follows if he neglects,<sup>2</sup> being under legal obligation, to furnish it with suitable food and clothing;<sup>3</sup> or thus neglects a servant, apprentice, or other person, where there is a legal duty.<sup>4</sup>

§ 558. **Malpractice by Physician.** — We have seen, that, if a medical man takes the life of a patient by gross malpractice, he is answerable for a felonious homicide;<sup>5</sup> so, if the injury falls short of the deprivation of life, he may be punished for a misdemeanor.<sup>6</sup> And —

**Unwholesome Food.** — Partly on this ground rests the offence, already mentioned,<sup>7</sup> of providing unwholesome food to be consumed in the community.<sup>8</sup>

§ 559. **Burglary — Arson.** — Dwelling-places are built to protect people from the physical elements and from the violence of beasts and men. Offences, therefore, against the habitation are indirectly such against the person. Of these, the common law has two, burglary and arson. The former<sup>9</sup> is the breaking<sup>10</sup> and entering,<sup>11</sup> in the night,<sup>12</sup> of another's dwelling-house,<sup>13</sup> with intent to commit a felony therein.<sup>14</sup> The latter<sup>15</sup> is the malicious<sup>16</sup> burning<sup>17</sup> of another's house.<sup>18</sup>

805; Gibson's case, 2 Broun, 366; Reg. v. Phillpot, 20 Eng. L. & Eq. 591.

<sup>1</sup> Reg. v. Waters, 1 Den. C. C. 356, Temp. & M. 57, 13 Jur. 130.

<sup>2</sup> Ante, § 241, 316, 317, 433; Vol. II. § 643, 659-662, 696.

<sup>3</sup> Rex v. Friend, Russ. & Ry. 20; Rex v. Smith, 2 Car. & P. 449.

<sup>4</sup> Rex v. Ridley, 2 Camp. 650; Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 19; Reg. v. Pelham, 8 Q. B. 959, 10 Jur. 659, 15 Law J. n. s. M. C. 105; Rex v. Warren, Russ. & Ry. 47, note; Rex v. Meredith, Russ. & Ry. 46; Rex v. Booth, Russ. & Ry. 47, note; Reg. v. Gould, 1 Salk. 381; Rex v. Clerke, 2 Show, 193; Rex v. Barney, Comb. 405; Rex v. Friend, Russ. & Ry. 20.

<sup>5</sup> Ante, § 217, 314.

<sup>6</sup> Greonvelt's Case, 1 Ld. Raym. 213; Parke, J. in Rex v. Long, 4 Car. & P. 398, 405.

<sup>7</sup> Ante, § 484, 491.

<sup>8</sup> Treeve's Case, 2 East P. C. 821.

<sup>9</sup> Vol. II. § 90.

<sup>10</sup> Stat. Crimes, § 290, 312.

<sup>11</sup> Rex v. Rust, 1 Moody, 183; Rex v.

Roberts, Car. Crim. Law, 3d ed. 293; Rex v. Bailey, Russ. & Ry. 341; Rex v. Bailey, 1 Moody, 23; The State v. McCall, 4 Ala. 643; Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex v. Davis, Russ. & Ry. 499.

<sup>12</sup> Stat. Crimes, § 276.

<sup>13</sup> Stat. Crimes, § 277-287.

<sup>14</sup> 1 Russ. Crimes, 3d Eng. ed. 785; ante, § 427; Commonwealth v. Newell, 7 Mass. 245; The State v. Wilson, Cox, 439; The State v. Bancroft, 10 N. H. 105; Lewis v. The State, 16 Conn. 32; Rex v. Knight, 2 East P. C. 510; Reg. v. Segar, Comb. 401; Rex v. Dobbs, 2 East P. C. 513; Rex v. Dingley, cited 1 Show. 53; The State v. Cooper, 16 Vt. 551.

<sup>15</sup> Vol. II. § 8.

<sup>16</sup> Ante, § 427-429.

<sup>17</sup> Stat. Crimes, § 310.

<sup>18</sup> Stat. Crimes, § 277, 289; ante, § 329, 384; 2 Russ. Crimes, 3d Eng. ed. 548; 4 Bl. Com. 220; 2 East P. C. 1015; Bloss v. Tobey, 2 Pick. 820, 325; Curran's Case, 7 Grat. 619; Sullivan v. The State, 5 Stew. & P. 175; Ritchey v. The State, 7 Blackf. 168; McNeal v. Woods, 8 Blackf.

§ 560. **Mental Force** — (“**Cruelty**” in **Divorce Law**). — The foregoing are illustrations of the law’s protection to the person against wrongful physical force. Mental force,<sup>1</sup> when directed against the personal safety and comfort, is not, like physical, universally indictable. But we shall see under the next sub-title, that, in some circumstances, it is so when employed to injure a man in his pecuniary interests;<sup>2</sup> and, in reason, it should be equally so when directed against his physical well-being. Practically, this question cannot often arise; because it is seldom that what proceeds only from the mind, with no aid from any thing physical, can injure a person in his physical existence. And there is no authority for holding that the production of mental unhappiness, by whatever means, is indictable. Even in matrimonial law, as administered in England and in most of our States, it is not, however extreme, the cruelty which authorizes a divorce.<sup>3</sup> And in the criminal law, we have seen, that one is not punishable for going frequently to a neighbor’s house and so abusing his family as to render their lives uncomfortable.<sup>4</sup> Yet in matrimonial law, according to the better opinion, it is cruelty for a husband to injure his wife physically, as in her health, by conduct addressed primarily to her mind.<sup>5</sup> Assuming, then, that a physical injury produced by mental causes is in like manner indictable, still it results from the differing nature of the criminal law, that the mental force must be of a sort, or attended by circumstances, to place him who employs it on unequal ground toward the other.<sup>6</sup> Thus, —

**Yielding to Persuasion — Kidnapping.** — In a North Carolina case, *Pearson, J.*, observing upon the construction of a statute against carrying free negroes out of the State to make slaves of them, said: “As a subject of the State, he [the free negro] has a right to expect protection against force; but, if he yields to seduction or persuasion, or allows himself to be beguiled by fraud, and of his own accord goes out of the State, it is his own folly.

485; *Rex v. Pedley*, Cald. 218, 1 Leach, 4th ed. 242, 2 East P. C. 1026; *Rex v. Scofield*, Cald. 397; *Rex v. Spalding*, 1 Leach, 4th ed. 218, 2 East P. C. 1025; *Rex v. Breeme*, 1 Leach, 4th ed. 220, 2 East P. C. 1026; *Rex v. Gowen*, 2 East P. C. 1027, 1 Leach, 4th ed. 246, note; *Rex v. Harris*, 2 East P. C. 1023.

<sup>1</sup> Ante, § 546.

<sup>2</sup> Post, § 581-589.

<sup>3</sup> 1 Bishop Mar. & Div. § 722-725.

<sup>4</sup> *Commonwealth v. Edwards*, 1 Ashm. 46; ante, § 538.

<sup>5</sup> 1 Bishop Mar. & Div. § 728-732.

<sup>6</sup> Ante, § 252, 545; post, § 581, 592, 585-588.

And although he has the protection of the State, and can bring an action for damages, he has no right to call for protection by the use of the strong arm of the criminal law, when he consents to the act, and does it of his own folly.”<sup>1</sup>

§ 561. **How in Principle.**— Nothing can be clearer in legal principle than that, in the proper circumstances, mental force employed to create a physical injury to an individual may be punishable. For while it is established, that, as to various other things, particularly as to property, there can be guile or fraud cognizable by the criminal law,—being, indeed, a plain and admitted ground of common-law liability to indictment,—surely such guile or fraud employed to the detriment of a man’s physical nature deserves reprehension, and merits punishment, quite as much as if it merely took away a little of his property.

§ 562. **Mental Force in Homicide.**— If life may be taken by mental force, and the act of so taking it be deemed murder or manslaughter, that will settle the entire question. Lord Hale says: “If a man either by working upon the fears of another, or possibly by harsh or unkind usage, put another into such passion of grief or fear that the party either die suddenly or contract some disease whereof he dies;” this, though murder or manslaughter in the sight of God, is not such at the common law, because of the difficulty of making proof.<sup>2</sup> And later elementary writers follow Hale.<sup>3</sup> But this proposition rests merely on private opinion, having never been affirmed in adjudication. And

<sup>1</sup> The State v. Weaver, Busbee, 9, 12.

<sup>2</sup> 1 Hale P. C. 429.

<sup>3</sup> 1 East P. C. 225. And see Commissioners Phillips & Walcott’s Report on the Penal Code of Massachusetts, A. D. 1844, tit. Homicide, p. 12, note. These commissioners recommend that it be not an indictable homicide “to occasion death by the operation of words or signs upon the imagination of persons.” They say this rule accords with the French code. They also deem it to be the rule of both the common and the Scotch law; but they add, that the British commissioners recommended the opposite for the code in India. As to the common law, they cite simply Lord Hale, and writers who cite him. As to the Scotch law, they refer to 1 Hume Crim. Law, 267, 2d ed. 177,—an authority which

hardly sustains them. For instance, it is there said: “Among other charges against Patrick Kinminmouth is that of breaking into a person’s house, and grievously alarming his wife, recently delivered, to the great injury (the libel says) of her health, and so that her child died, soon after, at her breast. *The interlocutor sustains the personal injury done to the mother as a ground of arbitrary pain; but it takes no notice of the death of the child.*” The learned Scotch author cites this case, with another, to the point that the death must sufficiently appear to have been caused by the injury alleged in the libel. So much it shows; and also shows, it seems to me, that the principle of the Scotch law is not in accordance with the recommendation of the Massachusetts commissioners.



the reason assigned by this eminent authority is unsatisfactory; since — why cast out from court a case, the proof of which is plain, simply because it may be difficult to prove cases not in court? On the other hand, a learned judge more recently said to the jury: “A man may throw himself into a river under such circumstances as to render it not a voluntary act, by reason of force *applied either to the body or to the mind*. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded.”<sup>1</sup> And —

**Command from a Superior.** — There are other cases which recognize the doctrine, that threats,<sup>2</sup> or a command from one who stands in a relation entitling him to command,<sup>3</sup> requiring an act dangerous in itself, and not necessary to be performed, in consequence of which the person threatened or commanded does what causes his death, may lay the foundation for an indictment.

§ 563. **Mental Force in Homicide, continued.** — These cases may not be deemed to meet directly and fully the point of our present inquiry, but they do in effect. When one, who sustains to another a relation entitling him to command, compels by a mere unlawful order, accompanied or not by threats of violence, the person in subjection to do an act which causes his death, he applies mental force alone. The person threatened is not moved by external physical impulses to obey; the threat, indeed, is no more a physical force than is a lecture from a moralist, who inculcates the doctrine of physical suffering following immoral acts; but the force is purely mental, from mind to mind.

§ 564. **Distinguished from Act through Another.** — This doctrine, of the indictability of mental force, is not related to the familiar one, that he whose will contributes to an act performed by the physical volition of another is in law guilty. As resting on the latter doctrine, —

**Procuring Capital Conviction by Perjury — (Homicide).** — The old common law held it to be murder intentionally to cause the death of a human being, on trial for his life, by appearing as a witness against him, and committing perjury.<sup>4</sup> So all the books

<sup>1</sup> Erskine, J. in *Reg. v. Pitts*, Car. & M. 284.

<sup>2</sup> *Rex v. Evans*, 1 Russ. Crimes, 3d Eng. ed. 489.

<sup>3</sup> *United States v. Freeman*, 4 Mason, 505.

<sup>4</sup> 1 Russ. Crimes, 3d Eng. ed. 494. And see 1 Hawk. P. C. 6th ed. c. 31, § 7.

say; but there is room for doubt whether this was ever truly the law. Perjury is an offence distinct from murder: the inflicting of a capital punishment, by officers of the law, in conformity to a judicial record, can hardly be deemed the act of the false witness; and, should we undertake to regard the government as the innocent agent of the witness,<sup>1</sup> there is a difficulty in making the act and intent appear concurrent in point of time,<sup>2</sup> because he has lost power over this agent, and he cannot prevent the execution if he repents. Probably this old doctrine is not to be deemed law at the present day.<sup>3</sup>

<sup>1</sup> Ante, § 310.

<sup>2</sup> Ante, § 207.

<sup>3</sup> 1. 1 Russ. Crimes, 3d Eng. ed. 494, 495; Commissioners Phillips & Walcott's Report on the Penal Code of Massachusetts A. D. 1844, tit. Homicide, p. 11, note; *Rex v. Macdaniel*, 1 Leach, 4th ed. 44. See, as illustrative, *Peckham v. Tomlinson*, 6 Barb. 253.

2. **Statutory Offences within this Sub-title.**—My endeavor, in the text, has been to present a view of the common law of the subject. Probably every one of the offences there mentioned has been more or less legislated upon. Arson, for example, which by the common law can be committed only of a house, has been made to include the burning of shops, and other structures not used for habitation. And burglary has been extended in like manner. These extensions are considered, in connection with the common-law offences, in the second volume. And there are more or less distinct crimes, created by statutes, discussed in "Statutory Crimes." Two, of considerable consequence, not included within either of those volumes, yet not such as it is deemed best to occupy much space with, are the Slave Trade and Revolt.

3. **The Slave Trade.**—There are statutes, English and American, intended to suppress the carrying away of slaves from Africa, and the trading in them. See R. S. of U. S. § 629, 1046, 5375, 5382, 5551–5569. But questions do not often arise under these statutes, therefore a mere reference to the adjudications is sufficient. Besides, the slave trade, with slavery, is passing away. The *Josefa Segunda*, 5 Wheat. 338; The *Emily*, 9

Wheat. 381; The *St. Jago de Cuba*, 9 Wheat. 409; The *Antelope*, 10 Wheat. 66; *United States v. Gooding*, 12 Wheat. 460; *United States v. Preston*, 3 Pet. 57; *United States v. The Garonne*, 11 Pet. 73; *United States v. The Amistad*, 15 Pet. 518; *United States v. Schooner Kitty, Bee*, 252; *United States v. Smith*, 4 Day, 121; *Fales v. Mayberry*, 2 Gallis. 560; *United States v. La Coste*, 2 Mason, 129; *La Jeune Eugénie*, 2 Mason, 409; The *Brig Alexander*, 3 Mason, 175; *United States v. Battiste*, 2 Sumner, 240; *United States v. Libby*, 1 Woodb. & M. 221; The *Brig Caroline*, 1 Brock. 384; *United States v. Kennedy*, 4 Wash. C. C. 91; *Brig Tryphenia v. Harrison*, 1 Wash. C. C. 522; The *Porpoise*, 2 Curt. C. C. 307; *United States v. Darnaud*, 3 Wal. Jr. 143; *Strohm v. United States*, Taney, 413; The *Slavers*, 2 Wal. 350, 375, 383; *United States v. Smith*, 3 Blatch. 255; *United States v. The Isla de Cuba*, 2 Clif. 295, 458, 2 Sprague, 26; *United States v. Catharine*, 2 Paine, 721; *United States v. Smith*, 2 Mason, 143; *United States v. Kelly*, 2 Sprague, 77; The *State v. Caroline*, 20 Ala. 19; *Neal v. Farmer*, 9 Ga. 555; *Commonwealth v. Greathouse*, 7 J. J. Mar. 590; *Commonwealth v. Griffin*, 7 J. J. Mar. 588; *Commonwealth v. Nix*, 11 Leigh, 636; The *State v. Turner*, 5 Harring. Del. 501; *Commonwealth v. Jackson*, 2 B. Monr. 402; *Commonwealth v. Griffin*, 3 B. Monr. 208. For the English law, see 1 Russ. Crimes, 3d Eng. ed. 163; *Reg. v. Zulueta*, 1 Car. & K. 215. *Reg. v. Serva*, 1 Den. C. C. 104, 2 Car. & K. 53.

4. **Revolt.**—Making and endeavoring to make a revolt or mutiny on shipboard are also statutory offences against the

## II. *Offences against the Right of acquiring and retaining Property.*

§ 565. **Order of this Discussion.** — We shall first call to mind, by name, the several common-law offences within this sub-title, and the definition or a general description of each, then inquire after the rules of law which govern them, as viewed in a sort of collective way. And, as we proceed, we shall now and then bring within our vision some statutory modification of the common law, or analogous statutory crime.

### § 566. *The Several Offences* : —

**Larceny.** — Larceny is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein ; and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.<sup>1</sup>

**Compound Larcenies.** — A larceny committed under certain circumstances of aggravation is termed a compound larceny.<sup>2</sup> Thus, —

**From the Person — from Shop — from Dwelling-house — Robbery.** — Of this class are larcenies from the person,<sup>3</sup> from the dwelling-house, from the shop,<sup>4</sup> robbery,<sup>5</sup> and the like ; a part of which, however, exist in their aggravated form only by force of statutes. Again, —

§ 567. **Receiving Stolen Goods.** — Under the old common law, it

United States. R. S. of U. S. § 5359, 5360. But a simple reference to authorities relating to these offences will be sufficient. *United States v. Kelly*, 11 Wheat. 417 ; *United States v. Savage*, 5 Mason, 460 ; *United States v. Smith*, 3 Wash. C. C. 525 ; *United States v. Smith*, 8 Wash. C. C. 78 ; *United States v. Smith*, 1 Mason, 147 ; *United States v. Keefe*, 3 Mason, 475 ; *United States v. Hamilton*, 1 Mason, 443 ; *United States v. Barker*, 5 Mason, 404 ; *United States v. Gardner*, 5 Mason, 402 ; *United States v. Haines*, 5 Mason, 272 ; *United States v. Morrison*, 1 Sumner, 448 ; *United States v. Matthews*, 2 Sumner, 470 ; *United States v. Ashton*, 2 Sumner, 13 ; *United States v. Cassidy*, 2 Sumner, 582 ; *United States v.*

*Forbes*, Crabbe, 558 ; *United States v. Borden*, 1 Sprague, 374 ; *United States v. Nye*, 2 Curt. C. C. 225 ; *Ely v. Peck*, 7 Conn. 239 ; *Galloway v. Morris*, 3 Yeates, 445.

<sup>1</sup> For other definitions, and authorities to sustain them and this one, see Vol. II. § 758, note.

<sup>2</sup> Vol. II. § 892 et seq.

<sup>3</sup> 2 East P. C. 700, 703-706 ; *Commonwealth v. Dimond*, 3 Cush. 235 ; *Rex v. Thompson*, 1 Moody, 78 ; *Reg. v. Walls*, 2 Car. & K. 214.

<sup>4</sup> See Stat. Crimes, § 238 ; *Reg. v. Ashley*, 1 Car. & K. 198 ; *The State v. Chambers*, 6 Ala. 855.

<sup>5</sup> Ante, § 553 ; Vol. II. § 892, 1158.

was an indictable misprision to receive stolen goods knowing them to be stolen ; but, before this country was settled, the receiver was by statute made an accessory after the fact.<sup>1</sup> In our States generally, the receiving is now, by statute, a substantive offence.

**Embezzlement.** — Embezzlement is a sort of statutory larceny, committed by servants and other like persons where there is a trust reposed, and therefore no trespass, so that the act would not be larceny at the common law.<sup>2</sup>

§ 568. **Malicious Mischief.** — There is an offence at the common law known as malicious mischief ; but it has been so much legislated upon, and some of the statutes are of dates so early, that its common-law limits are indistinct. Blackstone says, that it “ is such as is done, not *animo furandi*, or with an intent of gaining by another’s loss ; which is some, though a weak, excuse : but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson ; for, as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only a *trespass* at common law, is now by a multitude of statutes made penal in the highest degree.” And he goes on to enumerate several statutes which have elevated it to *felony*.<sup>3</sup>

§ 569. **How in our States** — (**Misapprehension from “Trespass”**). — As accurate a writer as Blackstone would, at the present day, use, in a passage like the above, the word “ misdemeanor,” where he has “ trespass.”<sup>4</sup> But if we consider the slight change which the current language of the law has undergone, the passage is plain. Some judges, however, not rightly apprehending it, and relying on his authority, have denied that this offence exists under the common law of this country ;<sup>5</sup> but the prevailing and better opinion is, that it does.<sup>6</sup>

<sup>1</sup> Post, § 699.

<sup>2</sup> See, as illustrating the nature of this offence, *Rex v. Grove*, 1 Moody, 447 ; *People v. Dalton*, 15 Wend. 581 ; *Reg. v. Chapman*, 1 Car. & K. 119 ; *Rex v. Taylor*, 8 B. & P. 596 ; *Reg. v. Jackson*, 1 Car. & K. 384 ; *Rex v. Hall*, Russ. & Ry. 463, 3 Stark. 67 ; *Commonwealth v. Simpson*, 9 Met. 138 ; *Reg. v. Creed*, 1 Car. & K. 63 ; *Commonwealth v. Libbey*, 11 Met. 64 ; *Rex v. Murray*, 5 Car. & P. 145, 1 Moody,

276 ; *Reg. v. Norman*, Car. & M. 501 ; *Rex v. Hodge*, 2 Leach, 4th ed. 1033, Russ. & Ry. 160 ; *The State v. Snell*, 9 R. I. 112 ; Vol. II. § 318 et seq.

<sup>3</sup> 4 Bl. Com. 243, 244.

<sup>4</sup> See post, § 625.

<sup>5</sup> *The State v. Wheeler*, 3 Vt. 344. And see *Illies v. Knight*, 3 Texas, 312 ; *Black v. The State*, 2 Md. 376.

<sup>6</sup> *People v. Smith*, 5 Cow. 258 ; *Loomis v. Edgerton*, 19 Wend. 419 ; *People v.*

**Limits of the Offence.** — One of the doubtful questions is, whether this offence extends at the common law to real property, or is limited to personal. The North Carolina court defined it to be, “the wilful destruction of some article of personal property, from actual ill-will or resentment towards its owner.”<sup>1</sup> And this definition, thus limiting it, is sustained alike by considerable authority<sup>2</sup> and legal reason. Other courts, with great force, maintain that it includes also injuries to real estate.<sup>3</sup> The statutes on this subject have generally, perhaps universally, extended it to real estate, the same as to personal.

§ 570. **How Limits in Reason.** — This question is of a sort which can be settled by no judicial reasoning; it must depend on authority.<sup>4</sup> On the one hand, it may be said that malicious mischief is of like nature with larceny; and, as the latter can be committed only of personal property, so therefore can the former. On the other hand, we have the view that all wrongful and wanton injuries to another’s property, whether real or personal, are, when of a certain degree of turpitude,<sup>5</sup> and with certain exceptions, an assumption of unfair ground toward him; <sup>6</sup> and, as such, are

Moody, 5 Parker, C. C. 568; Commonwealth v. Leach, 1 Mass. 59; The State v. Simpson, 2 Hawks, 460; The State v. Landreth, 2 Car. Law Repos. 446; The State v. Robinson, 3 Dev. & Bat. 130; Republica v. Teischer, 1 Dall. 335; The State v. Council, 1 Tenn. 305. And see Commonwealth v. Taylor, 5 Binn. 277. Shell v. The State, 6 Humph. 283, can hardly be understood as opposing our doctrine, but rather as indicating one of its limits.

**How in Scotland.** — A standard Scotch law writer says: “It may be affirmed generally, with respect to every act of great and wilful damage done to the property of another, and whether done from malice or misapprehension of right, that it is cognizable with us as a crime at common law; if it is done, as ordinarily happens, with circumstances of tumult and disorder, and of contempt and indignity to the owner. For instance, to enter a neighbor’s lands, with a convocation of servants and dependants, and cast down the houses, or root out or spoil the woods, or throw open and deface the enclosures; to break down, in the like fashion, the sluices and aqueducts of a mill; to break

or burn the boats and nets at a fishery, to tear and destroy the peats, turf, and fuel in a heath or moss; all these are competent articles of dittay. The same is true even of the bare usurpation of possession, though without any great damage done to the property, if it is accomplished with the show of a masterful force; so as to have a mixture of *riot*, as well as molestation or intrusion.” 1 Hume Crim. Law, 2d ed. 119.

<sup>1</sup> The State v. Robinson, 3 Dev. & Bat. 130.

<sup>2</sup> The State v. Helmes, 5 Ire. 364; Brown’s Case, 3 Greenl. 177. And see The State v. Burroughs, 2 Halst. 426; Commonwealth v. Powell, 8 Leigh, 719. See, as to destroying an account stated, Reg. v. Crisp, 6 Mod. 175 and notes.

<sup>3</sup> Loomis v. Edgerton, 19 Wend. 419; Comfort v. Fulton, 39 Barb. 56. And see Rex v. Westbeer, 2 Stra. 1133, 1 Leach 4th ed. 12; Rex v. Joyner, J. Kel. 29. For a fuller view of this question, see Vol. II. § 984, 985.

<sup>4</sup> Vol. II. § 984, 985.

<sup>5</sup> Ante, § 212 et seq.

<sup>6</sup> Post, § 574, 575.

indictable. The injury called larceny was by the common law separated from the mass and elevated to felony (so the reasoning will run); leaving the other injuries, whether to real or personal property, indictable as misdemeanors.<sup>1</sup> To repeat, then, this question cannot be settled by legal argumentation.

<sup>1</sup> **Statutory Malicious Mischiefs.**—

As to statutory malicious mischiefs, see Vol. II. § 983, 986–991, 994, 995, 997, 1000; and particularly Stat. Crimes, § 156, note, 246, 314, 431–449. There is one form of malicious mischief not there discussed; namely,—

*Destroying Vessels* :—

**Under United States Laws.**—The Revised Statutes of the United States make punishable, by fine and imprisonment, a conspiracy to destroy a vessel in order to defraud underwriters or persons having a lien upon it, and the building or fitting out of a vessel to be so destroyed. And they make it a capital offence actually to cast away or otherwise destroy the vessel for this purpose; also, without reference to underwriters and persons having liens, they make it capital for one not the owner “corruptly” to cast away or otherwise destroy a vessel “to which he belongs” on the high seas. And they make the unsuccessful attempt punishable, but less severely. These provisions are a mere re-enactment, with unimportant changes, of former ones; as see Act of March 26, 1804, and Act of March 3, 1825, 2 Stats. at Large, 290, and 4 Ib. 122. And see, as perhaps relating to some changes in phraseology, *Roberts v. The State*, 2 Head, 501; *United States v. Johns*, 1 Wash. C. C. 363, 4 Dall. 412. For English statutes which served as the originals of our own, see 2 East P. C. 1095 et seq. The meanings of some of the terms employed in this statute are explained in Statutory Crimes. Thus, “*Destroy*.”—This word does not require an irreparable disruption of the parts; it is satisfied when the vessel is unfitted for service beyond recovery by ordinary means. Stat. Crimes, § 224. And see § 214 and note, 223, 446. Therefore, when holes were bored in a vessel’s bottom, and she filled and was abandoned, but the crew of another vessel, finding her, pumped

her out and towed her to port, she was held to have been destroyed. *United States v. Johns*, 1 Wash. C. C. 363, 4 Dall. 412. And see *United States v. Vanranst*, 3 Wash. C. C. 146. But, says Mr. East, “If the ship be only run aground or stranded upon a rock, and be afterwards got off in a condition to be capable of being easily refitted, she cannot be said to be ‘cast away or destroyed.’” *De Londo’s Case*, 2 East P. C. 1098. “To injure any Person that may have underwritten,” &c.—A corporation is a “person” within this provision. Stat. Crimes, § 212. And, on a trial, the act of incorporation being proved, it is only further necessary to show that the company was *de facto* organized, and conducting as a corporation, and persons usually doing business as its officers signed the policy. It was also observed: “The law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or who shall underwrite, a policy thereon, which, for aught the prisoner knows, is valid; and does not prescribe that the policy should be valid so that a recovery could be had thereon. It points to the intended prejudice of an underwriter *de facto*.” *United States v. Amedy*, 11 Wheat. 392, 410, opinion by Story, J. **Conspiring.**—The act of March 3, 1825, making a conspiring punishable, was intended to protect the commerce on our rivers and lakes as well as on the high seas; and, as such, it does not exceed the constitutional power of Congress. *United States v. Cole*, 5 McLean, 513. **The Procedure.**—See, as to the form of the indictment and further as to the proofs, *United States v. McAvoy*, 4 Blatch. 418; *United States v. Johns*, 1 Wash. C. C. 363; *Reg. v. Kohn*, 4 Fost. & F. 68.

**Under State Laws.**—It seems to fol

§ 571. **Cheat at Common Law.** — The common-law cheat is important to be understood, though practically it is nearly superseded by the statutes against false pretences. It is a fraud accomplished through the instrumentality of some false symbol or token,<sup>1</sup> of a nature against which common prudence cannot guard,<sup>2</sup> to the injury<sup>3</sup> of one in some pecuniary interest. And there are indictable public wrongs analogous to cheat.<sup>4</sup> The English statute, 33 Hen. 8, c. 1,<sup>5</sup> against obtaining money or goods by a false privy token or counterfeit letter, affirmed the prior common law, to which it seems to have added little, if any thing;<sup>6</sup> and it is common law in this country.<sup>7</sup>

**False Pretences.** — Later English and American legislation has extended the doctrine to false pretences, where no symbol or token is employed.<sup>8</sup>

§ 572. **Forgery.** — One class of common-law cheats, including as well the unsuccessful attempt<sup>9</sup> as the executed act, is forgery.

low, from principles already discussed (see ante, § 152, and other places), that it is not competent for the States to punish offences of this sort, committed beyond their territorial limits. For illustration: The Massachusetts statute provides, that "whoever wilfully casts away, burns, sinks, or otherwise destroys a ship or vessel, with intent to injure or defraud any owner of such ship or vessel, or the owner of any property laden on board the same, or an insurer of such ship, vessel, or property, or of any part thereof, shall be punished," &c. Mass. Gen. Stats. c. 161, § 76. But though the writer is not able to refer to any decision of the question, it would seem the courts should not construe this statute to apply to acts committed out of the State; and, should they do so, the construction would render the statute so far unconstitutional.

<sup>1</sup> *Rex v. Lara*, 2 Leach, 4th ed. 647, 2 East P. C. 819, 6 T. R. 565; *Commonwealth v. Boynton*, 2 Mass. 77; *Reg. v. Jones*, 2 Ld. Raym. 1013; *Anonymous*, Lofft, 146; *Anonymous*, 7 Mod. 40; *Rex v. Govers*, Say. 206; *The State v. Grooms*, 5 Strob. 158; *People v. Stone*, 9 Wend. 182; *Commonwealth v. Warren*, 6 Mass. 72; *Respublica v. Teischer*, 1 Dall. 335; *Commonwealth v. Speer*, 2 Va. Cas. 65; *The State v. Patillo*, 4 Hawks, 348; *Peo-*

*ple v. Gates*, 13 Wend. 311, 319; *Respublica v. Powell*, 1 Dall. 47; *The State v. Wilson*, 2 Mill. 135, 139; *Hartmann v. Commonwealth*, 5 Barr. 60; *Rex v. Fowle*, 4 Car. & P. 592; *Rex v. Fawcett*, 2 East P. C. 862.

<sup>2</sup> *Anonymous*, 6 Mod. 105; *People v. Babcock*, 7 Johns. 201; *Cross v. Peters*, 1 Greenl. 376, 387; *Commonwealth v. Warren*, 6 Mass. 72; *People v. Stone*, 9 Wend. 182; *The State v. Stroll*, 1 Rich. 244; *The State v. Patillo*, 4 Hawks, 348; *Respublica v. Powell*, 1 Dall. 47. And see *Rex v. Flint*, Russ. & Ry. 460.

<sup>3</sup> *Rex v. Fawcett*, 2 East P. C. 862; *Commonwealth v. Davidson*, 1 Cush. 33; *Rex v. Dale*, 7 Car. & P. 352; *The State v. Little*, 1 N. H. 257, 258; *People v. Thomas*, 3 Hill, N. Y. 169; *People v. Galloway*, 17 Wend. 540. As to the limit of the doctrine on this point, see *The State v. Mills*, 17 Maine, 211.

<sup>4</sup> Vol. II. § 161-164.

<sup>5</sup> *Anonymous*, 6 Mod. 105, note; 2 East P. C. 826.

<sup>6</sup> 1 Gab. Crim. Law, 206.

<sup>7</sup> *Commonwealth v. Warren*, 6 Mass. 72. And see *Respublica v. Powell*, 1 Dall. 47.

<sup>8</sup> Vol. II. § 409 et seq.

<sup>9</sup> Ante, § 434, 437. It is said that forgery was indictable as a cheat at common

It is the false<sup>1</sup> making or materially altering,<sup>2</sup> with intent to defraud,<sup>3</sup> of any writing which, if genuine, might apparently be<sup>4</sup> of legal efficacy, or the foundation of a legal liability.<sup>5</sup> And the act may be equally forgery, though the person purporting to become liable in the writing is a mere fictitious name, because this may be equally an attempt to defraud.<sup>6</sup>

law only when successful. 2 East P. C. 825; 1 Gab. Crim. Law, 205. Clearly this must be so, owing to the distinction between a complete offence and an indictable attempt. Stat. Crimes, § 225 and note. But this distinction refers only to the form of the indictment; an unsuccessful forgery being an attempt to cheat. That there need be no fraud actually effected, see *The State v. Washington*, 1 Bay, 120; *Rex v. Crocker*, 2 Leach, 4th ed. 987, Russ. & Ry. 97, 2 New Rep. 87; *Rex v. Ward*, 2 Ld. Raym. 1461, 2 East P. C. 861; *Commonwealth v. Ladd*, 15 Mass. 526. Contra, *Reg. v. Boulton*, 2 Car. & K. 604.

<sup>1</sup> *Rex v. Story*, Russ. & Ry. 81; *Reg. v. Inder*, 1 Den. C. C. 325; *Rex v. Webb*, 3 Brod. & B. 228, Russ. & Ry. 405, cited 6 Moore, 447; *Rex v. Aickles*, 1 Leach, 4th ed. 438, 2 East P. C. 968; *The State v. Shurtliff*, 18 Maine, 368; *Mead v. Young*, 4 T. R. 28.

<sup>2</sup> *The State v. Floyd*, 5 Strob. 58; *The State v. Robinson*, 1 Harrison, 507; *Reg. v. Blenkinsop*, 1 Den. C. C. 276, 2 Car. & K. 531; *Rex v. Dawson*, 1 Stra. 19, 2 East P. C. 978; *Rex v. Post*, Russ. & Ry. 101; *Rex v. Treble*, 2 Leach, 4th ed. 1040, 2 Taunt. 328, Russ. & Ry. 164; *The State v. McLeran*, 1 Aikens, 311; *Rex v. Kinder*, 2 East P. C. 855; *The State v. Waters*, 2 Tread. 669; *The State v. Gherkin*, 7 Ire. 206; *The State v. Thornburg*, 6 Ire. 79; *The State v. Greenlee*, 1 Dev. 523; *People v. Fitch*, 1 Wend. 198.

<sup>3</sup> *Blake v. Allen*, Sir F. Moore, 619; *The State v. Odel*, 3 Brev. 552; *Reg. v. Cooke*, 8 Car. & P. 582; *Reg. v. Beard*, 8 Car. & P. 143, 148; *Grafton Bank v. Flanders*, 4 N. H. 239, 242; *People v. Peabody*, 25 Wend. 472; *Rex v. Crocker*, Russ. & Ry. 97, 2 New Rep. 87, 2 Leach, 4th ed. 987; *Reg. v. Page*, 8 Car. & P. 122; *Jackson v. Weisiger*, 2 B. Monr. 214; *The State v. Givens*, 5 Ala. 747. As to principles which limit this intent, see

*Reg. v. Hill*, 2 Moody, 30; *Rex v. Whiley*, Russ. & Ry. 90; *Reg. v. Beard*, 8 Car. & P. 143; *Reg. v. Wilson*, 2 Car. & K. 527, 1 Den. C. C. 284; *Rex v. Forbes*, 7 Car. & P. 224; *Reg. v. Parish*, 8 Car. & P. 94.

<sup>4</sup> *People v. Galloway*, 17 Wend. 540; 542; *Rex v. Teague*, Russ. & Ry. 33, 2 East P. C. 979; *De Bow v. People*, 1 Denio, 9; *Reg. v. Pike*, 2 Moody, 70; *Rex v. Deakins*, 1 Sid. 142; *Rex v. McIntosh*, 2 East P. C. 942; s. c. nom. *Rex v. Macintosh*, 2 Leach, 4th ed. 883; *Commonwealth v. Linton*, 2 Va. Cas. 476. Yet see *People v. Fitch*, 1 Wend. 198.

<sup>5</sup> *Ames's Case*, 2 Greenl. 365; *Rex v. Jones*, 2 East P. C. 991; *Reg. v. Tosaek*, 1 Den. C. C. 492; *Commonwealth v. Ayer*, 3 Cush. 150; *The State v. Smith*, 8 Yerg. 150; *Rex v. Knight*, 1 Salk. 375, 1 Ld. Raym. 530; *Reg. v. King*, 7 Mod. 150; *Rex v. O'Brian*, 7 Mod. 378; *Rex v. Harris*, 1 Moody, 393; *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560; *Harris v. People*, 9 Barb. 664; *The State v. Van Hart*, 2 Harrison, 327; *Van Horne v. The State*, 5 Pike, 349; *Reg. v. Boulton*, 2 Car. & K. 604; *Commonwealth v. Chandler*, Thacher Crim. Cas. 187; *Rex v. Burke*, Russ. & Ry. 496; *Commonwealth v. Mycall*, 2 Mass. 136; *Barnum v. The State*, 15 Ohio, 717; *Rex v. Ward*, 2 Ld. Raym. 1461, 2 Stra. 747; *Rex v. Harris*, 6 Car. & P. 129; *Rex v. Wall*, 2 East P. C. 953; *Rex v. Gade*, 2 Leach, 4th ed. 732, 2 East P. C. 874; *Upfold v. Leit*, 5 Esp. 100; *Foulkes v. Commonwealth*, 2 Rob. Va. 836; *The State v. Jones*, 1 Bay, 207; *The State v. Guttridge*, 1 Bay, 285; *People v. Cady*, 6 Hill, N. Y. 490.

<sup>6</sup> *Rex v. Marshall*, Russ. & Ry. 75; *Rex v. Taft*, 1 Leach, 4th ed. 172, 2 East P. C. 959; *People v. Peabody*, 25 Wend. 472; *Rex v. Peacock*, Russ. & Ry. 278; *Rex v. Bontien*, Russ. & Ry. 260; *Reg. v. Hill*, 2 Moody, 30; *Rex v. Francis*, Russ. & Ry. 209; *Rex v. Shepherd*, 2 East P.



§ 572 a. **Fraudulent Conveyance — (Secreting — Mortgaged, &c.)**

— The statute of 13 Eliz. c. 5, against fraudulent conveyances, is very familiar in our civil jurisprudence. It is, in its principal provisions, common law in our States.<sup>1</sup> By § 3, “all and every the parties” to the fraudulent conveyance, “and being privy and knowing of the same,” who “shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same” as being true “and upon good consideration,” or “shall alien, &c., any the lands, &c., goods, leases, or other things to him, &c., conveyed as is aforesaid, &c., shall incur the penalty and forfeiture, &c., and also being thereof lawfully convicted shall suffer imprisonment for one-half year without bail or mainprise.” An indictment lies upon this statute in England,<sup>2</sup> and there is no reason why it should not also in our States. But the author is unable to refer to any case in which this proceeding has actually been attempted. Yet, in some of our States, there are similar statutes, generally in broader terms, and extending to secreting property, selling it when mortgaged, and the like, on which there have been indictments.<sup>3</sup>

C. 967; s. c. nom. *Rex v. Sheppard*, 1 Leach, 4th ed. 226; *Rex v. Parkes*, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992; *Rex v. Bolland*, 1 Leach, 4th ed. 83, 2 East P. C. 958; *Rex v. Lewis*, 2 East P. C. 957, Foster, 116; *Rex v. Whiley*, Russ. & Ry. 90; *Commonwealth v. Chandler*, Thacher Crim. Cas. 187; *The State v. Givens*, 5 Ala. 747; *Rex v. Wilks*, 2 East P. C. 957; *Reg. v. Avery*, 8 Car. & P. 596; *Rex v. Dunn*, 1 Leach, 4th ed. 57.

<sup>1</sup> 1 Bishop Mar. Women, § 737-740; Report of Judges, 3 Binn. 595, 621; Kilty Rep. Stats. 234.

<sup>2</sup> *Reg. v. Smith*, 6 Cox C. C. 31.

<sup>3</sup> *People v. Underwood*, 16 Wend. 546; *People v. Morrison*, 13 Wend. 399; *Commonwealth v. Brown*, 15 Gray, 189; *Commonwealth v. Strangford*, 112 Mass. 289; *Commonwealth v. Damon*, 105 Mass. 580; *The State v. Marsh*, 36 N. H. 196; *The State v. Small*, 31 Texas, 184; *The State v. Devereaux*, 41 Texas, 383; *Stow v. People*, 25 Ill. 81; *People v. Stone*, 16 Cal. 369; *People v. Garnett*, 35 Cal. 470; *Goodenough v. Spencer*, 46 How. Pr. 347. And see *Christopher v. Van Liew*, 57 Barb. 17. Of the like kind with the offences mentioned in our text are —

**Frauds against Bankrupt Acts.**—

It is not proposed to discuss these frauds. There have long been statutes in England against them and the like, under the insolvent laws; as see 1 Hawk. P. C. Curw. ed. p. 586, 588; 2 Russ. Crimes, 3d Eng. ed. 228 et seq., 235; 4 Bl. Com. 156. And the English books contain various reported cases on this subject, as — *Rex v. Mitchell*, 4 Car. & P. 251; *Rex v. Walters*, 5 Car. & P. 138; *Reg. v. Radcliffe*, 2 Moody, 68; *Reg. v. Marner*, Car. & M. 628; *Reg. v. Lands*, Dears. 567, 33 Eng. L. & Eq. 536; *Reg. v. Gordon*, Dears. 586; *Reg. v. Sloggett*, Dears. 656, 36 Eng. L. & Eq. 620; *Reg. v. Scott*, Dears. & B. 47, 36 Eng. L. & Eq. 644; *Reg. v. Milner*, 2 Car. & K. 310; 1 Gab. Crim. Law, 441; *Rex v. Page*, 1 Brod. & B. 308, Russ. & Ry. 392, 3 Moore, 656, 7 Price, 616; *Ratcliffe's Case*, 2 Lewin, 57, 82; *Rex v. Forsyth*, Russ. & Ry. 274; *Reg. v. Harris*, 1 Den. C. C. 461, 3 Cox C. C. 565, *Reg. v. Jones*, 4 B. & Ad. 345, 1 Nev. & M. 78; *Rex v. Frith*, 1 Leach, 4th ed. 10; *Rex v. Burraston*, Gow, 210; *Rex v. Punshon*, 3 Camp. 96; *Rex v. Britton*, 1 Moody & R. 297; *Rex v. Evani*, 1 Moody, 70; *Reg. v. Dealtry*, 1 Den. C.

§ 573. **Extortion.** — Extortion is defined by Blackstone to “consist in any officer’s unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.”<sup>1</sup>

§ 574. *General Rules of Law governing the foregoing Offences:* —

**Physical Force.** — Recurring to the two kinds of force, physical and mental,<sup>2</sup> directed against the property-rights of individuals, we have seen,<sup>3</sup> that, whenever one intentionally injures another in his person, by physical force, he must answer for his act as a crime; because the law deems, that, in employing this instrumentality, he places himself toward the other on unfair ground. Therefore, —

**As injuring Property.** — In reason, this rule is not restricted to injuries to the person; it applies to injuries to the property as well. And this doctrine of reason has a sort of status in the adjudged law. But, —

§ 575. **Limitations of Doctrine.** — As applied to property, the rule meets with many qualifying rules, intercepting it, and cutting it short;<sup>4</sup> and, unless we bear them in mind, we shall go astray. Indeed, these qualifying rules are so numerous, and some are so wide in their influence, that, overlying at places the rule which they qualify, they render it an unsafe guide to a practitioner not well versed in this department of our law. In other words, the rule is theoretically correct, but practically it should be applied

C. 287; Reg. v. Hill, 1 Car. & K. 168; Reg. v. Hillam, 12 Cox C. C. 174, 2 Eng. Rep. 227; Reg. v. Beaumont, 12 Cox C. C. 183; Reg. v. Watkinson, 12 Cox C. C. 271, 4 Eng. Rep. 547; Reg. v. Widdop, Law Rep. 2 C. C. 3; s. c. nom. Reg. v. Widdup, 12 Cox C. C. 251. We have had some American statutes of the like sort; as to which see Dyott v. Commonwealth, 5 Whart. 67; Guldin v. Commonwealth, 6 S. & R. 554; United States v. Dickey, Morris, 412. Under the penalties of the present Bankrupt Act of the United States, some questions have arisen; as to which see — United States v. Prescott, 2 Abb. U. S. 169; United States v. Prescott, 2 Dillon, 405; United States v. Frank, 2 Bis. 263; United States v. Latorre, 8 Blatch. 184; United States v. Clark, 1 Lowell, 402, 4 Bankr. Reg. 59;

United States v. Pusey, 6 Bankr. Reg. 284.

<sup>1</sup> 4 Bl. Com. 141; 1 Russ. Crimes, 3d Eng. ed. 142; 1 Hawk. P. C. c. 68, § 1; Reg. v. Tracy, 6 Mod. 30; Rex v. Burdett, 1 Ld. Raym. 148, 149; Runnells v. Fletcher, 15 Mass. 525; Respublica v. Hannum, 1 Yeates, 71; The State v. Stotts, 5 Blackf. 460; People v. Whaley, 6 Cow. 661; Reg. v. Best, 2 Moody, 124; Smythe’s Case, Palmer, 318; Rex v. Baines, 6 Mod. 192; Commonwealth v. Bagley, 7 Pick. 279; Shattuck v. Woods, 1 Pick. 171; Reg. v. Woodward, 11 Mod. 137. See Vol. II. § 890, for a definition differing slightly from this in terms.

<sup>2</sup> Ante, § 546.

<sup>3</sup> Ante, § 550, 556.

<sup>4</sup> Stat. Crimes, § 86–90, 123 et seq.

cautiously, and only by one somewhat familiar with the doctrines of the criminal law and with the adjudged cases. Let us call to mind some of the qualifying rules.

§ 576. **Claim of Ownership.** — It is familiar doctrine, that a man may do what he will with his own if he does not injure his neighbor.<sup>1</sup> This doctrine, illumined by the principles relating to the intent, shows, that what one does of damage or destruction to another's property, under the *bona fide* belief of being himself its owner, does not subject him to criminal liability, however it may to civil.<sup>2</sup>

§ 577. **Real Estate.** — Again, real estate, being stable and firm, is deemed by the common law not to require protection in the criminal courts; therefore no offence to it, other than perhaps malicious mischief,<sup>3</sup> is indictable. But, upon the doctrine of this proposition great innovations have been made by statutes. It originated in rude times, when such estate consisted chiefly in lands and castles; and it is not adapted to modern conditions. We have indeed seen,<sup>4</sup> that —

**Arson.** — Arson is a crime at common law; but, though the thing burned is realty, the offence is rather against the security of the habitation than the property in it. Therefore, if the lessee of a house burns it, he does not commit common-law arson.<sup>5</sup> Also —

**Burglary.** — Burglary is an offence against the security of the habitation, not at all against the dwelling-house as property. And —

**Forcible Entries and Detainers.** — These are indictable, not to protect the realty, but because of their disturbing the public peace.<sup>6</sup>

§ 578. **Choses in Action — (Larceny).** — Once more: a man cannot at common law commit larceny, for example, by taking and carrying away a mere evidence of indebtedness; as a promissory note, bank-note, or bond, termed a *chose in action*; because he does not thereby get either the money due, or the right to

<sup>1</sup> Bloss v. Tobey, 2 Pick. 320, 325; ante, § 260.

<sup>2</sup> Ante, § 303; Vol. II. § 851, 998.

<sup>3</sup> Ante, § 568-570.

<sup>4</sup> Ante, § 559.

<sup>5</sup> McNeal v. Woods, 3 Blackf. 485; Rex v. Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1026; Rex v. Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025.

<sup>6</sup> Vol. II. § 489, 490.

receive it.<sup>1</sup> This exception has also been abrogated by statutes in most or all of the States.<sup>2</sup> So —

**Wild Animals.** — Animals *feræ naturæ* and unreclaimed are not sufficiently property to be the subjects of common-law larceny;<sup>3</sup> and, of this doctrine, only a few<sup>4</sup> statutory modifications have been made.

§ 579. **Too Small — (Larceny).** — Lastly, we have the extensive influence of the maxim, that the law does not regard small things.<sup>5</sup> In applying this maxim, we are to be guided rather by what has been held, than by any abstract reasoning. For example, while it is indictable to steal a chattel of the smallest value,<sup>6</sup> it is not to take the mere use<sup>7</sup> of one even of large worth; yet it would be difficult to sustain this distinction by any abstract reasoning which would be generally accepted as satisfactory.

§ 580. **Whether other Exceptions.** — The foregoing are such exceptions as occur to the writer to the rule, that physical force wrongly directed against the property rights of individuals is indictable at the common law. There may be others. This consideration of rule and exceptions is useful in a general way, but practitioners will need to consult the minuter expositions in our second volume.

§ 581. **Mental Force.** — We come now to consider the question of mental force, applied to the injury of individuals in their

<sup>1</sup> 2 Russ. Crimes, 3d Eng. ed. 70, 73; 2 East P. C. 597; Reg. v. Murtagh, 1 Craf. & Dix C. C. 355; Spangler v. Commonwealth, 3 Binn. 533; Rex v. Pearson, 5 Car. & P. 121, 1 Moody, 313; Ratcliffe's Case, 2 Lewin, 57, 96; Culp v. The State, 1 Port. 33; Vol. II. § 769.

<sup>2</sup> Damewood v. The State, 1 How. Missis. 262; Greeson v. The State, 5 How. Missis. 33; Commonwealth v. Rand, 7 Met. 475; Boyd v. Commonwealth, 1 Rob. Va. 691; The State v. Dobson, 3 Harring. Del. 563; Sylvester v. Girard, 4 Rawle, 185; McDonald v. The State, 8 Misso. 283; Pomeroy v. Commonwealth, 2 Va. Cas. 342; The State v. Tillery, 1 Nott & McC. 9; The State v. Casados, 1 Nott & McC. 91; Culp v. The State, 1 Port. 33; Cummings v. Commonwealth 2 Va. Cas. 128; Commonwealth v. Messinger, 1 Binn. 273.

Rich v. The State, 8 Ohio, 111; People v. Wiley, 3 Hill, N. Y. 194, 211; The State v. Allen, R. M. Charl. 518; Vol. II. § 782, 783, 785.

<sup>3</sup> 2 Russ. Crimes, 3d Eng. ed. 84; Norton v. Ladd, 5 N. H. 203; Reg. v. Cheafor, 2 Den. C. C. 361, 8 Eng. L. & Eq. 598; The State v. Murphy, 8 Blackf. 498; McConico v. Singleton, 2 Mill, 244; Broughton v. Singleton, 2 Nott & McC. 338; Wallis v. Mease, 3 Binn. 546; Pierson v. Post, 3 Caines, 175; Rex v. Searling, Russ. & Ry. 350; Reg. v. Cox, 1 Car. & K. 494; Rex v. Brooks, 4 Car. & P. 131; Vol. II. § 771-779.

<sup>4</sup> Stat. Crimes, § 232.

<sup>5</sup> Ante, § 212 et seq.

<sup>6</sup> Ante, § 224.

<sup>7</sup> Rex v. Philipps, 2 East P. C. 662; and ante, § 566.

property. And although such force, thus applied, is indictable under some circumstances, we find the rule relating to it not so broad as prevails respecting physical force. Men acquire physical strength by the cultivation of the soil, and by the various other active labors and pleasures of life, without exercising themselves upon one another; while mind is developed almost solely by collision with mind. Therefore in such collision the government, consulting the general good, allows its subjects free scope, if no one assumes toward another what we have called unfair ground.<sup>1</sup> Thus, —

§ 582. **Cheats — Breach of Contract — Enticing Apprentice.** —

When one injures his neighbor by telling him a falsehood, the common law says, the neighbor should not have believed him;<sup>2</sup> when, by a breach of contract, or of a duty in the nature of contract, the injured person is admonished that he should have learned better than to trust him:<sup>3</sup> and so, in these and other like cases, as, where an apprentice is enticed from his master's service,<sup>4</sup> the government merely permits the party injured to carry on, in its courts, a suit for civil redress,<sup>5</sup> but declines itself to interfere by a criminal prosecution. What would be the consequence if the like injuries were produced by physical force may not be quite plain; yet, —

**Robbery — Larceny.** — Where one gets away the personal property of another by the use, actual or even sometimes only threatened, of physical force, he commits robbery or larceny;<sup>6</sup> while,

<sup>1</sup> Ante, § 252, 546.

<sup>2</sup> Anonymous, 6 Mod. 105; Reg. v. Jones, 2 Ld. Raym. 1013, 1 Salk. 379; Commonwealth v. Warren, 6 Mass. 72; The State v. Delyon, 1 Bay, 353; Rex v. Bower, Cowp. 323; People v. Babcock, 7 Johns. 201; The State v. Justice, 2 Dev. 199; People v. Miller, 14 Johns. 371; Reg. v. Hannon, 6 Mod. 311; Rex v. Lewis, Say. 205; Rex v. Driffeld, Say. 146; Rex v. Botwright, Say. 147; Rex v. Grantham, 11 Mod. 222; Rex v. Osborn, 3 Bur. 1697; Rex v. Bryan, 2 Stra. 866.

<sup>3</sup> Rex v. Channell, 2 Stra. 793; Rex v. Dunnage, 2 Bur. 1130; Rex v. Bradford, 1 Ld. Raym. 366; Commonwealth v. Hearsey, 1 Mass. 137; Rex v. Wheatley, 1 W. Bl. 273; s. c. nom. Rex v. Wheatly, 2 Bur. 1125; Rex v. Watson, 2 T. R. 199.

<sup>4</sup> Reg. v. Daniel, 6 Mod. 182, 1 Salk. 380, 3 Salk. 191; s. c. nom. Reg. v. Daniell, 6 Mod. 99; Rex v. Pettit, Jebb, 151.

<sup>5</sup> Ante, § 251.

<sup>6</sup> Rex v. Blackham, 2 East P. C. 711; Rex v. Taplin, 2 East P. C. 712; Reg. v. Walls, 2 Car. & K. 214; Rex v. Macaulay, 1 Leach, 4th ed. 287; Rex v. Robins, 1 Leach, 4th ed. 290, note; Rex v. Horner, 1 Leach, 4th ed. 270; Rex v. Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557, 708; Rex v. Frances, 2 Comyns, 478, 2 Stra. 1015; s. c. nom. Rex v. Francis, Cas. temp. Hardw. 113; Rex v. Simons, 2 East P. C. 712; Rex v. Spencer, 2 East P. C. 712; ante, § 261, 553-566. And see Rex v. Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; The State v. Vaughan, 1 Bay, 282.

if he obtains it by any fraud, short of what will presently be explained,<sup>1</sup> his act is not a crime.<sup>2</sup>

§ 583. **Larceny, continued — (Possession of Property — Cheat).** — The little regard which the common law of crimes pays to mental force directed against property rights appears from a distinction in the law of larceny. If one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny<sup>3</sup> nor any other crime by the taking, unless the transaction amounts to an indictable cheat.<sup>4</sup> But if, with the like intent, he fraudulently gets leave to take the possession only, and takes and converts the whole to himself, he becomes guilty of larceny; because, while his intent is thus to appropriate the property, the consent, which he fraudulently obtained, covers no more than the possession.<sup>5</sup> Again, —

§ 584. **Forgery — Cheat.** — According to a doctrine apparently just in reason, and sustained by numerous authorities, while yet they are conflicting,<sup>6</sup> one does not commit forgery,<sup>7</sup> who, fraudulently misrepresenting the contents of an unexecuted instrument, or misreading or altering it, thereby prevails on another to sign it, supposing himself executing what is different.<sup>8</sup> Yet circum-

<sup>1</sup> Post, § 585.

<sup>2</sup> Post, § 583.

<sup>3</sup> *Rex v. Coleman*, 2 East P. C. 672; *Rex v. Nicholson*, 2 Leach, 4th ed. 610, 2 East P. C. 669; *Rex v. Parkes*, 2 Leach, 4th ed. 614; s. c. nom. *Rex v. Parks*, 2 East P. C. 671; *Reg. v. Barnes*, 1 Eng. L. & Eq. 579, 2 Den. C. C. 59, Temp. & M. 387; *Wilson v. The State*, 1 Port. 118; *Rex v. Adams*, Russ. & Ry. 225; *Reg. v. Adams*, 1 Den. C. C. 38; *Reg. v. Thomas*, 9 Car. & P. 741; *Reg. v. Wilson*, 8 Car. & P. 111; *Rex v. Hawtin*, 7 Car. & P. 281; *Mowrey v. Walsh*, 8 Cow. 238; *Ross v. People*, 5 Hill, N. Y. 294; *Lewer v. Commonwealth*, 15 S. & R. 93; Vol. II. § 808.

<sup>4</sup> Ante, § 571; post, § 585.

<sup>5</sup> *Rex v. Semple*, 1 Leach, 4th ed. 420, 2 East P. C. 691; *Rex v. Hench*, Russ. & Ry. 163; *Rex v. Aickles*, 1 Leach, 4th ed. 294, 2 East P. C. 675; *Rex v. Pear*, 1 Leach, 4th ed. 212, 2 East P. C. 685, 697; *Rex v. Tunnard*, 2 East P. C. 687, 1 Leach, 4th ed. 214, note; *Rex v. Wilkins*,

1 Leach, 4th ed. 520, 2 East P. C. 673; *Rex v. Patch*, 1 Leach, 4th ed. 238, 2 East P. C. 678; *Rex v. Marsh*, 1 Leach, 4th ed. 345; *Rex v. Watson*, 2 Leach, 4th ed. 640, 2 East P. C. 680; *Rex v. Pearce*, 2 East P. C. 603; *Reg. v. Johnson*, 14 Eng. L. & Eq. 570, 2 Den. C. C. 310; *Rex v. Robson*, Russ. & Ry. 413; *The State v. Gorman*, 2 Nott & McC. 90; *The State v. Thurston*, 2 McMullan, 382; *Commonwealth v. James*, 1 Pick. 375; *Starkie v. Commonwealth*, 7 Leigh, 752; *Rex v. Longstreeth*, 1 Moody, 137; *Rex v. Pratt*, 1 Moody, 250; *Rex v. Summers*, 3 Salk. 194; *Anonymous*, J. Kel. 35, 81, 82; *The State v. Lindenthall*, 5 Rich. 237. Contra, in Tennessee, *Felter v. The State*, 9 Yerg. 397. And see Vol. II. § 809, 813, 814.

<sup>6</sup> See Vol. II. § 156, 589-591.

<sup>7</sup> Ante, § 572.

<sup>8</sup> *Reg. v. Chadwick*, 2 Moody & R. 545; *Reg. v. Collins*, 2 Moody & R. 461; *Woodward's Case*, cited 2 Leach, 4th ed. 782; *Reg. v. White*, 1 Den. C. C. 208; *Marvin's Case*, 8 Dy. 288, pl. 52; *Rex v.*

stances may arise in which this kind of fraud will be indictable as a cheat of a different character.<sup>1</sup>

§ 585. **Cheat, continued — (False Token — Larceny — Forgery).**

— When, however, one makes use of a false token, of such a nature that, according to the necessary customs and order of society, men must place confidence in it, and thereby persuades another to part with property, he is indictable, as we have seen, for the cheat;<sup>2</sup> though the act is not larceny.<sup>3</sup> Some of the cases imply that the token must be a public one;<sup>4</sup> but, according to the better view, it need only be calculated to deceive men generally;<sup>5</sup> for we have seen,<sup>6</sup> that the criminal common law is not administered on the principle of extending a particular protection to the weak and feeble. Such a cheat, indeed, is forgery;<sup>7</sup> which need not be of a public document.

§ 586. **False Pretences.** — We have seen,<sup>8</sup> that various modern statutes make it indictable to obtain goods by false pretences, though no false token is employed; for the extended trade and more refined culture of modern times<sup>9</sup> require a certain degree of universal confidence to be placed in mere verbal representations. Yet these statutes are interpreted in the spirit of the common law and by its reasons;<sup>10</sup> and they do not, therefore, extend, as the non-professional reader might suppose, to every imaginable kind of false pretence.<sup>11</sup> So that, notwithstanding the

Maddocks, 2 Russ. Crimes, 3d Eng. ed. 499; Putnam v. Sullivan, 4 Mass. 45; Commonwealth v. Sankey, 10 Harris, Pa. 390; Hill v. The State, 1 Yerg. 76. Contra, The State v. Shurtliff, 18 Maine, 368. And see Vol. II. § 156, 589–591.

<sup>1</sup> Ante, § 571; Hill v. The State, 1 Yerg. 76. And see Rex v. Hevey, Russ. & Ry. 407, note, 2 East P. C. 856, 1 Leach, 4th ed. 229; Rex v. Webb, 3 Brod. & B. 228, Russ. & Ry. 405, cited 6 Moore, 447; 1 Hawk. P. C. Curw. ed. p. 318, § 1. But see The State v. Justice, 2 Dev. 199; Vol. II. § 156.

<sup>2</sup> Ante, § 571.

<sup>3</sup> Ante, § 583.

<sup>4</sup> The State v. Stroll, 1 Rich. 244; People v. Stone, 9 Wend. 182.

<sup>5</sup> People v. Babcock, 7 Johns. 201; Cross v. Peters, 1 Greenl. 376, 387; Commonwealth v. Warren, 6 Mass. 72; Rex v.

Osborn, 3 Bur. 1697; Rex v. Atkinson, 2 East P. C. 673; ante, § 571. And see and compare Rex v. Jackson, 3 Camp. 370, and Rex v. Lara, 2 Leach, 4th ed. 647, 2 East P. C. 819, 827, 6 T. R. 565.

<sup>6</sup> Ante, § 251.

<sup>7</sup> Ante, § 572; Butler v. Commonwealth, 12 S. & R. 237.

<sup>8</sup> Ante, § 571.

<sup>9</sup> Ante, § 252.

<sup>10</sup> Stat. Crimes, § 123, 133, 141, 154, 155.

<sup>11</sup> Rex v. Fuller, 2 East P. C. 837; People v. Williams, 4 Hill, N. Y. 9; The State v. Simpson, 3 Hawks, 620; Commonwealth v. Wilgus, 4 Pick. 177, 178; People v. Crissie, 4 Denio, 525; People v. Haynes, 14 Wend. 546, 557; McKenzie v. The State, 6 Eng. 594; Burrow v. The State, 7 Eng. 65; Rex v. Wavell, 1 Moody, 224; Rex v. Goodhall, Russ. & Ry. 461.

statutes, there are cheats and frauds not indictable either under them or at the common law.<sup>1</sup>

§ 587. **Officer — (Extortion).** — Moreover, when one in office takes advantage of his official position to extort money, he is indictable for this, as we have seen;<sup>2</sup> because, in drawing thus on the obedience due from the subject to the government and its agents, he places himself on unfair ground toward the person whom he injures.<sup>3</sup> Perhaps this offence may be traced also to the general obligation of the officer to discharge well his official duties.<sup>4</sup> Likewise, —

**False Personating.** — It seems, that, if a man cozens another by falsely representing himself to be an officer, he is indictable for this;<sup>5</sup> and he may be so though the one personated is a mere private individual.<sup>6</sup>

§ 588. **Abusing Legal Proceedings.** — One not an officer may subject himself to punishment by an oppressive use of legal proceedings. When, therefore, a man purchased three several promissory notes against another, and brought on them three separate suits instead of one; and, on obtaining judgment, caused the executions to be levied oppressively; the court considered, that, though this was not barratry,<sup>7</sup> it was an indictable common-law offence.<sup>8</sup> Perhaps this conduct may be deemed an exercise rather of physical force than of mental.<sup>9</sup>

§ 589. **Perjury.** — Perjury, in a criminal proceeding, is an offence against the public, rather than the individual.<sup>10</sup> And this may be also one ground on which it is cognizable criminally, though committed in a civil cause;<sup>11</sup> since the government furnishes courts for the redress of private wrongs. But it is also an offence against the individual; it is such, even in a criminal cause, if committed to the injury of the prisoner; for he who thus wrongs him does it standing toward him on an unequal ground.<sup>12</sup>

<sup>1</sup> *Commonwealth v. Eastman*, 1 Cush. 189, 223; *The State v. Roberts*, 34 Maine, 320.

<sup>2</sup> *Ante*, § 573; Vol. II. § 390.

<sup>3</sup> *Ante*, § 252.

<sup>4</sup> *Ante*, § 459.

<sup>5</sup> *Serlested's Case*, Latch, 202; *ante*, § 468.

<sup>6</sup> 2 East P. C. 1010; Vol. II. § 152-155, 439.

<sup>7</sup> *Ante*, § 541.

<sup>8</sup> *Commonwealth v. McCulloch*, 15 Mass. 227.

<sup>9</sup> And see *ante*, § 564.

<sup>10</sup> *Ante*, § 468.

<sup>11</sup> *Ante*, § 467.

<sup>12</sup> *Ante*, § 252.



§ 590. **Summary, as to Mental Force.** — This doctrine of mental force, employed to injure men in their property, is briefly thus: When minds combat with one another, a strength is generated useful to the community. This is the general rule; and, so long as the conflict is of this sort, the one who obtains an advantage over the other is not indictable. But, when one of the parties, assuming an unfair ground toward the other, changes the combat from a strengthening to a destructive process, he commits a public offence.<sup>1</sup>

### III. *Offences against Personal Reputation.*

§ 591. **Damage to Reputation not punishable.** — It is the policy of the law to leave the care of men's reputations to themselves. No damage done to a reputation, therefore, at least by a single individual,<sup>2</sup> is foundation for a criminal prosecution.

**Libel and Slander — (Obscene).** — In libel and slander,<sup>3</sup> the exception to this proposition is apparent, not real. For the courts, whether correctly or not in principle, hold these wrongs to be indictable, not because of injury to the reputation, but by reason of their tending to create breaches of the peace.<sup>4</sup> Thus it is of libels against the individual; but obscene libels are indictable as tending to corrupt the public morals.<sup>5</sup> Hence the common-law rule, that it is immaterial whether what is said in a libel is true or false,<sup>6</sup> — a question vital in the suit for damages, — but, the tendency to disturb the public tranquillity or corrupt the public morals being the same in either alternative, the offence is the same. This legal rule is somewhat modified by other doctrines, but not so as to impair it for the present illustration.<sup>7</sup> And modern legis-

<sup>1</sup> Ante § 230 et seq., 258-260.

<sup>2</sup> **Conspiracy against Reputation.** — A conspiracy, see post, § 592, to charge one with an indictable offence, or with being the father of a bastard child, is indictable; but possibly this is not on the ground of injury to the reputation. *Commonwealth v. Tibbets*, 2 Mass. 536; *Reg. v. Best*, 2 Ld. Raym. 1167, 6 Mod. 187, 185; *Timberly v. Childe*, 1 Sid. 68; *Rex v. Armstrong*, 1 Vent. 304; 1 Gab. Crim. Law, 252. Yet, on the whole, the doctrine seems pretty clearly to be, that a conspiracy to injure one's reputation is

indictable. *Rex v. Rispal*, 1 W. Bl. 368, 3 Bur. 1320. And see Vol. II. § 216, 217, 235.

<sup>3</sup> Ante, § 540.

<sup>4</sup> Vol. II. § 907, 909.

<sup>5</sup> Ante, § 500, 504; Vol. II. § 910.

<sup>6</sup> Vol. II. § 918.

<sup>7</sup> *Cropp v. Tilney*, Holt, 422; *Commonwealth v. Clap*, 4 Mass. 163, 168, 169; *The State v. Burnham*, 9 N. H. 34; *People v. Croswell*, 3 Johns. Cas. 336; *Commonwealth v. Blanding*, 3 Pick. 304; *Rex v. Draper*, 3 Smith, 390; *The State v. Lehre*, 2 Tread. 809; *Rex v. Halpin*, 9 B. & C. 65.

lation has, to a still further extent, permitted the truth of a libel against the individual to be given in evidence by the accused.<sup>1</sup>

#### IV. *Combinations to commit Private Injuries.*

§ 592. **Conspiracy.**—In the foregoing discussion we have assumed, that the wrongful thing is done by one only. But often numbers combine for wrong; and then the combination may be criminal, even where the thing contemplated would not be so if actually performed by one.<sup>2</sup> Because obviously two or more persons, united in skill and endeavor, may stand toward another on unfair ground; while, if one alone had undertaken the same thing, there would be no inequality. Therefore, in the former instance, a criminal liability is incurred, whether what was agreed upon is accomplished or not; but not in the latter, even though the thing is actually done.<sup>3</sup> This combination is called conspiracy.<sup>4</sup> The offence is not confined to injuries to individuals; but it extends also to those injuries which concern directly the public.<sup>5</sup>

§ 593. **Witchcraft.**—Like conspiracy, is the antiquated offence of witchcraft. “Of offenders of this nature there are said to be three kinds,—first, conjurers, who by force of certain magic words endeavor to raise the Devil, and compel him to execute

<sup>1</sup> Commonwealth v. Bonner, 9 Met. 410; Barthelemy v. People, 2 Hill, N. Y. 248; The State v. White, 7 Ire. 180; People v. Croswell, 3 Johns. Cas. 336; Rex v. Burdett, 3 B. & Ald. 717, 4 B. & Ald. 95; Vol. II. § 920.

<sup>2</sup> Vol. II. § 172, 173, 178, 181, 182.

<sup>3</sup> Twitchell v. Commonwealth, 9 Barr, 211, 212; Reg. v. Orbell, 6 Mod. 42; Rex v. Macarty, 2 East P. C. 823, 6 Mod. 301; s. c. nom. Rex v. Mackarty, 2 Ld. Raym. 1179; 2 East P. C. 824; People v. Stone, 9 Wend. 182; People v. Babcock, 7 Johns. 201; Commonwealth v. Warren, 6 Mass. 72; Anderson v. Commonwealth, 5 Rand. 627; The State v. Burnham, 15 N. H. 396; The State v. Murphy, 6 Ala. 765; Commonwealth v. Judd, 2 Mass. 329; Lambert v. People, 7 Cow. 166, 9 Cow. 578; Commonwealth v. Hunt, 4 Met. 111, 131; The State v. Rowley, 12 Conn. 101; Sydeserff v. Reg., 11 Q. B. 245, 12 Jur. 418;

Rex v. Hilbers, 2 Chit. 163; Commonwealth v. Ward, 1 Mass. 473; Patten v. Gurney, 17 Mass. 182, 184; Bean v. Bean, 12 Mass. 20, 21; Commonwealth v. Eastman, 1 Cush. 189; Rhoads v. Commonwealth, 3 Harris, Pa. 272; People v. Fisher, 14 Wend. 9; Commonwealth v. Ridgway, 2 Ashm. 247; Rex v. Cope, 1 Stra. 144; Reg. v. Gompertz, 9 Q. B. 824; Mifflin v. Commonwealth, 5 Watts & S. 461; Commonwealth v. Tibbetts, 2 Mass. 536; Reg. v. Best, 6 Mod. 137, 185, 2 Ld. Raym. 1167, Holt, 151; Timberly v. Childe, 1 Sid. 68; Rex v. Armstrong, 1 Vent. 304; The State v. Buchanan, 5 Har. & J. 317; Rex v. Worrall, Skin. 108; Reg. v. Blacket, 7 Mod. 89; The State v. De Witt, 2 Hill, S. C. 282. Contra, The State v. Rickey, 4 Halst. 293, 300.

<sup>4</sup> And see ante, § 482.

<sup>5</sup> For the full discussion, see Vol. II. § 169 et seq.

their commands ; secondly, witches, who by way of friendly conference are said to bargain with an evil spirit to do what they desire of him ; thirdly, sorcerers or charmers, who, by the use of certain superstitious forms of words, or by means of images or other odd representations of persons or things, &c., are said to produce strange effects, above the ordinary course of nature.”<sup>1</sup> This offence appears to have been misdemeanor at the common law ;<sup>2</sup> but, by 1 Jac. 1, c. 12, it was elevated to felony.<sup>3</sup> Belief in the existence of the thing called witchcraft having become obsolete, —

**Falsely pretending Witchcraft.** — Later English legislation, not in force with us, abolished the crime of real witchcraft and created another of falsely pretending to it.<sup>4</sup>

**How in our States.** — In this country, witchcraft is in effect no offence, because its existence is not believed. But if the opinion should again become general, that spirits hold intercourse with mortals, and have such power over them as to render conspiracies between the embodied and disembodied to the injury of their victims practicable, no reason appears why such confederations would not be indictable by force of the common law. It might be difficult to seize and bring to punishment the rogues out of the flesh, yet this would furnish no reason why those in the flesh should escape.

<sup>1</sup> 1 Hawk. P. C. 6th ed. c. 3, § 1. “Witchcraft seems to be the skill of applying the plastic spirit of the world unto some unlawful purpose, by means of a confederacy with evil spirits.” Cotton Mather’s *Wonders of the Invisible World*, Eng. ed. of 1862, p. 161. For interesting matter on witchcraft, see *Smith’s Case*, 2 Howell St. Tr. 1049; *The Essex Witches’ Case*, 4 Howell St. Tr. 817; *The Suffolk Witches’ Case*, 6

*Howell St. Tr.* 647; *The Devon Witches’ Case*, 8 Howell St. Tr. 1017; *The trial of Witches*, before Sir Matthew Hale, bound up among other papers with *Jacob’s Supp. to Hale P. C.* And see 3 Inst. 43.

<sup>2</sup> Hawk. ut sup. § 2. But see 1 Hale P. C. 429.

<sup>3</sup> 1 Hawk. P. C. 6th ed. c. 3, § 4.

<sup>4</sup> 1 East P. C. 5.

## CHAPTER XLI.

## PROTECTION TO THE LOWER ANIMALS.

§ 594. **Malicious Mischief, distinguished.** — Malicious mischief<sup>1</sup> to personal property, wherein commonly and by the old rules the intent is to injure the owner,<sup>2</sup> can be committed as well by doing damage to an animal considered as property as to any other subject of ownership. Protection to the creature as a sensitive being is not the thing sought, either under this branch of the unwritten law, or under the malicious-mischief statutes.<sup>3</sup> As to the animals themselves, —

**No direct Protection.** — Man has always held in subjection the animals below him, to be used or destroyed at will, for his advantage or pleasure. The right to take their life, and to make property of them, includes all other rights of theirs; so that the common law recognizes as indictable no wrong, and punishes no act of cruelty, which they may suffer, however wanton or unnecessary.<sup>4</sup> Contrary to this, some, misinterpreting cases of malicious mischief to animals, and cases of public cruelty amounting to

<sup>1</sup> Ante, § 568, 569.

<sup>2</sup> Ante, § 298; Vol. II. § 996-998; Stat. Crimes, § 430, 433-436.

<sup>3</sup> Stat. Crimes, § 432, 437-448; *Brown v. The State*, 26 Ohio State, 176; *The State v. Rector*, 34 Texas, 565; *Reid v. The State*, 8 Texas, Ap. 430; *Reg. v. Welch*, 1 Q. B. D. 23, 13 Cox C. C. 121; *Lott v. The State*, 9 Texas Ap. 206; *The State v. Linde*, 54 Iowa, 139; *Street v. The State*, 7 Texas Ap. 5; *The State v. Simpson*, 73 N. C. 269; *The State v. Hill*, 79 N. C. 656; *Shubrick v. The State*, 2 S. C. 21; *Gaskill v. The State*, 56 Ind. 550; *The State v. Butler*, 65 N. C. 309; *Thomas v. The State*, 30 Ark. 433; *Oviatt v. The State*, 19 Ohio State, 573; *Branch v. The State*, 41 Texas, 622; *The State v. Heath*, 41 Texas, 426; *Hayworth*

*v. The State*, 14 Ind. 590; *The State v. Painter*, 70 N. C. 70; *Commonwealth v. Falvey*, 108 Mass. 304; *Rex v. Mogg*, 4 Car. & P. 363; *Burgess v. The State* 44 Ala. 190; *Swartzbaugh v. People*, 85 Ill. 457; *Caldwell v. The State*, 49 Ala. 34; *Duncan v. The State*, 49 Missis. 331; *Darnell v. The State*, 6 Texas Ap. 482; *The State v. Parker*, 81 N. C. 548. And see *Rex v. Buck*, 1 Stra. 679. "It is an oppression, &c., to cut or cause to be cut out the tongue of any tame beast, being alive, of any other persons." *Pulton de Pace*, 104 a. Among lawful assemblies are those "at the baiting of a bull or bear." *Ib.* 25 b. And see *Ex parte Hill*, 3 Car. & P. 225 and note.

<sup>4</sup> See Stat. Crimes, § 1093, 1094.

nuisance,<sup>1</sup> and the like, have, therefore, deemed mere cruelty to animals punishable at the common law.<sup>2</sup> But even —

§ 595. In **Malicious Mischief**, — there must be other malice than simply against the animal to make any injury to it indictable either by the common law or under the statutes. Equally under the old statutory and the unwritten law, no malice would suffice except against the owner; and, though the construction of some of the modern enactments is not quite so, there is nothing in the interpretation of any of them favoring the idea that mere cruelty to animals, regarded as creatures susceptible to pleasure and pain, is a common-law offence.<sup>3</sup> Now, —

**Conclusive as to Cruelty.** — The doctrine thus stated relating to malicious mischief to animals is conclusive, as to this of cruelty. If, in the numerous cases wherein the indictment failed because, though malice was proved toward a cruelly-abused animal, none appeared toward its owner, the law had made cruelty to animals punishable, there would have been convictions for this offence; the indictments being, in this view, sufficient, and the prosecutor's misnaming the offence making no difference.<sup>4</sup> For the rule is universal, that, whenever an indictment sets out an offence, whether the one really meant by the prosecuting power or not, there may be a conviction upon it. So that, as often as cruelty to an animal was alleged as malicious mischief, without an averment of malice against the owner, if the cruelty alone had been punishable, the prosecution would have been sustained on this ground. Each of the decisions referred to in the last paragraph is, therefore, a direct adjudication that cruelty to animals is not indictable at the common law. But —

§ 596. **Collateral Effect.** — A learned judge once observed, that "cruelty to a domestic animal has, in some cases, been held to change what otherwise would have been a simple trespass into a criminal offence;"<sup>5</sup> and from other judges have fallen words

<sup>1</sup> Post, § 597.

<sup>2</sup> Stage Horse Cases, 15 Abb. Pr. n. s. 51; Ross's Case, 3 City Hall Rec. 191.

<sup>3</sup> The State v. Pierce, 7 Ala. 728; The State v. Wilcox, 3 Yerg. 278; The State v. Jackson, 12 Ire. 329; Rex v. Austen, Russ. & Ry. 490; The State v. Latham, 13 Ire. 33; Rex v. Pearce, 1 Leach, 4th ed. 527, 2 East P. C. 1072; Rex v. Kean, 2 East P. C. 1073; s. c. nom. Rex v.

Hean, 1 Leach, 4th ed. 527, note; Ranger's Case, 2 East P. C. 1074; Rex v. Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; Stat. Crimes, § 433, 435; Vol. II. § 996, 997; Reg. v. Tivey, 1 Car. & K. 704; Stat. Crimes, § 434.

<sup>4</sup> Crim. Proced. I. § 416, 417.

<sup>5</sup> Beardsley, C. J., in Kilpatrick v. People, 5 Denio, 277, 279.

approximating more or less nearly to the same meaning.<sup>1</sup> We cannot find in the common law itself any general doctrine of this nature; though perhaps cruelty to such animals may enter into the consideration when an act is sought to be made punishable as corrupting to the public morals,<sup>2</sup> and the like. So —

**Statutory Cruelty.** — Cruelty to animals is in modern times a statutory offence in England and perhaps all our States.<sup>3</sup> And, —

§ 597. **Public Cruelty.** — Quite consistently with the foregoing doctrines, the public, cruel beating of a cow or other animal in a street of a city has been held to be indictable at the common law as a public nuisance. “The gist of the offence,” said the learned judge in a case in the District of Columbia, “was the public cruelty to the common nuisance, and it was not necessary for the United States to prove that the cow died of the beating.”<sup>4</sup> The same was adjudged, during slavery, of the beating of a slave in the streets of a city, in public view.<sup>5</sup>

§ 597 a. **Conspiracies against Animals.** — A conspiracy, to be indictable, does not, we have seen,<sup>6</sup> require that the contemplated wrong shall be such as would be punishable criminally if performed by one. Nor need its purpose be to injure an individual. Equally, also, if its aim is the disturbance of any public interest, of a sort within the care of the law, it will, where the other essential elements are present, be a crime.<sup>7</sup> And, within these and the other principles of the law of conspiracy, plainly it would be punishable to conspire to do such cruelty to any part of the animate creation as would constitute a public, or even a private nuisance. We have no authorities on this question; but, so far, the steps in the argument are plain, and the reasoning is conclusive. Here the contemplated end is, in the language of the books, “unlawful.” Still again, in all conspiracies, for an indictment to lie, either the means or the end proposed must be of a sort which, though not necessarily criminal, is indicated by the word “unlawful.”<sup>8</sup> Within this distinction would fall, on the in-

<sup>1</sup> *Commonwealth v. Tilton*, 8 Met. 232, 234.

<sup>2</sup> *Ante*, § 495 et seq.

<sup>3</sup> For a discussion of the statutory offence, see *Stat. Crimes*, § 1003 et seq.

<sup>4</sup> *United States v. Jackson*, 4 Cranch

C. C. 483; *People v. Stakes*, 1 Wheeler Crim. Cas. 111.

<sup>5</sup> *United States v. Cross*, 4 Cranch C. C. 603.

<sup>6</sup> *Ante*, § 592.

<sup>7</sup> Vol. II. § 181, 196-234.

<sup>8</sup> Vol. II. § 171, 172, 175, 178.

dictable side, various cruel shooting-matches, not only in the nature of nuisance, as just said, but of gaming,<sup>1</sup> and of unlawful sport.<sup>2</sup> So far, again, the steps of the argument are, in a general way, plain and conclusive; but into the particulars it is not proposed here to descend. Nor are these intimations meant to indicate absolutely the outer limits of the doctrine. Conspiracy is an offence of gradual growth in the law.<sup>3</sup> Undoubtedly it has not yet reached its maturity, and precisely what it will be when it has no one can say. So that, though dumb animals have no direct protection in our unwritten law of crime, they have much of what may be termed indirect. And at last the written laws have come pretty fully to their defence.

<sup>1</sup> Stat. Crimes, § 848-851; Bishop Con. § 489, 490.

between lawful and unlawful sports, see 1 Russ. Crimes, 5th Eng. ed. 818-821.

<sup>2</sup> For something of the distinction

<sup>3</sup> Vol. II. § 170.

## BOOK VI.

TECHNICAL DIVISIONS AND DISTINCTIONS, WITH  
THEIR ATTENDANT DOCTRINES.

## CHAPTER XLII.

## OUTLINES OF DIVISIONS AND DISTINCTIONS.

§ 598. **Scope of this Chapter.** — The technical divisions and distinctions which, extending through the entire field of the criminal law, part it off into separate grounds as to the unequal turpitude of the respective crimes, and the several degrees and forms in which different persons may participate in each, will in this chapter be presented in outline. The filling up, and the authorities for the outline itself, are reserved for a series of subsequent chapters; which, moreover, will be carried forward to include still minuter divisions. But, —

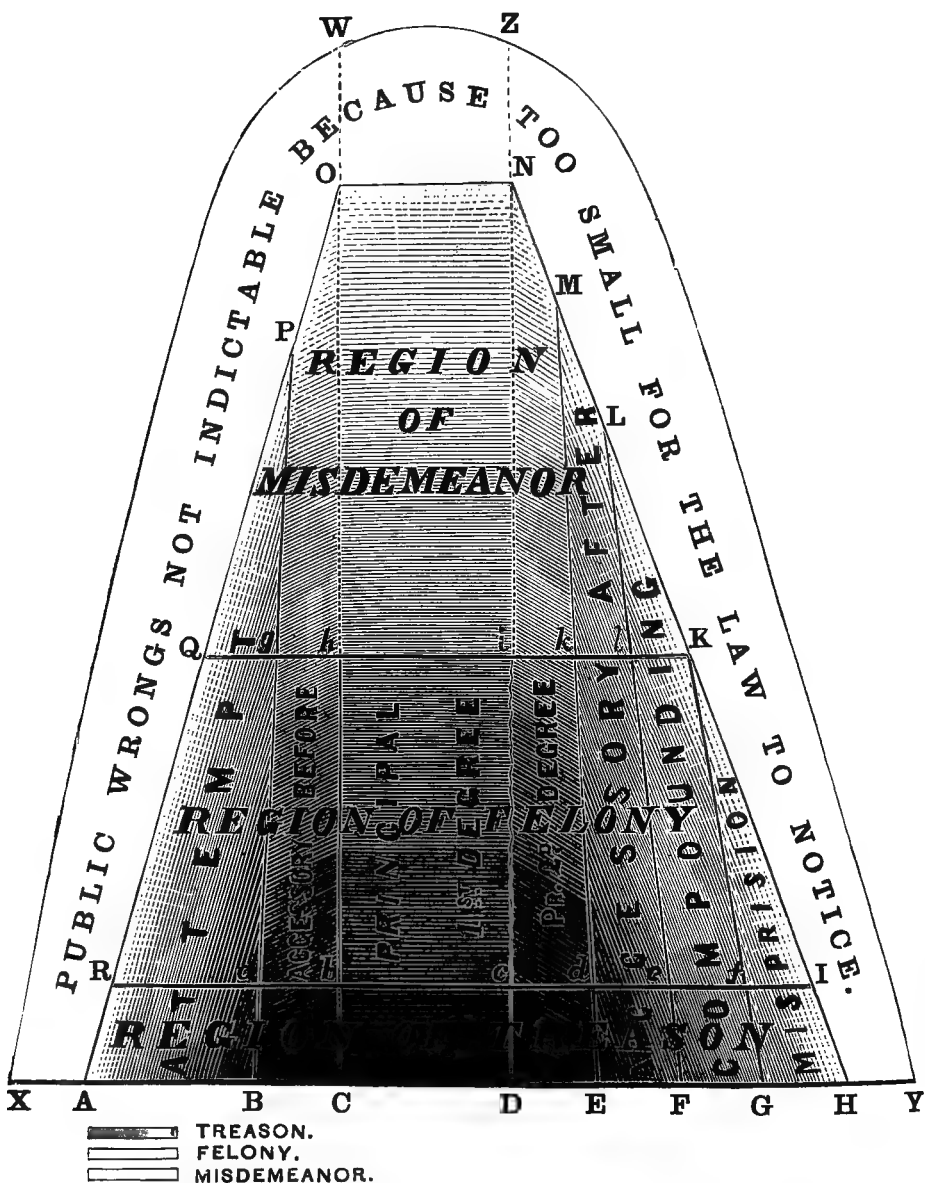
§ 599. **Specific Crimes.** — Before looking at the larger divisions of the criminal field, let us obtain some idea of what is a specific crime. The prohibitions of the criminal law are in a degree specific, and its penalties vary with the thing done. Now, if the law, whether statutory or common, forbids a defined combination of act and intent, and attaches a certain penalty to a violation of the inhibition, it establishes what is termed a specific crime. It usually, not always, gives to the crime a name; as, larceny, malicious mischief, cheat, false pretences, or the like. But the wrong is equally a specific crime whether named or not.

§ 600. **Aggravations of Crimes.** — In morals, we look upon a crime as more or less heinous according to the circumstances of its commission. But, in law, there is, in the strict sense, no aggravation of a crime. If a man does the forbidden thing with the intent forbidden, he incurs the legal guilt; and he can be punished with only the law's penalty, though he does with it a thousand other things reprehensible in morals. Yet the law





# DIAGRAM OF CRIME.



NOTE. — *E F e d*, in England, is treason; but, according to the views presented in this book, it is felony in the States, and misdemeanor under the laws of the United States.

itself not unfrequently makes an offender more heavily punishable who adds to a specified offence an aggravation which it points out; but, in this instance, he becomes guilty of another and distinct crime. Thus, —

**In Homicide.** — At an early period in the history of this offence, it was punishable with death to kill a man by any of the unjustifiable means which now render the killing manslaughter. If the killing was also of “malice aforethought,” which now makes it murder, it was worse in morals but not in law. Afterward the law adopted the rule of morals, by making the killing murder when done of “malice aforethought;” while, if it was without such malice, it was called by the name of manslaughter; and punished only murder with death, manslaughter less severely. Still, if the malice aforethought with which a murder was committed was “deliberately premeditated,” it was in morals more aggravated, not in law. Of such a circumstance, the law took no cognizance. At last, however, the law has in most of our States taken this aggravation also into account; punishing the murder capitally only when thus aggravated, while a milder punishment is provided for simple murder, called murder in the second degree. Yet there remain aggravations, recognized in morals, of which the law even now takes no notice.

§ 601. **Aggravations as to Discretionary Punishment.** — Yet where the punishment is discretionary with the tribunal, the considerations which aggravate an offence in morals may be taken into the account. In the instances depending on positive law, the aggravations must be set out in the indictment;<sup>1</sup> in these they need not be, though sometimes in practice they are. Let us now proceed to consider —

§ 602. *The larger Technical Divisions* : —

**Diagram.** — The other technical divisions of the criminal field are displayed on the accompanying “Diagram of Crime.” The colored part represents what is indictable, and around it there is a space to denote “public wrongs not indictable, because too small for the law to notice.” Let us look a little into the indictable part.

§ 603. **Treason — Felony — Misdemeanor.** — At the common law, every crime is treason, or felony, or misdemeanor. Treason is the heaviest, misdemeanor the lightest, and felony holds an inter-

<sup>1</sup> *Crim. Proced. I.* § 77 et seq., 95 et seq., *II.* § 562–589.

mediate ground. These three gradations are represented by three distinct *colors* on the Diagram.

§ 604. **Degrees of Participation.** — As there are thus grades in crime, so also there are degrees of participation in the criminal thing. These degrees are represented on the Diagram by what lies within the nearly vertical lines ; as, —

**Attempt.** — If a man undertakes to do a thing which in law is a crime, and, after proceeding a certain way in the doing, is interrupted, or if his effort otherwise miscarries, so that the intended crime is not committed, he is still indictable for what he does, under the name of “Attempt.” This sort of wrong is indicated, in the Diagram, by A B P. Now, A B P does not extend quite to the top of the indictable space. The explanation is, that some of the lesser misdemeanors are of too small magnitude in the criminal field to draw the indictable quality to the mere attempt to commit them.

**Accessory before.** — Persuasion is one form of attempt. It is, therefore, indictable to persuade or hire a person to commit a crime, especially of the heavier sort, though he declines to do it, or undertakes it and fails. Yet if this person actually does what he is persuaded or hired to do, the effort of the procurer ceases to be called an attempt, because it has become a success. If the thing is felony, the procurer is now termed an “Accessory before the Fact ;” or, if it is treason or misdemeanor, his conduct is still in its nature accessorial, though in strict law he is a principal offender. His position on the Diagram is indicated by B C O P. Yet here we come to a mere point at O, indicating that there may be some small misdemeanors for which even the procurer is not indictable, the quality of indictability being restricted to the actual doer.

**Principal of First Degree.** — The offence of the actual doer appears next on the Diagram, indicated by C D N O. It requires no special observation. He is called “Principal of the First Degree.”

**Principal of Second Degree.** — Next we have the offence of him who stands by, encouraging the act of crime, while the hand of another performs it. Such an offender is “Principal of the Second Degree.” Yet, even in felony, this sort of principal may, in strict law, be regarded the same as the other, if the prosecuting power chooses. His crime is indicated on the Diagram by D E

M N. This region comes to a point at N, denoting that there are inferior misdemeanors for which one in the position of principal of the second degree is not indictable.

**Accessory after.** — One harboring another who has committed a crime, to screen him from justice, incurs legal guilt. He is termed an “Accessory after the Fact.” In the Diagram, his position is represented by E F L M. His guilt is less intense than that of him who stands by encouraging the other; and there are more crimes to which it does not attach. Consequently the space devoted to this form of offence ends at M, not extending to the top, at N.

**Compounding.** — “Compounding a Crime,” or agreeing not to prosecute it, is a participation in it after the fact, of the same nature as last described, except that the guilt is less intense. On the Diagram, therefore, it is placed further from the principal offence; and it extends less far among the misdemeanors, showing that there are more offences here, than under the last specification, which do not subject this sort of participant to indictment. It is represented by F G K L.

**Misprision.** — Finally, we have “Misprision.” The reader will see, on looking at the Diagram, that it attaches to treason and felony, but not to misdemeanor. It is represented by G H K. It is a criminal neglect, and consists either in not preventing the crime, or in forbearing to take steps to bring the perpetrator to justice.

§ 605. **Treason, Felony, and Misdemeanor, again.** — Looking once more at the Diagram, the reader perceives that A H I R is marked “Region of Treason.” But this “Region” is divided into the various parts just specified. Beginning at the left hand, we have A B a R, which represents the “attempt” to commit a treason. Observing the coloring, we see that this attempt is not treason, but misdemeanor. The coloring also indicates, that the accessory before the fact in treason is a traitor; as, of course, is the principal, whether of the first or second degree. But E F e d, denoting the guilt of the accessory after the fact in treason, is, on this Diagram, colored for felony. So, according to views in this work, is the law in our States. But in England the crime of the accessory after is treason. Compounding treason, and misprision of treason, are, as the coloring shows, misdemeanors. It is not necessary to go over the “Region of Felony” in this way, the

reader can do it for himself. He will notice that all of it is felony, except attempt, compounding, and misprision, — these three are misdemeanors. All the “Region of Misdemeanor” is misdemeanor.

§ 606. **Course of the Discussion.** — What is thus given in outline in this chapter will, in a series of chapters next following, be presented in detail, sustained by the authorities. It will be most convenient, however, to proceed in an order differing from that in the foregoing sections.

**Heavier and Lighter Offences.** — Since offences differ in turpitude, the heavier and lighter are, on the Diagram, distinguished in a general way by the heavier and lighter shadings from the ink. But this, which is palpable both to the eye and the understanding, requires no particular explanation.

## CHAPTER XLIII.

## THE DIVISION OF CRIMES INTO TREASON, FELONY, AND MISDEMEANOR.

§ 607-610. Introduction.

611-613. Treason.

614-622. Felony.

623-625. Misdemeanor.

§ 607. **Uses of Division.** — Divisions and classifications are essential to the orderly disposition and mastery of every science. It is so in the law. Those of the criminal department are more than mere helps to the learner; they adhere in the law itself. And though some of them are quite technical, even they are practically promotive of justice.

§ 608. **Division into Treason, Felony, and Misdemeanor.** — An old division is into treason, felony, and misdemeanor. Though technical, it proceeds on the reasonable idea of classifying crime according to its turpitude; what is most reprehensible being treason, felony occupying a middle ground, and the rest being misdemeanor.

§ 609. **Importance of this Division.** — Technical as this division is, it is one of the most important in our law. In other pages of this work, and in the works on Criminal Procedure and Statutory Crimes, the reader will see numerous instances in which questions the most grave turn on this division. Let us note some of them. A man may be guilty of a misprision of felony, but not of a misprision of misdemeanor.<sup>1</sup> One, in misdemeanor or treason, may commit the crime of a principal by procuring another to do the act in his absence; but in felony such a procurer is only an accessory before the fact.<sup>2</sup> A person against whose property a misdemeanor has been committed may immediately sue the offender; but, when the wrongful act is felony, he must, according to the

<sup>1</sup> Post, § 717.<sup>2</sup> Post, § 673, 675, 681, 682, 685.

better opinion, wait until he has set on foot a criminal prosecution.<sup>1</sup> These illustrations might be continued to great length; and, among them, uncertainties and contradictions of doctrine would appear, more than on any other line of inquiry in the entire criminal field.

§ 610. **How this Chapter divided.** — We shall consider, I. Treason; II. Felony; III. Misdemeanor.

### I. *Treason.*

§ 611. **English Treasons — High and Petit.** — When our ancestors brought the common law from England, treasons were numerous there. And they were divided into high and petit. But what is now meant by the simple word treason, is high treason. By the ancient common law, there were several forms of petit treason, which, by 25 Edw. 3, stat. 5, c. 2, were reduced to three. They were the killing, by a servant, of his master; the killing, by a wife, of her husband; and the killing of a prelate by an ecclesiastic owing obedience to him.<sup>2</sup> In 1828, these petit treasons were abolished.<sup>3</sup>

**How with us.** — Treason, with us, is reduced to a single form of what was formerly termed high treason.<sup>4</sup> And petit treason is unknown to our laws.

§ 612. **Treason is also Felony.** — In the language of Mr. East, “all treason is felony, though it may be something more.”<sup>5</sup> Consequently, —

**What was Treason.** — An offence which, on the settlement of this country, was in England treason, is here, when the traitorous quality is taken from it, felony.

§ 613. **Does not follow Rules of Felony.** — Since, therefore, treason is composed of felony and the aggravation which makes it treason, we might suppose it would follow rather the rules of felony than of misdemeanor. But we shall see, further on, that it more resembles misdemeanor than felony.

<sup>1</sup> Ante, § 264 et seq.

<sup>2</sup> 1 Hawk. P. C. Curw. ed. p. 105.

<sup>3</sup> By 9 Geo. 4, c. 81, § 2, providing, that “every offence which, before the commencement of this act, would have amounted to petit treason, shall be deemed to be murder only.” This pro-

vision is continued by 24 & 25 Vict. c. 100, § 8.

<sup>4</sup> Ante, § 456.

<sup>5</sup> 1 East P. C. 334, 336; 1 Hawk. P. C. Curw. ed. p. 71, § 2; 4 Bl. Com. 94, 95. And see Co. Lit. 391 a.



II. *Felony.*

§ 614. **Difficulties — Statutes.** — The common-law doctrine of felony is in some particulars difficult, but in the general it is plain. We shall see that, in some of our States, statutes have been passed to remove obscurities, creating others of their own.

§ 615. **How defined.** — Felony is any offence which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods or both, or which a statute expressly declares to be such.<sup>1</sup>

**Exposition of Doctrine.** — Gabbett says: “The word *felon* is (according to the best opinions) derived from two northern words,<sup>2</sup> *fee* which signifies fief, feud, or beneficiary estate, and *lon*, which signifies price or value; and the word ‘felony’ imports rather the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord of the fee, than the capital punishment to which lay or unlearned offenders were formerly liable in all cases of felony. In proof of this, —

**Suicide — Homicide — Heresy — Treason.** — “Suicide has been always considered to be a felony, because it subjected the person committing it to forfeiture, though the party, being already dead, could not be the object of capital punishment: and homicide by misadventure, or in self-defence, is, strictly speaking, a felony also, being followed with forfeiture, though according to the better opinions it never was punished with death; while heresy, which was a capital offence by the common law,<sup>3</sup> but not a felony, never worked any forfeiture of goods.<sup>4</sup> And, as a further proof, treason was anciently held to be a felony; which can only be accounted for upon the principle that forfeiture was one of the consequences of attainder in high treason. Though this is the

<sup>1</sup> See and compare, 1 Gab. Crim. Law, 15, 16; 1 Hawk. P. C. Curw. ed. p. 71-73; Co. Lit. 391 a. See also 4 Bl. Com. 94, 95; Gray v. Reg. 6 Ir. Law Rep. 482, 502; Adams v. Barrett, 5 Ga. 404; Foxley's Case, 5 Co. 109 a; Finch's Case, 6 Co. 63, 68; Reg. v. Whitehead, 2 Moody, 181, 9 Car. & P. 429; Whitaker v. Wisbey, 9 Eng. L. & Eq. 457; United States v. Jacoby, 12 Blatch. 491; United States v. Cross, 1 McAr. 149.

<sup>2</sup> Spelman Glos. tit. Felon; 4 Bl. Com. 94, 95.

<sup>3</sup> The life, however, was taken by burning, not by hanging, 3 Inst. 43; and possibly this difference was what prevented the offence from being a felony.

<sup>4</sup> 4 Bl. Com. 97; 3 Inst. 43, where it appears, however, that there was forfeiture for this offence by Stat. 2 Hen. 5, c. 7, which was repealed by Stat. 1 Eliz. c. 1.

proper definition of felony, yet this term has been so generally connected with the idea of capital punishment, that, . . . whenever a statute made any new offence a felony, the law implied that it should be punished with death by hanging, as well as forfeiture, unless the offender prayed the benefit of clergy."<sup>1</sup>

§ 616. **How under our Common Law.** — Now, forfeitures and corruptions of blood, consequent upon crimes, are almost<sup>2</sup> unknown in this country;<sup>3</sup> yet the distinction between felonies and the other two grades is a part of our common law.<sup>4</sup> The punishment of felony with us is neither always nor usually death, and the same is now true also in England. In both countries, therefore, the term, at the present day, simply denotes "the degree or class of crime committed."<sup>5</sup> And the former test to determine what is felony, and what is not, has little or no practical use in either country. Consequently, where no statute has defined felony, we look into the books upon common-law crimes, and see what was felony and what was not under the older laws of England. And, though we have lost the old test, we hold that to be felony which was such when the test was operative. For, with us, if a statute reduces the punishment of a capital felony to imprisonment, it does not cease to be a felony.<sup>6</sup>

§ 617. **Continued.** — The general rule, therefore, is, that what is felony under the English common law is such also under ours. But there may be exceptions,<sup>7</sup> founded on special reasons. Also we have seen,<sup>8</sup> that, if what is treason at the common law is cut off from being such by a constitutional or legislative provision, it will then be felony.

§ 618. *Statutes regulating the Question:—*

**Punishable by Death or Imprisonment.** — In a considerable number of our States, statutes have defined, that all offences punishable either by death or by imprisonment in the State prison shall be felonies.<sup>9</sup>

<sup>1</sup> 1 Gab. Crim. Law, 15, 16.

<sup>2</sup> See *Wooldridge v. Lucas*, 7 B. Monr. 49.

<sup>3</sup> Ante, § 273; post, § 970.

<sup>4</sup> "The rule once fixed must remain until altered by the legislature." Lord Campbell in *Reg. v. Gray*, 3 Crawf. & Dix C. C. 238, 343. And see ante, § 275.

<sup>5</sup> 1 Russ. Crimes, 3d Eng. ed. 44.

<sup>6</sup> *The State v. Dewey*, 65 N. C. 572. See post, § 621.

<sup>7</sup> *Commonwealth v. Newell*, 7 Mass. 245; *A. v. B.*, R. M. Charl. 228, 232, 234, note. And see *Commonwealth v. Lester*, 2 Va. Cas. 198.

<sup>8</sup> Ante, § 612.

<sup>9</sup> *Weinzorpflin v. The State*, 7 Blackf. 186, 188; *Wilson v. The State*, 1 Wis. 184; *The State v. Smith*, 8 Blackf. 489; *People v. Brigham*, 2 Mich. 550; *Randall v. Commonwealth*, 24 Grat. 644; *Nichols v. The State*, 35 Wis. 308; *Buford v.*

§ 619. **Effect of Discretion as to Punishment.** — If, by the terms of the statute, the court or jury is at liberty to inflict some milder punishment instead of imprisonment or death, this discretion, it is held, does not prevent the offence from being felony. That the heavier punishment *may* be imposed is sufficient.<sup>1</sup> And the majority of the New York court adjudged, that the case is not different, though, by reason of immature age, the particular defendant is by law subject only to a milder penalty.<sup>2</sup>

§ 620. **Effect of Statutes on Common-law Felonies.** — There may be an offence which at common law is felony, while yet it is punishable neither by death nor by imprisonment in the State prison. What is the effect, upon it, of this sort of statute? By a general rule of interpretation, a statute without negative words does not abrogate the common law, but both stand together.<sup>3</sup> On this sound principle, the Michigan court has held, that common-law felonies, punishable less severely than the statutory standard, do not cease to be felonies because of this provision.<sup>4</sup> So also it has been said in New York;<sup>5</sup> but later authority there, is possibly (the author does not say it is) the other way.<sup>6</sup> And special terms in a statute may require an interpretation contrary to what we have thus seen to be the better general doctrine. It is so in some of the States, or the ordinary words are so construed.<sup>7</sup>

§ 621. **How in Particular States — (Vermont — Louisiana — South Carolina).** — The judge in a Vermont case intimated, that, in this State, common-law felony is unknown, things indictable being divided simply into crimes and misdemeanors.<sup>8</sup> Yet, from other cases,<sup>9</sup> and a consideration of the statutes and jurisprudence of the State, it seems not improbable that the question is here much as in the States just mentioned, where capital offences, and all punishable in the State prison, are felonies. Even in Louisiana,

Commonwealth, 14 B. Monr. 24, and the cases cited in the next three notes.

<sup>1</sup> The State v. Smith, 32 Maine, 369; Johnston v. The State, 7 Misso. 183; Ingram v. The State, 7 Misso. 293; People v. Van Steenburgh, 1 Parker C. C. 39; People v. War, 20 Cal. 117; The State v. Mayberry, 48 Maine, 218; Chandler v. Johnson, 39 Ga. 85; Smith v. The State, 33 Maine, 48. Contra in Illinois, Lamkin v. People, 94 Ill. 501.

<sup>2</sup> People v. Park, 41 N. Y. 21.

<sup>3</sup> Stat. Crimes, § 154 et seq.

<sup>4</sup> Drennan v. People, 10 Mich. 169.

<sup>5</sup> Ward v. People, 3 Hill, N. Y. 395; yet see Carpenter v. Nixon, 5 Hill, N. Y. 260.

<sup>6</sup> Shay v. People, 22 N. Y. 317. See Fassett v. Smith, 23 N. Y. 252.

<sup>7</sup> Nathan v. The State, 8 Misso. 631; Tharp v. Commonwealth, 3 Met. Ky. 411; People v. War, 20 Cal. 117.

<sup>8</sup> The State v. Scott, 24 Vt. 127; R. S. of 1839, c. 102.

<sup>9</sup> The State v. Wheeler, 3 Vt. 344, 347.

whose jurisprudence is not purely of the common law, the distinction of felony and misdemeanor prevails.<sup>1</sup> In South Carolina, the act of 1801 made forgery a felony; that of 1845 changed the punishment from death to whipping, imprisonment, and a fine; and the court held, that forgery was still, according to the act of 1801, a felony.<sup>2</sup>

§ 622. **What Statutory Words create Felony.** — The statutes thus far discussed are in terms express; but, where a statute is not so, it will not create a felony except by necessary implication.<sup>3</sup> If, however, it makes the penalty for its violation death by hanging;<sup>4</sup> or provides for the punishment of accessories after the fact, there being in law none in misdemeanor;<sup>5</sup> or declares that one doing the forbidden thing “shall be deemed to have feloniously committed such act;”<sup>6</sup> the effect will be to create a felony.<sup>7</sup> “But an offence shall never be made a felony by any doubtful or ambiguous words; as, when an act is prohibited under pain ‘of forfeiting all that a man has,’ or ‘of forfeiting body and goods,’ or ‘of being at the king’s will for body and lands and goods;’ for such words will only make the offence a high misdemeanor.”<sup>8</sup> So, where the provision was, that one assaulting another as pointed out should “be deemed a felonious assaulter,” and punished by imprisonment, it was held not to create a felony; for “the word ‘felonious’ may be applied to the disposition of the mind of the offender, as aggravating a misdemeanor, and not as descriptive of the offence.”<sup>9</sup>

### III. *Misdemeanor.*

§ 623. **How defined.** — All crime less than felony is misdemeanor.<sup>10</sup>

<sup>1</sup> The State v. Rohfrischt, 12 La. An. 382.

<sup>2</sup> The State v. Rowe, 8 Rich. 17. And see ante, § 616.

<sup>3</sup> 1 Hawk. P. C. Curw. ed. p. 72, § 5, 6; ante, § 123. And see United States v. Lancaster, 2 McLean, 431; Commonwealth v. Macomber, 3 Mass. 254; Commonwealth v. Barlow, 4 Mass. 439; Commonwealth v. Simpson, 9 Met. 138.

<sup>4</sup> 1 Hale P. C. 703; 3 Inst. 91; 1 Hawk. P. C. Curw. ed. p. 72, § 5.

<sup>5</sup> Commonwealth v. Macomber, 3 Mass. 254; Commonwealth v. Barlow, 4

Mass. 439. And see Hughes v. The State, 12 Ala. 458.

<sup>6</sup> Rex v. Johnson, 3 M. & S. 539, 556.

<sup>7</sup> See also Rex v. Wyer, 1 Leach, 4th ed. 480, 2 East P. C. 753, 2 T. R. 77; Rex v. Solomons, 1 Moody, 292; Rex v. Cale, 1 Moody, 11.

<sup>8</sup> 1 Gab. Crim. Law, 17; 1 Hawk. P. C. Curw. ed. p. 72, § 6; 1 Co. Lit. 391; Bac. Abr. Statute, I. 1.

<sup>9</sup> Commonwealth v. Barlow, 4 Mass. 439. See Mead v. Boston, 3 Cush. 404.

<sup>10</sup> 1 Russ. Crimes, 3d Eng. ed. 45; Commonwealth v. Callaghan, 2 Va. Cas. 460; Rex v. Powell, 2 B. & Ad. 75.

§ 624. Further of the Word "Misdemeanor." — The word misdemeanor is sometimes loosely used in meanings less broad than as thus defined.<sup>1</sup> But its employment in the sense of our definition is sufficiently established. Russell<sup>2</sup> observes: "The word misdemeanor, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine, or imprisonment, or both."<sup>3</sup> A misdemeanor is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances.<sup>4</sup> Misdemeanors have been sometimes termed —

"Misprisions." — Indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please.<sup>5</sup> But generally misprision of felony is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law or by statute."<sup>6</sup>

§ 625. "Trespass" — (Escape). — The word trespass sometimes, in the older law writings, and occasionally in those of recent date,<sup>7</sup> means substantially misdemeanor, in distinction from felony;<sup>8</sup> or, more especially, a misdemeanor of the less aggra-

<sup>1</sup> On the other hand, the word "misdemeanor" may even denote a mere civil trespass. The State *v.* Mann, 21 Wis. 692.

<sup>2</sup> 1 Russ. Crimes, 3d Eng. ed. 45. I copy, in connection with the extract, the author's notes.

<sup>3</sup> 3 Burn Just. tit. Misdemeanor, citing Barrow Just. tit. Misdemeanor.

<sup>4</sup> 4 Bl. Com. 5, note 2; 3 Burn Just. tit. Misdemeanor.

<sup>5</sup> 1 Hawk. c. 20, § 2, and c. 59, § 1, 2; Burn Just. tit. Felony.

<sup>6</sup> 1 Hawk. P. C. c. 59, § 5.

<sup>7</sup> See, for a modern illustration, 1 Russ. Crimes, 3d Eng. ed. 675, where it is said, that, though rape was anciently a felony, the statute of Westm. 1, c. 13,

"reduced the offence to a trespass, and subjected the party to two years' imprisonment, and a fine at the king's will." The word "trespass" is also used in the same sense by Parsons, C. J., in Commonwealth *v.* Newell, 7 Mass. 245, 248. So also by the court in Commonwealth *v.* Miller, 2 Ashm. 61, 63; Chanet *v.* Parker, 1 Tread. 333. And see Wortham *v.* Commonwealth, 5 Rand. 669; The State *v.* Hurt, 7 Misso. 321.

<sup>8</sup> For example, in Reg. *v.* Tracy, 6 Mod. 30, 32, Holt, C. J., said: "It is known, that a fact which would make one accessory in felony, in trespass and in treason makes him a principal." In Rex *v.* Westbeer, 1 Leach, 4th ed. 12, 14, we are informed, that the question arose,

vated kind, or embracing some such element as is signified by the same term in the civil department. Thus it is used in various places by Blackstone; as, where, speaking of officers who voluntarily suffer prisoners to escape, he says: "It is generally agreed, that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or *trespass*."<sup>1</sup> Since there are civil trespasses, and this is our only word to designate them, the precision of legal language is best preserved by limiting its use to the civil wrong, and employing instead of it the term misdemeanor when treating of the criminal law.

"whether the prisoner should be discharged, or receive judgment as for a *trespass*." In an argument in favor of the latter course, "it was answered, that the prisoner would, in this case, lose many advantages to which, if he were indicted for *the misdemeanor*, he would in law be entitled." Examples without end might be added. The reader may refer

to *Rex v. Joyner*, J. Kel. 29; *Rex v. Newton*, 2 Lev. 111; 2 Hawk. P. C. Curw. ed. p. 55, § 63; 2 East P. C. 748; or he may open at random the old books of criminal law, and the collections of ancient statutes.

<sup>1</sup> 4 Bl. Com. 130. See also 4 Bl. Com. 36.

## CHAPTER XLIV.

## PROXIMITY OF THE OFFENDER TO THE COMPLETED CRIME.

§ 626. **Nearness of Participant.** — We saw, in the last chapter, that the law makes three degrees of crime, as to its enormity. Now, in like manner, we shall in a series of chapters consider how the law regards crime as to the nearness of the several participants in its commission. For example, one man may undertake to commit a crime but not accomplish what he meant, a second may excite a third to go elsewhere and do it, the third may stand by and encourage a fourth, and the fourth may with his own hands accomplish what all intended should be done. And we say that these four persons, all of whom incurred legal guilt, stand in different degrees of proximity to the completed crime. Does the law treat them alike? This is what is to be explained in the chapters on which we are now to enter.

§ 627. **In what Order discussed.** — But, before we enter upon the direct inquiries thus suggested, we shall examine, in the next chapter, the general doctrine of the combination of persons in crime, as to the degree and nature of the participation which, when it is committed, will make one, in any form, guilty. The transition will then be easy, in subsequent chapters, to the degree and nature of his guilt. Further on, we shall consider compounding and misprision, wherein one, without combining with another, still incurs a guilt in respect of the other's wrong-doing. Afterward, under the title Attempt, we shall consider how a man, not combining with another, becomes guilty in respect of an offence which neither he nor any one else in fact commits.

## CHAPTER XLV.

## COMBINATIONS OF PERSONS IN CRIME.

§ 628. **In General.** — If one employs another to do a thing, we commend or blame him precisely as though it were done with his own hands. In like manner, we commend or blame the other, if his will concurred, the same as though he had proceeded self-moved. And if two act together in the doing, it is the same as to each. To illustrate this principle, as seen in the criminal law, is the purpose of the present chapter.

§ 629. **Doctrine defined.** — The doctrine of combination in crime is, that, when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrong-doing is in law responsible for the whole, the same as though performed by himself alone. It may be particularized thus, —

§ 630. **Acting jointly — Severally.** — If persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone;<sup>1</sup> and it is the same if, the act being divided into parts, each proceeds with his several part unaided.<sup>2</sup> And, —

§ 631. **Acting by Agent.** — Since an act by an agent has in law the effect of a personal act,<sup>3</sup> if one employs another to do a criminal thing for him, he is guilty the same as though he had done it himself.<sup>4</sup> Nor is his guilt the less if the agent

<sup>1</sup> *People v. Mather*, 4 Wend. 229, 259; *Reg. v. Haines*, 2 Car. & K. 368; *Reg. v. Mazeau*, 9 Car. & P. 676.

<sup>2</sup> *Rex v. Lockett*, 7 Car. & P. 300; *Reg. v. Nickless*, 8 Car. & P. 757; *Reg. v. Whittaker*, 1 Den. C. C. 310; *Reg. v. Hurse*, 2 Moody & R. 360; *Rex v. Standley*, Russ. & Ry. 305; *Reg. v. Gerrish*, 2 Moody & R. 219; *Rex v. Passey*, 7 Car. & P. 282; *Reg. v. Rogers*, 2 Moody, 85, 2

*Lewin*, 119, 297; *Reg. v. Kelly*, 2 Cox C. C. 171; *Smith v. People*, 1 Col. Ter. 121.

<sup>3</sup> *Broom Leg. Max.* 2d ed. 643.

<sup>4</sup> *United States v. Morrow*, 4 Wash. C. C. 733; *Reg. v. Williams*, Car. & M. 259; *Schmidt v. The State*, 14 Misso. 137; *Adams v. People*, 1 Comst. 173; *Commonwealth v. Stevens*, 10 Mass. 181; *Commonwealth v. Nichols*, 10 Met. 259;



proceeds equally from his own desires or on his own account.<sup>1</sup> Finally, —

§ 632. **Will contributing.** — By this sort of reasoning we reach the conclusion, that every person whose corrupt intent contributes to a criminal act, in a degree sufficient for the law's notice,<sup>2</sup> is in law guilty of the whole crime.<sup>3</sup> Thus, —

**Present countenancing — (Prize-fight).** — It may be said in a sort of general way, that all who by their presence countenance a riot or a prize-fight or any other crime, — especially if ready to help should necessity require,<sup>4</sup> — are liable as principal actors.<sup>5</sup> But this statement needs to be made more exact.

§ 633. **Mere Presence — What more.** — A mere presence is not sufficient; <sup>6</sup> nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done.<sup>7</sup> There must be something going a little further; <sup>8</sup> as, for example, some word or act.<sup>9</sup> The party to be charged "must," in the language of Cockburn, C. J., "incite, or procure, or encourage the act."<sup>10</sup>

*Rex v. Dyson*, Russ. & Ry. 523; *The State v. Dow*, 21 Vt. 484; *Commonwealth v. Hill*, 11 Mass. 136. And see *Ewing v. Thompson*, 13 Misso. 132; *Caldwell v. Sacra*, Litt. Sel. Cas. 118; *Leggett v. Simmons*, 7 Sm. & M. 348.

<sup>1</sup> *Rex v. Russell*, 1 Moody, 356; *Ross v. Commonwealth*, 2 B. Monr. 417.

<sup>2</sup> Ante, § 212 et seq.

<sup>3</sup> *Lord Mohun's Case*, Holt, 479; 1 East P. C. 89; *Rex v. Plummer*, J. Kel. 109, 114, 118; *Rex v. Whithorne*, 3 Car. & P. 394; *United States v. Jones*, 3 Wash. C. C. 209; *The State v. Heyward*, 2 Nott & McC. 312; *Howlett v. The State*, 5 Yerg. 144; *Reg. v. Howell*, 9 Car. & P. 437; *Collins v. Commonwealth*, 3 S. & R. 220; *The State v. Caldwell*, 2 Tyler, 212; *Reg. v. Swindall*, 2 Car. & K. 230; *Reg. v. Harris*, Car. & M. 661, note; *Green v. The State*, 13 Misso. 382; *Reg. v. Young*, 8 Car. & P. 644; *Rex v. Skerrett*, 2 Car. & P. 427; *Rex v. Douglas*, 7 Car. & P. 644.

<sup>4</sup> *Doan v. The State*, 26 Ind. 495.

<sup>5</sup> *Rex v. Hunt*, 1 Keny. 108; *Rex v. Perkins*, 4 Car. & P. 537; *Rex v. Billingham*, 2 Car. & P. 234; *Rex v. Murphy*, 6 Car. & P. 103; *Rex v. Fursey*, 6 Car. & P. 81; *The State v. Straw*, 33 Maine, 554; *Williams v. The State*, 9 Misso. 270.

And see *Reg. v. Young*, 8 Car. & P. 644.

<sup>6</sup> *Butler v. Commonwealth*, 2 Duvall, 435; *The State v. Farr*, 33 Iowa, 553; *The State v. Hardy*, Dudley, S. C. 236; *People v. Woodward*, 45 Cal. 203; *People v. Ah Ping*, 27 Cal. 489. So mere knowledge that an offence is about to be committed will not involve in guilt a person who takes no part in it, and is not present at its commission. *Tullis v. The State*, 41 Texas, 598.

<sup>7</sup> *Clem v. The State*, 33 Ind. 418; *Plummer v. Commonwealth*, 1 Bush, 76. And see *Thompson v. Commonwealth*, 1 Met. Ky. 13; *Ring v. The State*, 42 Texas, 282; *People v. Ah Ping*, 27 Cal. 489; *Smith v. The State*, 37 Ala. 472.

<sup>8</sup> *Burrell v. The State*, 18 Texas, 713. And see *United States v. Poage*, 6 McLean, 89.

<sup>9</sup> *Reg. v. Atkinson*, 11 Cox C. C. 330; *Commonwealth v. Cooley*, 6 Gray, 350. And see *The State v. Cockman*, Winston, No. 2, 95; *The State v. David*, 4 Jones, N. C. 353; *Huling v. The State*, 17 Ohio State, 533; *Cabbell v. The State*, 46 Ala. 195.

<sup>10</sup> *Reg. v. Taylor*, Law Rep. 2 C. C. 147, 149, 13 Cox C. C. 68, 12 Eng. Rep

His will must in some degree contribute to what is done. To illustrate, —

**False Pretence — Conspiracy.** — If one of several persons utters a false pretence in the presence of the others who concur in it, all are guilty.<sup>1</sup> And if several conspire to seize and run away with a vessel, and death comes to one opposing, all who are present abetting are punishable criminally for the murder.<sup>2</sup>

§ 634. *Applications of the Doctrine in Varying Circumstances* :—

**Sometimes Difficult.** — It is believed that the foregoing illustrations sufficiently explain the general doctrine ; but its application is sometimes difficult ; and, as to this, further views will be helpful.

**Persons Lawfully together — Crime by One.** — From the proposition that mere presence at the commission of a crime does not render a person guilty,<sup>3</sup> it results, that, if two or more are lawfully together, and one does a criminal thing without the concurrence of the others, they are not thereby involved in guilt.<sup>4</sup> But, however lawful the original coming together, the after conduct may satisfy a jury that all are guilty of what is done.<sup>5</sup>

**Unlawfully together.** — Even where persons are unlawfully together, and by concurrent understanding are in the actual perpetration of some crime, if one of them, of his sole volition, and not in pursuance of the main purpose, does a criminal thing in no way connected with what was mutually contemplated, he only is liable.<sup>6</sup> Thus, —

**Robbery after joint Wounding — Resisting Arrest.** — If, in England, poachers join in an attack on the gamekeeper, and leave him

636, and Moak's note. Compare this case with Vol. II. § 311.

<sup>1</sup> *Young v. Rex*, 3 T. R. 98. And see *Reg. v. Tisdale*, 20 U. C. Q. B. 272.

<sup>2</sup> *United States v. Ross*, 1 Gallis. 624.

<sup>3</sup> Ante, § 633.

<sup>4</sup> *J. Kel.* 47 ; 1 East P. C. 334 ; Anonymous, 6 Mod. 43 ; *The State v. Stalcup*, 1 Ire. 30 ; *United States v. Jones*, 3 Wash. C. C. 209, 223 ; *Reg. v. Luck*, 3 Fost. & F. 483. And see *Reg. v. Howell*, 9 Car. & P. 437.

<sup>5</sup> Vol. II. § 1150 ; *The State v. St. Clair*, 17 Iowa, 149. See also *Kelly v. Commonwealth*, 1 Grant, Pa. 484 ; *Brown v. The State*, 28 Ga. 199 ; *Strawhern v. The State*, 37 Missis. 422.

<sup>6</sup> *Rex v. Hodgson*, 1 Leach, 4th ed. 6 ; s. c. nom. *Rex v. Hubson*, 1 East P. C. 258 ; *Rex v. Mastin*, 6 Car. & P. 396 ; *Rex v. Collison*, 4 Car. & P. 565 ; *Rex v. Hawkins*, 3 Car. & P. 392 ; *Rex v. Plummer*, *J. Kel.* 109, 111, 113 ; *United States v. Gibert*, 2 Sumner, 19, 29 ; *Rex v. McIlhone*, 1 Crawf. & Dix C. C. 156 ; *Reg. v. Soley*, 2 Salk. 594, 595 ; Anonymous, 6 Mod. 43 ; *Rex v. Southern*, Russ. & Ry. 444 ; *Reg. v. Price*, 8 Cox C. C. 96 ; *Reg. v. Doddridge*, 8 Cox C. C. 335 ; *Commonwealth v. Campbell*, 7 Allen, 541 ; *Reg. v. Luck*, 3 Fost. & F. 483 ; *Manier v. The State*, 6 Baxter, 595 ; *Mercersmith v. The State*, 8 Texas Ap. 211. And see *Reg. v. Howell*, 9 Car. & P. 437.

senseless, — then, if one of them returns and steals his money, this one alone can be convicted of the robbery.<sup>1</sup> So, if two have committed a larceny together, and one suddenly wounds an officer attempting to arrest both, the other one cannot be convicted of this wounding unless the two had conspired, not only to steal, but to resist also, with extreme violence, any who might attempt to apprehend them.<sup>2</sup> Again, —

§ 635. **Maiming by one to prevent Arrest.** — If several are out committing a felony, and, on alarm, run different ways, and one to avoid being taken maims a pursuer, the others are not guilty parties in the mayhem.<sup>3</sup> And —

**Assault ending in Mayhem.** — It has been even held, that, where two join in an assault, and one commits mayhem, the other is not liable for the latter offence, unless he also intended to maim.<sup>4</sup> But the correctness of this decision is doubtful.<sup>5</sup> So, —

**Homicide by One.** — If two are riding rapidly along a highway as in racing, and one of them passes a third without harming him, but the other rides against his horse and it throws and kills him, this one alone is responsible for the manslaughter.<sup>6</sup> Yet a man who invites another to a place to be murdered by an accomplice is accessory to the homicide when committed.<sup>7</sup> Again, —

**Robbery by One.** — Where a statute had made the obtaining of goods on a false charge of sodomy<sup>8</sup> a different offence from robbery,<sup>9</sup> and two combined thus to obtain goods of a third, and, while they were jointly in the execution of this plan, one of them without the other's concurrence got possession of the goods by force, the one only was held to have committed robbery.<sup>10</sup>

§ 636. **Acts within Common Plan.** — But, as we saw in another connection,<sup>11</sup> a man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of

<sup>1</sup> *Rex v. Hawkins*, 3 Car. & P. 392.  
And see *Sloan v. The State*, 9 Ind. 565.

<sup>2</sup> *Rex v. Collison*, 4 Car. & P. 565.  
And see *Reg. v. Howell*, 9 Car. & P. 437.

<sup>3</sup> *Rex v. White, Russ. & Ry.* 99.

<sup>4</sup> *The State v. Absence*, 4 Port. 397.  
And see *Frank v. The State*, 27 Ala. 37;  
*Brennan v. People*, 15 Ill. 511; *Thompson v. The State*, 25 Ala. 41.

<sup>5</sup> *Post*, § 636.

<sup>6</sup> *Rex v. Mastin*, 6 Car. & P. 396.

<sup>7</sup> *Reg. v. Manning*, 2 Car. & K. 887.

<sup>8</sup> See Vol. II. § 1172.

<sup>9</sup> In a subsequent case, it was doubted whether the statute — 1 Vict. c. 87, § 3 — did so operate. *Reg. v. Stringer*, 2 Moody, 261.

<sup>10</sup> *Reg. v. Henry*, 9 Car. & P. 309, 2 Moody, 118.

<sup>11</sup> *Ante*, § 313-336.

one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable.<sup>1</sup>

§ 637. **Degree of Departure from Plan.** — There is a degree, not exactly definable, in which a departure, by a confederate, from the contemplated plan will relieve the rest from responsibility for what he does, and another less degree which will not relieve. Some instances are the following, —

**Rioters, and Homicide by those suppressing.** — If there is a riot, and an innocent third person is accidentally killed by those suppressing it, the rioters are not guilty of the homicide; for in no way did they concur in or encourage the act which caused death.<sup>2</sup> But, —

**Killing Person opposing.** — If several are committing a crime together, and one of them kills an officer or other person who opposes or attempts to arrest them, the rest are not necessarily, as we have seen,<sup>3</sup> to be deemed participants in the homicide; but in various circumstances they are, although it was not their original design to take life.<sup>4</sup>

**Libel.** — If one requests another to write a libel, which he does, but swells it beyond the matter contemplated, the former is responsible for the whole.<sup>5</sup>

**Homicide not contemplated.** — If two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable.<sup>6</sup>

§ 638. **Changing Means to agreed End — (Treason).** — “If,” in

<sup>1</sup> *United States v. Ross*, 1 Gallis. 624; *Rex v. Plummer*, J. Kel. 109, 114, 118; *United States v. Gibert*, 2 Sumner, 19, 29; *Mansell's Case*, 2 Dy. 128 b, pl. 60; *Rex v. Murphy*, 6 Car. & P. 108; *Ashton's Case*, 12 Mod. 256; *Rex v. Keat*, 5 Mod. 288, 292; *Sir C. Stanley's Case*, J. Kel. 86; *Rex v. Edmeads*, 3 Car. & P. 390; 1 East P. C. 258; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Howell*, 9 Car. & P. 437; *Brennan v. People*, 15 Ill. 511; *Thompson v. The State*, 25 Ala. 41; *Reg. v. Bernard*, 1 Fost. & F. 240; *Reg. v. Jackson*, 7 Cox C. C. 357; *Reg. v. Caton*, 12 Cox C. C. 624, 10 Eng. Rep. 506; *Reg. v. Harrington*, 5 Cox C. C. 281; *Ferguson*

*v. The State*, 32 Ga. 658. But see *Frank v. The State*, 27 Ala. 37; *The State v. Absence*, 4 Port. 397.

<sup>2</sup> *Commonwealth v. Campbell*, 7 Allen, 541.

<sup>3</sup> *Ante*, § 635.

<sup>4</sup> *Ruloff v. People*, 45 N. Y. 213, 11 Abb. Pr. n. s. 245, 5 Lans. 261; *Moody v. The State*, 6 Coldw. 299.

<sup>5</sup> *Reg. v. Cooper*, 1 Cox C. C. 266.

<sup>6</sup> *Reg. v. Caton*, 12 Cox C. C. 624, 10 Eng. Rep. 506. And see *Watts v. The State*, 5 W. Va. 532; *Reg. v. Skeet*, 4 Fost. & F. 931; *Reg. v. Lee*, 4 Fost. & F. 63; *Reg. v. Phillips*, 8 Cox C. C. 225; *The State v. Shelledy*, 8 Iowa, 477.

the words of Popham, C. J., "many do conspire to execute treason against the prince in one manner, and some of them do execute it in another manner, yet their act, though different in the manner, is the act of all them who conspire, by reason of the general malice of the intent."<sup>1</sup> Thus, also, —

§ 639. **Joining in Part** — (**Rescue — Homicide**). — If a person is present aiding in the commencement of an assault with intent to rescue a prisoner, he does not cease to be guilty though his fears prevent him from going all lengths with his party.<sup>2</sup> Yet East observes, that, "in order to make the killing, by any, murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done, or in contemplation, it must happen during the actual strife or endeavor, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened."<sup>3</sup>

§ 640. **Prompting to a Crime**. — It is within a principle already stated,<sup>4</sup> that, if one purposely excites another to commit an offence, — as, if he harangues people inflaming them to a riot, — and the offence is accordingly committed, he is guilty, though he personally takes no part in it. But the connection between what is done by him and them must be reasonably apparent.<sup>5</sup> And it may be a nice question what departures from the plan will relieve from responsibility the person who sets it on foot.<sup>6</sup>

<sup>1</sup> Blunt's Case, 1 Howell St. Tr. 1409, 1412. And see 1 East P. C. 98.

<sup>2</sup> The State v. Morris, 3 Hawks, 388; Reg. v. Wallis, 1 Salk. 334, Holt, 484; Rex v. Warner, 1 Moody, 380, 5 Car. & P. 525.

<sup>3</sup> 1 East P. C. 259.

<sup>4</sup> Ante, § 631.

<sup>5</sup> Reg. v. Sharpe, 3 Cox C. C. 288; Vol. II. § 1146, 1153.

<sup>6</sup> Hawkins says: "If a man command another to commit a felony on a particular person or thing, and he do it on another: as, to kill A, and he kill B; or, to burn the house of A, and he burn the house of B; or, to steal an ox, and he steal an horse; or, to steal such an horse, and he steal another; or, to commit a felony of one kind, and he commit another of a quite different nature, — as, to rob J. S. of his plate as he is going to market, and he break open his house in the night and there steal the plate, — it is said, that the commander is not an ac-

cessory, because the act done varies in substance from that which was commanded. But it is observable, that Plowden, in his report of Saunders's Case (Reg. v. Saunders, 2 Plow. 473, 475), which seems to be the chief foundation of what is said by others concerning these points, in putting the case of a command to burn the house of A, which shall not make the commander an accessory to the burning of the house of B unless it were caused by burning that of A, states in this manner: 'If I command a man to burn the house of such an one, which he well knows, and he burn the house of another, there I shall not be accessory, because it is another distinct thing, to which I did not give assent,' &c. By which it seems to be implied, that it is a necessary ingredient in such a case to make B no accessory, that he knew the house which he was commanded to burn; for, if he did not know it, but mis-

§ 641. **Rules to determine Responsibility.**—The true view is doubtless as follows: One is responsible for what of wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not contemplate it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But, if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein, merely because, when it was done, he meant to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules.

§ 642. **Joining in Act partly performed.**—If, while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole; because he contributed to the result.<sup>1</sup> Should the offence be one requiring a specific intent,<sup>2</sup> and the charge be that he was present abetting the others, his knowledge of their intent must also be shown.<sup>3</sup> If, in these cases, there is no mutual understanding of each other's purpose, then each who contributed in act to the result will be responsible simply for what he personally meant.<sup>4</sup>

**After Offence completed.**—When a crime has been fully committed, one not already guilty is too late to be a sharer in it;<sup>5</sup> though, if it is a felony, he may become an accessory after the

took another for it, and, intending only to burn the house which he was commanded to burn, happen by such mistake to burn the other, it may probably be argued, that the commander ought to be esteemed an accessory to such burning; because it was the direct and immediate effect of an act wholly influenced by his command, and intended to have pursued it." 2 Hawk. P. C. Curw. ed. p. 444, § 21, 22.

<sup>1</sup> *People v. Mather*, 4 Wend. 229, 259; *Sir Charles Stanley's Case*, J. Kel. 86;

*Anonymous*, 6 Mod. 43; 1 East P. C. 70; *Reg. v. Simpson*, Car. & M. 669; *Keithler v. The State*, 10 Sm. & M. 192.

<sup>2</sup> *Ante*, § 320, 342.

<sup>3</sup> *Reg. v. Cruse*, 8 Car. & P. 541. And see *Rex v. Southern*, Russ. & Ry. 444; *Brown v. The State*, 28 Ga. 199.

<sup>4</sup> *Beets v. The State*, Meigs, 106; *Rex v. Murphy*, 6 Car. & P. 103; *Reg. v. Howell*, 9 Car. & P. 437.

<sup>5</sup> *Rex v. Hawkins*, 3 Car. & P. 392; *Rex v. King*, Russ. & Ry. 332; *Rex v. McMakin*, Russ. & Ry. 333, note.

fact.<sup>1</sup> Therefore, it appearing on an indictment against three for cutting and wounding, that the third came to the spot only after one of the others had gone away, and there kicked the wounded man struggling on the ground with the remaining one, he was deemed entitled to an acquittal.<sup>2</sup>

§ 643. **Conclusion.** — Having thus seen under what circumstances the law holds different persons responsible for a crime committed by more than one, we are prepared to inquire what is the particular form of guilt which it attributes to each.

<sup>1</sup> *Rex v. Lee*, 6 Car. & P. 536.

<sup>2</sup> *Reg. v. McPhane*, Car. & M. 212.

## CHAPTER XLVI.

THE PRINCIPAL ACTOR.<sup>1</sup>

§ 644, 645. Introduction.

646-654. As to Felony.

655. As to Treason.

656-659. As to Misdemeanor.

§ 644. **Scope of this Chapter** — (**Principals of First and Second Degrees**). — On the “Diagram of Crime,”<sup>2</sup> the scope of this chapter is indicated by C E M N O. It includes principals of the first and second degrees in felony, and those who sustain the like relation in treason and misdemeanor. But participants who are treated as principals in treason and misdemeanor, by reason of their having advised what another performs in their absence, will be considered in the next chapter.

§ 645. **How the Chapter divided**. — We shall examine the doctrine, I. As to Felony; II. As to Treason; III. As to Misdemeanor.

I. *As to Felony.*

§ 646. **Participants how named**. — A mere attempt to commit felony,<sup>3</sup> or a compounding<sup>4</sup> or misprision<sup>5</sup> of it, is misdemeanor. But there are four differing methods of participation in it which make the participant a felon.<sup>6</sup> He may be an accessory before the fact,<sup>7</sup> or an accessory after the fact,<sup>8</sup> or a principal of the first, or a principal of the second degree. The last two are now for consideration.

§ 647. **Contribution of Will**. — We saw, in the last and preceding chapters, that, for a man to be criminal in respect of an act performed either by his own physical volitions or another's, his

<sup>1</sup> See *Crim. Proc.* II. § 1 et seq.<sup>2</sup> Ante, § 602.<sup>3</sup> Post, § 723 et seq.<sup>4</sup> Post, § 709 et seq.<sup>5</sup> Post, § 716 et seq.<sup>6</sup> And see *Vaux's Case*, 4 Co. 44.<sup>7</sup> Post, § 672 et seq.<sup>8</sup> Post, § 692 et seq.



will must contribute to it. In these chapters, we assume that the will does thus contribute.

§ 648. **Two degrees of Principals.** — In felony, there are two degrees in which men become principal offenders.

**Principal First Degree defined.** — A principal of the first degree is one who does the act, either himself directly, or by means of an innocent agent.<sup>1</sup>

**Principal Second Degree.** — A principal of the second degree is one who is present lending his countenance and encouragement, or otherwise aiding, while another does the act.<sup>2</sup>

**Distinction Formal — (Its Origin — How the Indictment).** — But the distinction between the two degrees is without practical effect.<sup>3</sup> Its origin is, that anciently those only who are now called principals of the first degree were deemed principals at all: persons present abetting were accessories at the fact. But when the courts came to hold the latter to be principals, they termed them principals of the second degree.<sup>4</sup> And now an indictment against one as principal of the first degree is sustained by proof of his being principal of the second; and, on the contrary, an indictment against him as principal of the second degree is supported by proof that he is principal of the first.<sup>5</sup> The distinction is in all respects without a difference;<sup>6</sup> and it should not be preserved in the books.

<sup>1</sup> See ante, § 310; post, § 649, 651.

<sup>2</sup> *Williams v. The State*, 47 Ind. 568, 574.

<sup>3</sup> *Crim. Proc.* II. § 3.

<sup>4</sup> 1 *Russ. Crimes*, 3d Eng. ed. 26; *Griffith's Case*, 1 *Plow.* 97, 98; *Foster*, 347, 348.

<sup>5</sup> *Crim. Proc.* II. § 3; *The State v. Mairs*, *Coxe*, 463; *The State v. Anthony*, 1 *McCord*, 285; *Rex v. Cunningham*, 1 *Crawf. & Dix C. C.* 196; *Rex v. Greene*, 1 *Crawf. & Dix C. C.* 198; *The State v. Cameron*, 2 *Chand.* 172; *Bauson v. Offley*, 8 *Salk.* 38; *Reg. v. Wallis*, 1 *Salk.* 334; *Reg. v. Crisham*, *Car. & M.* 187; *Rex v. Towle*, *Russ. & Ry.* 314, 3 *Price*, 145; *Rex v. Gogerly*, *Russ. & Ry.* 343; *Foster*, 351; *Shaw v. The State*, 18 *Ala.* 547; *Archb. New Crim. Proc.* 13. *The State v. Hill*, 72 *N. C.* 345; *Young v. Commonwealth*, 8 *Bush*, 366; *People v. Ah Fat*, 48 *Cal.* 61. But see *Reg. v. Tyler*, 8 *Car. & P.* 616.

<sup>6</sup> *The State v. Fley*, 2 *Brev.* 338; *Reg. v. Rogers*, 2 *Moody*, 85; *Griffith's Case*, 1 *Plow.* 97, 98, 100; *Reg. v. Phelps*, *Car. & M.* 180; *Rex v. Taylor*, 1 *Leach*, 4th ed. 360; *Shaw's Case*, 1 *East P. C.* 351; *Rex v. Folkes*, 1 *Moody*, 354; *Reg. v. Williams*, *Car. & M.* 259; *Rex v. Gray*, 7 *Car. & P.* 164; *Rex v. Potts*, *Russ. & Ry.* 353; *Rex v. Royce*, 4 *Bur.* 2073; *Rex v. Moore*, 1 *Leach*, 4th ed. 314, 2 *East P. C.* 679; *Dennis v. The State*, 5 *Pike*, 230; *Fugate v. The State*, 2 *Humph.* 397; *The State v. Arden*, 1 *Bay*, 487; *Hately v. The State*, 15 *Ga.* 346; *McCarty v. The State*, 26 *Missis.* 299, 303; *United States v. Wilson*, *Bald.* 78; *The State v. Ross*, 29 *Miss.* 32; *Hill v. The State*, 28 *Ga.* 604; *The State v. Simmons*, 6 *Jones*, *N. C.* 21; *The State v. McGregor*, 41 *N. H.* 407; *King v. The State*, 21 *Ga.* 220; *The State v. Ellis*, 12 *La. An.* 390; *Brown v. The State*, 28 *Ga.* 199; *The State v. Merritt*, *Phillips*, 134; *Common-*

**Under Exceptional Statutes.** — Occasionally, however, we meet with a statute so drawn upon this distinction as necessarily to keep it alive for its particular purpose.<sup>1</sup>

§ 649. **Who a Principal.** — It being, therefore, unimportant to draw any nice distinctions between the two sorts of principal, let us see where the line separates the principal of either degree from the accessory. One plain proposition is, that there can be no crime without a principal. There may be more principals than one; but there must be, at least, one. Therefore a man whose sole will procures a criminal transaction is principal, whatever physical agencies he employs,<sup>2</sup> and whether he is present or absent<sup>3</sup> when the thing is done. Or, if he is present abetting while any act necessary to constitute the offence is being performed through another,<sup>4</sup> though not the whole thing necessary, — and perhaps, while any act is being done which may enter into the offence,<sup>5</sup> though not strictly necessary, — he is a principal. But he is not such if what is accomplished in his presence is in no sense a part of the offence.<sup>6</sup> Again, —

§ 650. **Distinct Acts to one End — (Forgery).** — Where several acts constitute together one crime, if each is separately performed by a different individual in the absence of the rest, all are principals as to the whole.<sup>7</sup> For example, where forgery is a statutory felony, if persons make distinct parts of a forged instrument, each is a principal as to the whole, even though he does not know by whom the other parts are executed, and one finishes it alone while the rest are absent.<sup>8</sup> Were the law not so, no one could be punished; for a person whose own hand does

wealth *v.* Fortune, 105 Mass. 592; *The State v. Jenkins*, 14 Rich. 215; *Clay v. The State*, 40 Texas, 67; *The State v. Squaires*, 2 Nev. 226; *The State v. Dyer*, 59 Maine, 303; *The State v. Center*, 35 Vt. 378; *Washington v. The State*, 36 Ga. 222; *People v. Cotta*, 49 Cal. 166.

<sup>1</sup> And see *Foster*, 355 et seq.; *Brennan v. People*, 15 Ill. 511; *Reg. v. Whistler*, 11 Mod. 25, 2 Ld. Raym. 842; *Warden v. The State*, 24 Ohio State, 143.

<sup>2</sup> See post, § 651.

<sup>3</sup> *Pinkard v. The State*, 30 Ga. 757.

<sup>4</sup> *Reg. v. Kelly*, 2 Car. & K. 379; *Reg. v. Simpson*, Car. & M. 669; *Rex v. Jordan*, 7 Car. & P. 432; *Rex v. Harding*, Russ. & Ry. 125; *Rex v. Palmer*, Russ. &

Ry. 72, 2 Leach, 4th ed. 978, 1 New-Rep. 96; *Rex v. Standley*, Russ. & Ry. 305; *Rex v. County*, 2 Russ. Crimes, 3d Eng. ed. 118; *Rex v. Butteris*, 6 Car. & P. 147; *Cornwal's Case*, 2 Stra. 881; *Hawkins's Case*, cited 2 East P. C. 485; *Rex v. Harris*, 7 Car. & P. 416; ante, § 642.

<sup>5</sup> *Rex v. Dyer*, 2 East P. C. 767; *Rex v. Hornby*, 1 Car. & K. 305.

<sup>6</sup> *Rex v. King*, Russ. & Ry. 332; *Rex v. McMakin*, Russ. & Ry. 333, note; *Rex v. Badcock*, Russ. & Ry. 249.

<sup>7</sup> See, as illustrative, *Rex v. Cope*, 1 Stra. 144. And see post, § 653.

<sup>8</sup> *Rex v. Kirkwood*, 1 Moody, 304; *Rex v. Dade*, 1 Moody, 307; *Rex v. Bingley*, Russ. & Ry. 446.

the criminal act, either wholly or in part, is not an accessory.<sup>1</sup>

§ 651. **Act through Innocent Agent.** — And because there must always be a principal,<sup>2</sup> one is such who does the criminal thing through an innocent agent,<sup>3</sup> though personally absent. If a dose of poison,<sup>4</sup> or an animate object like a human being, with<sup>5</sup> or without<sup>6</sup> general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, the latter is deemed in law a principal offender, for there is no other. But, if the agent employed incurs guilt, then the employer is simply an accessory before the fact.<sup>7</sup>

§ 652. **Counselling to Suicide.** — If one counsels another to suicide, and it is done in his presence, the adviser is, in every view, guilty as principal.<sup>8</sup> Accordingly where two persons, agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other.<sup>9</sup> But does the person who takes his own life occupy the position

<sup>1</sup> In an English jury case, Cresswell, J., on consultation with Patteson, J., ruled, that, if one of two confederates unlocks the door of a room in which a larceny is to be committed, then goes away, and the other confederate comes and steals the goods, the former is not a principal in the theft. *Reg. v. Jeffries*, 3 Cox C. C. 85. I doubt the soundness of this ruling. If sustainable, it must be on the ground that the unlocking of the door constituted no part of the crime. But it seems to me that it was a part of the criminal transaction, distinctly contributing to the end. In Ohio, one of several confederates enticed the owner of a store a mile away and detained him, while the others broke open the store and took the goods; and the court held, it seems to me correctly, that he was a principal. The decision was put upon the ground that he was constructively present. He not merely advised, but bore a part in the criminal transaction; that constitutes a principal, whether we call it being constructively present or not. *Breese v. The State*, 12 Ohio State, 146. In these two cases, which seem on principle alike, but decided differently by different courts, it

would appear not unreasonable to hold, that, as the unlocking of the door in the one, and the enticing away of the owner in the other, were not necessarily parts of the crime, it would have been competent for the prosecuting power, at its election, to deal with these persons as accessories before the fact. See post, § 663, 664.

<sup>2</sup> Ante, § 649.

<sup>3</sup> Ante, § 310.

<sup>4</sup> *Vaux's Case*, 4 Co. 44; *Reg. v. Michael*, 9 Car. & P. 356, 2 Moody, 120.

<sup>5</sup> *Rex v. Giles*, 1 Moody, 166, Car. Crim. Law, 3d ed. 191; *Commonwealth v. Hill*, 11 Mass. 136; *Adams v. People*, 1 Comst. 173; *Reg. v. Mazeau*, 9 Car. & P. 676; *Reg. v. Saunders*, 2 Plow. 473; *The State v. Fulkerson*, Phillips, 233, and other cases cited ante, § 310.

<sup>6</sup> Anonymous, J. Kel. 53. And see *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Michael*, 9 Car. & P. 356, 2 Moody, 120.

<sup>7</sup> *Wixson v. People*, 5 Parker C. C. 119; *Reg. v. Manley*, 1 Cox C. C. 104.

<sup>8</sup> Vol. II. § 1187; *Rex v. Dyson*, Russ. & Ry. 523; *Reg. v. Alison*, 8 Car. & P. 418.

<sup>9</sup> *Reg. v. Alison*, 8 Car. & P. 418. And see 1 East P. C. 229; *The State v. Ludwig*, 70 Misso. 412.

of an innocent or a guilty agent? The latter is the English doctrine; so that, if the adviser is absent at the commission of the act, he is only an accessory before the fact, who cannot be convicted except after or with his principal, — which is never.<sup>1</sup> It is not quite certain whether this is the American doctrine also; or whether, with us, the person committing suicide is to be deemed an innocent agent in inflicting the violence on himself,<sup>2</sup> so that the adviser will be principal, though absent when the deed is done. In Massachusetts, two prisoners being confined in adjoining cells within hearing of each other, one advised the other to take his own life, which he did; and it was ruled, that, if the advice was the cause moving to the deed, the adviser was guilty of murder.<sup>3</sup> To some extent, at present, this question is regulated by statutes.

§ 653. **In Presence of Principal of First Degree.** — Some of the foregoing doctrines, the reader perceives, grow out of the necessity of there being a principal. But where there is unquestionably a principal of the first degree, — that is, a responsible person in the actual commission of the offence through his own volition, — no other person will be a principal as abetting him, unless in a position to render, if necessary, some personal assistance. If the will of the other contributes to the act,<sup>4</sup> the test, to determine whether he is a principal rather than an accessory,<sup>5</sup> is, whether he is so near, or otherwise so situated, as to make his personal help, if required, to any degree available.<sup>6</sup> He need not be in the actual presence of the other principal; but, if he is constructively there, as thus explained, it is enough.<sup>7</sup> And, for reasons already

<sup>1</sup> *Rex v. Russell*, 1 Moody, 856; *Reg. v. Leddington*, 9 Car. & P. 79. See *Reg. v. Fretwell*, Leigh & C. 161, 9 Cox C. C. 152.

<sup>2</sup> And see Vol. II. § 1187.

<sup>3</sup> *Commonwealth v. Bowen*, 13 Mass. 356. See, as perhaps illustrative, *Berry v. The State*, 10 Ga. 511, 518.

<sup>4</sup> Ante, § 628 et seq.

<sup>5</sup> Post, § 663.

<sup>6</sup> *Commonwealth v. Knapp*, 9 Pick. 496, 516-519; *Rex v. Manners*, 7 Car. & P. 801; *Rex v. Stewart*, Russ. & Ry. 363; *Green v. The State*, 13 Misso. 382; *Rex v. Soares*, Russ. & Ry. 25, 2 East P. C. 974; *Rex v. Kelly*, Russ. & Ry. 421; *Reg. v. Jones*, 9 Car. & P. 761; *Tate v. The*

*State*, 6 Blackf. 110; *Rex v. Davis*, Russ. & Ry. 113; *The State v. Wisdom*, 8 Port. 511; *Norton v. People*, 8 Cow. 137; *Reg. v. Perkins*, 12 Eng. L. & Eq. 687; *Breese v. The State*, 12 Ohio State, 146, 154; *Wixson v. People*, 5 Parker C. C. 119; *Trim v. Commonwealth*, 18 Grat. 983; *The State v. Nash*, 7 Iowa, 347; *Doan v. The State*, 26 Ind. 495; *Selvidge v. The State*, 30 Texas, 60.

<sup>7</sup> *Tate v. The State*, 6 Blackf. 110; *The State v. Heyward*, 2 Nott & McC. 312; *Coyles v. Hurtin*, 10 Johns. 85; *Commonwealth v. Lucas*, 2 Allen, 170; *Reg. v. Vanderstein*, 16 Ir. Com. Law, 574, 10 Cox C. C. 177; *The State v. Hamilton*, 13 Nev. 386.

seen,<sup>1</sup> this is especially so when he does something which enters into the offence, as constituting a part of it.<sup>2</sup> Thus, —

§ 654. *In Larceny — Duelling — Uttering Forgeries.* — A person waiting outside of a house to receive goods which his confederate is stealing within, is a principal of the second degree in the larceny.<sup>3</sup> So may one be who is in a lower room while his confederate is operating in an upper room.<sup>4</sup> And if death occurs in a duel, the seconds are principals in the murder.<sup>5</sup> But it was held not sufficient in evidence to convict one as principal in the uttering of a forged note (assumed to be felony), that he came with the utterer to town, put up at the same inn with him, walked out with him; and, two hours later, the other alone passed off the note; in twenty minutes more, the two came together; and, when he saw that the utterer was arrested, he ran from the officer, and each affected ignorance of the other.<sup>6</sup>

## II. *In Treason.*

§ 655. *In General.* — We shall see, in the next chapter, that, in treason, not only are they principals who would be such if the offence were felony, but they also who would be accessories before the fact. There is, therefore, relating to treason, nothing which demands consideration in this chapter.

## III. *As to Misdemeanor.*

§ 656. *In General.* — Likewise, in misdemeanor, the distinction between principals of the first and second degree is unknown. Neither is there any distinction between accessories before the fact and principals; all participants being principals, the same as in treason,<sup>7</sup> — a question for the next chapter.

<sup>1</sup> Ante, § 649.

<sup>2</sup> *Rex v. Passey*, 7 Car. & P. 282; *Rex v. Lockett*, 7 Car. & P. 300; *Rex v. Franklin*, 1 Leach, 4th ed. 255, Cald. 244. And see *Rex v. Borthwick*, 1 Doug. 207; *Rex v. Harris*, 7 Car. & P. 416.

<sup>3</sup> *Rex v. Owen*, 1 Moody, 96. And see *Rex v. Skerrit*, 2 Car. & P. 427.

<sup>4</sup> *Commonwealth v. Lucas*, 2 Allen, 170.

<sup>5</sup> *Rex v. Cuddy*, 1 Car. & K. 210; *Reg.*

*v. Young*, 8 Car. & P. 644; *Reg. v. Baronet*, Dears. 51; Vol. II. § 311.

<sup>6</sup> *Rex v. Davis*, Russ. & Ry. 113. And see for similar facts, *Rex v. Else*, Russ. & Ry. 142. The judges, in both of these cases, were under the misapprehension that the offence was felony; it was really misdemeanor, therefore the cases were wrongly decided, but they are good in illustration of the doctrines of the text.

<sup>7</sup> Ante, § 655.

**Persons acting together.** — If persons are proceeding together in the commission of a misdemeanor, the act of each is the act of all, the same as in felony; for the same reasons control the one case as the other.<sup>1</sup> And the possession of a thing by one, contrary to the prohibition of a statute, is the possession of all.<sup>2</sup>

§ 657. **Lighter Misdemeanors distinguished.** — But when we ascend among the lighter misdemeanors, we find some differences occasioned by the smaller degree of blameworthiness involved in an offence, or the special terms of the statute creating it. The cases are neither sufficiently numerous nor uniform to enable an author to state precisely and fully what the doctrine of the courts is on this subject; but the principle is reasonably plain, as follows. If the terms of a statute distinctly limit the penalty to persons who participate in the act only in a certain way, those terms furnish the rule for the court. Or, if the expression is general, then, if the offence is of minor turpitude, and especially if the thing is only *malum prohibitum*, the courts, by construction, will limit its operation to those persons who are more particularly within the reason or the express words of the enactment. And there are misdemeanors of such a nature, and so small in turpitude, that even a person present and lending the support of his will to the commission of the act is, nevertheless, not punishable.<sup>3</sup> Thus, —

§ 658. **Retailing Liquor.** — Under the statutes making it penal for unlicensed persons to retail intoxicating liquor, it is generally held<sup>4</sup> that one who, as purchaser, lends the concurrence of his will

<sup>1</sup> And see *Edelmuth v. McGarren*, 4 Daly, 467; *The State v. Potter*, 30 Iowa, 587.

<sup>2</sup> *Reg. v. Thompson*, 11 Cox C. C. 362, 364; *Reg. v. Goodfellow*, 1 Den. C. C. 81, 1 Car. & K. 724.

<sup>3</sup> See ante, § 212 et seq.

<sup>4</sup> **Why? And Connected Views.** — In *Commonwealth v. Willard*, 22 Pick. 476, the purchaser of intoxicating liquor sold without license was held not to be excusable from testifying against the seller, on the ground that he would criminate himself. In delivering the opinion of the court, Shaw, C. J., after observing that “no precedent and no authority has been shown for such a prosecution, and no such prosecution has been at-

tempted within the knowledge of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers,” proceeded: “It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however,

to what is done, and tempts the seller with his money, and is present encouraging him, is still not liable to punishment. But —

is manifest in all the cases, and that is, that the offence proposed to be committed by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law." p. 478. And see, as confirming this doctrine, *The State v. Hopkins*, 4 Jones, N. C. 305; *The State v. Wright*, 4 Jones, N. C. 308. And see *Rawles v. The State*, 15 Texas, 581. The question thus adjudged in the Massachusetts court was decided in the same way in New Hampshire. *The State v. Rand*, 51 N. H. 361. Smith, J., who delivered the opinion, put the result in part upon a consideration of the general scope and purpose of the statute. And, referring to the Massachusetts case, he said: "We are not prepared to adopt the view there advanced, that one who approximates so nearly to the direct act, as a purchaser does, is not liable as an aider or accessory because of the comparatively insignificant character of the main offence." p. 366. But, while he thus disclaimed, he affirmed a doctrine not differing essentially from this, as follows: "The rules of statute interpretation, enunciated prior to the enactment of the prohibitory liquor law, and still recognized as sound, justify the court in giving weight to the above considerations. In cases of *mala prohibita*, the fact that the penalty is in terms imposed upon only one of two parties whose concurrence is requisite to the commission of the offence, and that the statute was made for the protection of the other party, who is generally regarded as the less culpable of the two, has repeatedly been considered good ground for giving the statute a construction exempting the party not named from criminal liability." p. 364. As sustaining this doctrine he referred to *Browning v. Morris*, Cowp. 790; *Williams v. Hedley*, 8 East, 378;

*Tracy v. Talmage*, 14 N. Y. 162, 181-186; *Curtis v. Leavitt*, 15 N. Y. 9; *Buffalo City Bank v. Godd*, 25 N. Y. 163; *Richardson, C. J.*, in *Roby v. West*, 4 N. H. 285, 288, 289; *Perley, C. J.*, in *Prescott v. Norris*, 32 N. H. 101, 105; *White v. Franklin Bank*, 22 Pick. 181; *Sargent, J.*, in *Butler v. Northumberland*, 50 N. H. 33, 38, 39. Now, as we have seen (ante, § 383), the substance of the distinction between *malum in se* and *malum prohibitum* is that the former is more intensely evil than the latter; so that in essence this New Hampshire doctrine does not differ from what is held elsewhere. And see, as confirming in a general way the foregoing views, *Commonwealth v. Wood*, 11 Gray, 85; *Commonwealth v. Boynton*, 116 Mass. 343. On the other hand, there is a Tennessee case, the reporter's head-note to which is as follows: "The sale of liquor by a slave is a criminal offence, and a white man who tempts him to commit the offence, by purchasing liquor from him, is an aider and abettor, and as much guilty, as a principal offender, of a misdemeanor, as if the seller had been of his own color." And *McKinney, J.*, said: "In the case of a *white man*, we suppose it cannot be seriously controverted, that, upon general principles, the purchaser of spirituous liquors, in violation of the statutes passed to suppress tippling, is as much guilty of the violation of the law, and as much amenable to criminal prosecution and punishment, as the seller. They are, in all respects, *particeps criminis*; they are alike wilful violators of the law. The express prohibition to sell, upon every just principle of construction, must be considered as implying a prohibition to purchase. The purchaser — whether we regard his intent, or the effect and consequences of his act — is no less guilty, no less within the mischief intended to be suppressed, than the seller. It matters not that the former is not placed under the obligation of a bond or oath. This takes nothing from the force of the argument. He still stands guilty of wilfully participating in, and aiding

**Agent of Retailer.** — One is indictable who himself sells as another's servant, though without compensation.<sup>1</sup> And —

**Participants in Riots, &c.** — All who by their presence countenance a riot,<sup>2</sup> or an affray,<sup>3</sup> are criminally responsible.<sup>4</sup>

§ 659. **Treason and Fornication compared.** — Another illustration, distinguishing the lighter offences from the heavier, is the following: The statute of 25 Edw. 3, stat. 5, c. 2, made it high treason "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir;" and the construction was, that the woman, if consenting, was guilty as well as the man.<sup>5</sup> But when, in Tennessee, it was enacted, that, "if any white man or woman shall presume to live with any negro or mulatto man or woman, as man and wife, each and every of the parties so offending shall be liable to forfeit and pay the sum of five hundred dollars to any person

and encouraging the commission of, a criminal offence. Does not this, upon the soundest principles of criminal law, constitute him a *principal* in the offence? We think it does. And perhaps it would scarcely be going too far to say, that he ought to be regarded as less excusable than the seller. He has not the poor pretext of the latter, that the forbidden traffic is in part his means of procuring a living." The State v. Bonner, 2 Head, 135, 137. For further views on this topic, see, as respects small things, ante, § 212 et seq. See also Brown v. Perkins, 1 Allen, 89; Stamper v. Commonwealth, 7 Bush, 612. **Malicious Shooting.** — In the case last cited it was held, that one who abets at the fact a malicious shooting is not pursuable under the Kentucky statute, which provides only for the punishment of the principal offender. The statutory words are, that, "if any person shall wilfully and maliciously shoot at and wound another, with an intention to kill him, so that he does not die thereby, . . . he shall be confined in the penitentiary not less than one nor more than five years." Said Hardin, J.: "As a general rule, where a statute creates a felony and prescribes a particular punishment therefor, or where a statute provides a punishment for a common-law felony *by name*, those who were present, aiding and abetting in the commission of the crime,

are held to be included by the statute, although not mentioned as such in the statute. But where, as in this case, the punishment is imposed by the statute upon the *person* alone who actually committed the acts constituting the offence, and not in general terms upon those who were *guilty* of the offence, according to common-law rules mere aiders and abettors, will not be deemed to be within the act." P. 614, referring to Rosc. Crim. Ev. 215. I do not propose to inquire how far these views would be generally accepted as sound.

<sup>1</sup> The State v. Bugbee, 22 Vt. 82. And see Commonwealth v. Hadley, 11 Met. 66; Geuing v. The State, 1 McCord, 573; Hays v. The State, 13 Misso. 246; The State v. Bryant, 14 Misso. 340; Roberts v. O'Conner, 83 Maine, 496; Vaughn v. The State, 4 Misso. 530.

<sup>2</sup> Rex v. Hunt, 1 Keny. 108; Williams v. The State, 9 Misso. 270; ante, § 628 et seq.

<sup>3</sup> Hawkins v. The State, 13 Ga. 322.

<sup>4</sup> **Participants in Gaming.** — And see, as to gaming, Smith v. The State, 5 Humph. 163; Howlett v. The State, 5 Yerg. 144; The State v. Smitherman, 1 Ire. 14. **In Perjury.** — As to perjury, United States v. Staats, 8 How. U. S. 41.

<sup>5</sup> 1 East P. C. 65; 1 Hale P. C. 89, 128; 3 Inst. 1, 2, 9; Eden Penal Law, 8d ed. 125.



who shall or will sue for the same, by action of debt, and moreover be liable to be indicted and punished at the discretion of the court ; ” the white person only was held to be liable, not also the colored.<sup>1</sup> So, —

**Hiring Time.** — In North Carolina, a former statute to prevent slaves from hiring their time of the owners, was construed to make the slave alone guilty in case of its violation.<sup>2</sup> Now, —

**Reason why.** — The different degree of wrong in the offences created by these statutes accounts for the different construction given them ; and this result comes in spite of what might seem to be the opposing rule,<sup>3</sup> that the graver the offence created by a legislative enactment, the stricter must be its interpretation.

<sup>1</sup> The State v. Brady, 9 Humph. 74. And see Rawles v. The State, 15 Texas,

<sup>2</sup> The State v. Clemons, 3 Dev. 472. 581.

<sup>3</sup> Stat. Crimes, § 190.

## CHAPTER XLVII.

THE ACCESSORY BEFORE THE FACT, AND THE LIKE.<sup>1</sup>

§ 660, 661. Introduction.

662-671. General Doctrine of Accessory.

672-680. Before the Fact in Felony.

681-684. In Treason.

685-689. In Misdemeanor.

§ 660. **Scope of this Chapter.**—On the “Diagram of Crime,”<sup>2</sup> the subject of this chapter is indicated by B C O P. It embraces the accessory before the fact, properly so called, in felony; the party who sustains the like relation in treason, being himself, in law, a principal offender; and the one thus related in misdemeanor, also regarded, in law, as a doer.

§ 661. **How the Chapter divided.**—We shall consider, I. The General Doctrine of Accessory, whether before or after the Fact; II. Before the Fact in Felony; III. In Treason; IV. In Misdemeanor.

*I. The General Doctrine of Accessory, whether before or after the Fact.*

§ 662. **Limit of Term “Accessory.”**—The word accessory properly refers only to one who participates as such in a felony. In this chapter, for convenience, we consider also the party who sustains the like relation in treason and misdemeanor.

§ 663. **How defined.**—An accessory is one who participates in a felony too remotely to be deemed a principal.<sup>3</sup>

**Distinguished from Principal.**—If the participant is a principal, though but of the second degree, he cannot be held under an

<sup>1</sup> See Crim. Proced. II. § 1 et seq.

<sup>2</sup> Ante, § 602.

<sup>3</sup> See ante, § 653.

indictment charging him as accessory ;<sup>1</sup> if he is an accessory, he cannot be held as principal.<sup>2</sup>

§ 664. **Separate Acts — (Both Principal and Accessory).** — Yet, by separate acts, one may become both principal and accessory in the same felony : as, by commanding another to kill a third person, rendering him an accessory when the murder is done ; and afterward joining with the person commanded in doing it, which makes him a principal.<sup>3</sup> Also, —

**Accessory both Before and After.** — By separate acts, a person may be both an accessory before, and an accessory after, the fact.<sup>4</sup>

§ 665. **In Statutory Felonies.** — And, in a statutory felony, one may be an accessory, precisely as in a felony at the common law, unless special terms in the statute preclude this construction.<sup>5</sup>

§ 666. **Accessory follows Principal.** — An accessory follows, like a shadow, his principal.<sup>6</sup> Thus, —

**Guilt not exceed Principal's.** — He can neither be guilty of a higher offence than his principal ; nor at all guilty as accessory,<sup>7</sup> unless his principal is guilty. For illustration, —

**In Petit Treason and Murder.** — When petit treason was an offence separate from murder,<sup>8</sup> “ if a wife or servant cause a stranger to murder the husband or master, and are absent when the murder is committed, they cannot be said to be accessories to petit treason, but to murder only ; because the offence of the principal is but murder. But if such wife or servant had been present when the murder was committed, they would have been guilty of petit treason, and the stranger of murder ; because, in respect to

<sup>1</sup> *Rex v. Gordon*, 1 Leach, 4th ed. 515, 1 East P. C. 352 ; *Reg. v. Perkins*, 12 Eng. L. & Eq. 587 ; *The State v. Larkin*, 49 N. H. 39. That in some respects this was formerly thought otherwise by some writers, see *Foster*, 361, 362.

<sup>2</sup> *Course's Case*, cited *Foster*, 349 ; *Hughes v. The State*, 12 Ala. 458 ; *Hately v. The State*, 15 Ga. 346 ; *The State v. Dewey*, 65 N. C. 572 ; *McCoy v. The State*, 52 Ga. 287 ; *Wicks v. The State*, 44 Ala. 398 ; *The State v. Larkin*, *supra* ; *Reg. v. Munday*, 2 Fost. & F. 170. And see *Rex v. Plant*, 7 Car. & P. 575.

<sup>3</sup> 2 Hawk. P. C. Curw. ed. p. 436, § 1 ;

3 Inst. 139 ; *Reg. v. Hilton*, Bell C. C. 20, 8 Cox C. C. 87.

<sup>4</sup> *Rex v. Blackson*, 8 Car. & P. 43 ; *The State v. Coppenburg*, 2 Strob. 278. And see *Rex v. Dannelly*, 2 Marshall, 471 ; *Norton v. People*, 8 Cow. 137 ; *Stoops v. Commonwealth*, 7 S. & R. 491 ; *Bibb's Case*, 4 Co. 43 b.

<sup>5</sup> Stat. Crimes, § 139, 145, 775 ; *Rex v. Bear*, 2 Salk. 417, 418.

<sup>6</sup> *Broom Leg. Max.* 2d ed. 374 ; 4 Bl Com. 36 ; 3 Inst. 139.

<sup>7</sup> See *ante*, § 651. And see *People v. Collins*, 53 Cal. 185.

<sup>8</sup> *Ante*, § 611.

such presence, they would have been principals<sup>1</sup> in killing."<sup>2</sup> Again, —

§ 667. **Convicted only with or after Principal.** — Where no change in common-law rules has been made by statute, not only is it impossible for one to be guilty as accessory unless there is a guilty principal, but he cannot be convicted except jointly with or after the principal, whose acquittal acquits him.<sup>3</sup> According to what Hawkins esteems the better opinion, he may be indicted and arraigned before, yet can be tried before only with his consent.<sup>4</sup> After his conviction, judgment will not be arrested though the indictment does not allege the attainder of the principal.<sup>5</sup> If there are several principals, the accessory may be tried in respect of such as are already attainted, before the attainder of the rest.<sup>6</sup> But if, without his consent, he is tried as to all, and convicted generally, the conviction will not be good.<sup>7</sup> Some of these doctrines, as concerns merely the procedure, are perhaps doubtful on authority, though believed to be as above stated. Indeed the earlier and later cases are not quite harmonious. In matter of evidence, —

**Proof of Principal's Guilt.** — Where the accessory is tried after the principal, it is *prima facie* sufficient, in proof of the latter's guilt, to produce the record of his conviction.<sup>8</sup>

§ 668. **Omitting to sentence Principal.** — The accessory is at common law so completely attached to his principal, that, if sentence is not passed on the latter's conviction (the consequence of which is called in the English law attainder), no judgment can

<sup>1</sup> Ante, § 653.

<sup>2</sup> 2 Hawk. P. C. Curw. ed. p. 442, § 15.

<sup>3</sup> The State v. Pybass, 4 Humph. 442; United States v. Crane, 4 McLean, 317; Whitehead v. The State, 4 Humph. 278; Commonwealth v. Woodward, Thacher Crim. Cas. 63; 2 Hawk. P. C. Curw. ed. p. 483, § 47; Baron v. People, 1 Parker C. C. 246; The State v. Yancy, 1 Tread. 241; Sampson v. Commonwealth, 5 Watts & S. 385; Smith v. The State, 46 Ga. 298. See Loyd v. The State, 45 Ga. 57; Brown v. The State, 18 Ohio State, 496.

<sup>4</sup> 2 Hawk. P. C. Curw. ed. p. 451, § 45; 2 Hale P. C. 224. See, for the contrary doctrine as to the arraignment, Gittin's Case, 1 Plow. 98, 99; Common-

wealth v. Andrews, 3 Mass. 126; Commonwealth v. Woodward, Thacher Crim. Cas. 63.

<sup>5</sup> Harty v. The State, 3 Blackf. 386. But see, on this point, Stoops v. Commonwealth, 7 S. & R. 491.

<sup>6</sup> Stoops v. Commonwealth, 7 S. & R. 491; Commonwealth v. Knapp, 10 Pick. 477; Starin v. People, 45 N. Y. 333. And see The State v. Pybass, 4 Humph. 442; Whitehead v. The State, 4 Humph. 278; Commonwealth v. Woodward, Thacher Crim. Cas. 63.

<sup>7</sup> Stoops v. Commonwealth, 7 S. & R. 491; Starin v. People, supra.

<sup>8</sup> The State v. Chittum, 2 Dev. 49; Commonwealth v. Knapp, 10 Pick. 477; Crim. Proced. II. § 12.

be pronounced against the accessory. Thus, said Lord Hardwicke: "Before the statute of 1 Anne, stat. 2, c. 9, if the principal was convicted only of a clergyable felony, and had his clergy allowed;<sup>1</sup> or stood mute, or peremptorily challenged above the number of twenty jurors; the accessory could not be arraigned. By this means accessories to very flagrant crimes frequently avoided all manner of punishment."<sup>2</sup> This statute is of a date too recent to be generally received as common law in this country.<sup>3</sup> It provides, among other things, that, "if any principal offender shall be convicted of any felony, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve of the jury, it shall and may be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding any such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before attainer." But, —

**Death or Escape of Principal.** — Since this provision was enacted, as well as before, if, for a cause not mentioned in it, as the escape or death of the principal, he is not attainted, the accessory cannot be proceeded against.<sup>4</sup> Yet —

**Attainder Erroneous.** — An erroneous attainder of the principal unreversed justifies proceedings against the accessory,<sup>5</sup> though a reversal of it discharges him.<sup>6</sup>

**Pardon.** — A pardon of the principal, after he is not only convicted but attainted, will in no way avail the accessory.<sup>7</sup>

**American Statutes.** — This common-law impediment is in some of our States removed by statute.<sup>8</sup>

§ 669. **Deny Principal's Guilt.** — Though the record of the principal's attainder is, as against an accessory tried separately, *prima facie* evidence of the guilt of the former,<sup>9</sup> it

<sup>1</sup> Stevens's Case, Cro. Car. 566, 567.

<sup>2</sup> Rex v. Burridge, 3 P. Wms. 439, 485. And see 2 Hawk. P. C. Curw. ed. p. 460, § 41. See, as to Georgia, Loyd v. The State, 45 Ga. 57.

<sup>3</sup> See post, § 700 and note.

<sup>4</sup> Commonwealth v. Phillips, 16 Mass. 423; The State v. McDaniel, 41 Texas, 229.

<sup>5</sup> Rex v. Baldwin, 3 Camp. 265, Russ.

& Ry. 241, 2 Leach, 4th ed. 928, note; The State v. Duncan, 6 Ire. 236.

<sup>6</sup> Marsh's Case, 1 Leon. 325.

<sup>7</sup> Syer's Case, 4 Co. 43*b*; Bibitthe's Case, 4 Co. 43*b*; s. c. nom. Goff v. Byby, Cro. Eliz. 540.

<sup>8</sup> As to Virginia, see Commonwealth v. Williamson, 2 Va. Cas. 211. And see post, § 670.

<sup>9</sup> Ante, § 667.

is not conclusive,<sup>1</sup> being in a proceeding between other parties.

§ 670. **Statutes making Accessory a Principal.**—If a contrary rule would be unjust; so, in natural reason, it is unjust to hold the State concluded, in its prosecution of one person, by its failure to convict another. Therefore, as already observed, legislation has in some of the States directed, that proceedings may be carried on against the accessory, irrespective of the case against the principal offender.<sup>2</sup> The statutes are not all in these terms; but, in Massachusetts,<sup>3</sup> Maine,<sup>4</sup> Missouri,<sup>5</sup> Illinois,<sup>6</sup> Ohio,<sup>7</sup> Iowa,<sup>8</sup> California,<sup>9</sup> Nevada,<sup>10</sup> Kansas,<sup>11</sup> and probably some of the other States, the accessory before the fact is in law, as in reason, either actually or substantially a principal.<sup>12</sup> So he is in England, since the statute of 11 & 12 Vict. c. 46.<sup>13</sup>

**"Counsel or Procure."**—In England, 24 & 25 Vict. c. 94, § 2, makes it felony to "counsel, procure, or command any other person to commit any felony;" and this is held to include only those cases in which the felony persuaded to is committed; the mere attempt, through solicitation, remaining a misdemeanor.<sup>14</sup>

**"Before or after Principal."**—The Indiana statute, after providing punishments for persons abetting or counselling to a felony, and being accessories after the fact, proceeds: "Every person who shall be guilty of any crime punishable by the [above] provi-

<sup>1</sup> *Rex v. Smith*, 1 Leach, 4th ed. 288; *Commonwealth v. Knapp*, 10 Pick. 477; *Rex v. Turner*, 1 Moody, 347; *Keithler v. The State*, 10 Sm. & M. 192; *The State v. Duncan*, 6 Ire. 98.

<sup>2</sup> *Crim. Proced. II.* § 4.

<sup>3</sup> R. S. c. 133, § 2; *Gen. Stats. c.* 168, § 4; as to the construction of which see *The State v. Ricker*, 29 Maine, 84. As to the earlier law in Massachusetts, see *Commonwealth v. Knapp*, 9 Pick. 496.

<sup>4</sup> *The State v. Ricker*, 29 Maine, 84.

<sup>5</sup> *Loughridge v. The State*, 6 Misso. 594.

<sup>6</sup> *Baxter v. People*, 3 Gilman, 368; *Breunan v. People*, 15 Ill. 511, 516; *Dempsey v. People*, 47 Ill. 323; *Yoe v. People*, 49 Ill. 410.

<sup>7</sup> *Noland v. The State*, 19 Ohio, 131.

<sup>8</sup> *Bonsell v. United States*, 1 Greene, Iowa, 111.

<sup>9</sup> *People v. Bearss*, 10 Cal. 63; *People v. Trim*, 39 Cal. 75; *People v. Campbell*, 40 Cal. 129; *People v. Outeveras*, 48 Cal. 19; *People v. Shepardson*, 48 Cal. 189.

<sup>10</sup> *The State v. Jones*, 7 Nev. 408; *The State v. Chapman*, 6 Nev. 320.

<sup>11</sup> *The State v. Cassady*, 12 Kan. 550.

<sup>12</sup> As to North Carolina, see *The State v. Groff*, 1 Murph. 270; *The State v. Goode*, 1 Hawks, 403. As to Kentucky, see *Able v. Commonwealth*, 5 Bush, 698.

<sup>13</sup> *Reg. v. Manning*, 2 Car. & K. 887, 903; *Reg. v. Hughes*, Bell C. C. 242. The statute now regulating the subject in England is 24 & 25 Vict. c. 94. See *Greaves Crim. Law Acts*, 2d ed. 18; *Reg. v. Gregory*, Law Rep. 1 C. C. 77.

<sup>14</sup> *Reg. v. Gregory*, Law Rep. 1 C. C. 77, 10 Cox C. C. 459.

sions, may be indicted and convicted before or after the principal offender is indicted and convicted." And this is construed not to take away the common-law right of an accessory to be exempt from prosecution if the principal has been tried and acquitted. Even if a verdict has been rendered against him, then, if the principal is acquitted, the accessory may show the acquittal in bar of judgment, and demand his discharge.<sup>1</sup>

§ 671. *Further of the Statutes.* — In Massachusetts, a statute in force before the present enactments provided, that, "if any person shall aid, assist, abet, counsel, hire, command, or procure any person to commit the crime, &c., he is and shall be considered as an accessory before the fact to the principal offender or offenders, and, being thereof convicted, shall suffer the like punishment as is by law assigned for the crime to the commission of which he shall be so accessory;" and this was held, not to impair the common-law distinction between principal and accessory. Consequently it did not refer to persons aiding and abetting at the fact, as principals of the second degree.<sup>2</sup> Moreover, statutes like these do not supersede the necessity of proving the guilt of the principal; for, in the nature of things, one cannot procure what is not done, or receive the doer of what was never performed.<sup>3</sup> Where the accessory is indicted separately from the principal, the latter's confession does not prove his guilt as against the former; for, in this issue, it is mere hearsay.<sup>4</sup>

## II. *Before the Fact in Felony.*

§ 672. *Doctrines of last Sub-title.* — What is said in the last sub-title belongs also under this. It was separated from this because relating equally to the accessory after the fact.

§ 673. *How defined.* — An accessory before the fact is a person whose will contributes<sup>5</sup> to a felony committed by another as principal,<sup>6</sup> while himself too far away to aid in the felonious act.<sup>7</sup>

*Nature and Origin.* — The distinction between such accessory and a principal rests solely in authority; being without founda-

<sup>1</sup> *McCarty v. The State*, 44 Ind. 214.

<sup>2</sup> *Commonwealth v. Knapp*, 9 Pick. 496. And see *Stat. Crimes*, § 142.

<sup>3</sup> *Simmons v. The State*, 4 Ga. 465; *Ogden v. The State*, 12 Wis. 532.

<sup>4</sup> *Ogden v. The State*, *supra*.

<sup>5</sup> Ante, § 628 et seq.

<sup>6</sup> Ante, § 651.

<sup>7</sup> Ante, § 653.

tion either in natural reason or the ordinary doctrines of the law. The general rule of the law is, that what one does through another's agency is to be regarded as done by himself.<sup>1</sup> And, even in felonies, the common law makes no distinction in the punishment between a principal and an accessory, — the crime of each being felony, of which the penalty was originally death.<sup>2</sup> So likewise in morals, there are circumstances in which we attach more blame to the accessory before the fact than to his principal; as where a husband commands his wife,<sup>3</sup> or a master his servant, to do for his benefit a criminal thing which, in his absence,<sup>4</sup> is done reluctantly through fear or affection overpowering a subject mind. How this distinction, then, came into the law, can only be conjectured; probably it originated in the same confused legal apprehension from which sprang the now exploded distinction between principals and accessories *at the fact*.<sup>5</sup> Having, however, become established as a technical rule, it cannot be removed by the courts.<sup>6</sup>

§ 674. **Not favored** — (*Statute interpreted*). — Since, however, this distinction rests on no good foundation, our judges usually permit it to extend no further than compelled by the authorities. Consequently, where a statute in New York provided, that "all suits, informations, and indictments for any crime or misdemeanor, *murder excepted*," should be brought within three years after its commission; the word "murder" was held to include as well accessories before the fact as principals. "Writers on criminal law," said Marcy, J., "make some difference between the offence of a principal and that of an accessory, but it is chiefly as to the order and mode of proceeding against them."<sup>7</sup>

§ 675. **How distinguish Accessory**. — In respect of the criminal intent, the rules of which have already been discussed, there is no distinction between the accessory before the fact and the prin-

<sup>1</sup> Broom Leg. Max. 2d ed. 643; Co. Lit. 258 a. "The principle of common law, *Qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases." Hosmer, C. J., in *Barkhamsted v. Parsons*, 3 Conn. 1, 8.

<sup>2</sup> 2 Hawk. P. C. Curw. ed. p. 440, § 11; Foster, 343, 359; 4 Bl. Com. 39; ante, § 646; *Rex v. Higgins*, 2 East, 5, 18, 19, 21.

<sup>3</sup> See *Rex v. Morris*, 2 Leach, 4th ed. 1096.

<sup>4</sup> Ante, § 355, 359; post, § 678.

<sup>5</sup> Ante, § 648.

<sup>6</sup> See ante, § 275. For some unsatisfactory reasons by Blackstone, see 4 Bl. Com. 39, 40.

<sup>7</sup> *People v. Mather*, 4 Wend. 229, 255. Possibly the relation of the particular words to their context might have influenced the construction.



principal.<sup>1</sup> In many instances, the accessory is the one in whose mind the idea of the crime originated, and he excites the doer to it. But the legal consequence is the same though the evil purpose is born in the mind of the latter, and the former encourages him therein.<sup>2</sup> There must be, first, a principal; <sup>3</sup> secondly, the accessory must not be so near him as to be able to render personal assistance; because, if he is so able, he will be himself a principal.<sup>4</sup> Also, the thing counselled must be done,<sup>5</sup> else the counselling will be only an indictable attempt. To illustrate, —

§ 676. In **Murder of Child**. — If, before the birth of a child, a person advises the mother to murder it when born, and she does so, the adviser is an accessory before the fact in the murder.<sup>6</sup> And, —

**Uttering Forgery**. — If several plan the uttering of a forged order, where this offence is felony by statute, and one of them utters it in the absence of the rest, he only is a principal, while the others are accessories.<sup>7</sup> Again, —

**Larceny in Dwelling-house — Burglary**. — A servant, on a Saturday afternoon, let a man into his master's house to rob it; concealed him there till Sunday morning; and then, by arrangement, left. The man, after the servant's departure, stole money; and he was held to be rightly indicted as a principal in the larceny, and the servant as accessory before the fact.<sup>8</sup> If the charge had been for the burglary of breaking into the house, both would have been principals.<sup>9</sup>

§ 677. **Accessory to an Accessory**. — Where one employs another to procure a third to commit a felony, and it is committed, — in other words, becomes an accessory before the fact to another like accessory, — he is an accessory also to the third; that is, to the principal.<sup>10</sup> “And it will be sufficient, even though the accessory

<sup>1</sup> Ante, § 204 et seq., 285 et seq.

<sup>2</sup> Keithler v. The State, 10 Sm. & M. 192.

<sup>3</sup> See ante, § 649–651, 663–666.

<sup>4</sup> See ante, § 653, 663.

<sup>5</sup> 1 Hale P. C. 622.

<sup>6</sup> Parker's Case, 2 Dy. 186, pl. 2; 2 Hawk. P. C. Curw. ed. p. 443, § 18.

<sup>7</sup> Rex v. Badcock, Russ. & Ry. 249; Rex v. Soares, Russ. & Ry. 25, 2 East P. C. 974; Rex v. Else, Russ. & Ry. 142. And see Rex v. Stewart, Russ. & Ry. 363.

These English cases were decided under the misapprehension that the uttering was felony.

<sup>8</sup> Reg. v. Tuckwell, Car. & M. 215.

<sup>9</sup> Rex v. Jordan, 7 Car. & P. 432; ante, § 648, 649.

<sup>10</sup> Rex v. Cooper, 5 Car. & P. 535; McDaniel's Case, Foster, 121, 125; 4 Bl. Com. 37; 2 Hawk. P. C. Curw. ed. p. 436, § 1. And see Reg. v. Williams, 1 Den. C. C. 39; post, § 698.

does not name the person to be procured, but merely directs the agent to employ some person.”<sup>1</sup>

§ 678. **Nature of the Offence.** — A particular felony may be of a nature rendering it impossible there should be an accessory before the fact in it. Thus, —

**Manslaughter.** — There cannot be an accessory before the fact in manslaughter; because, when the killing is of previous malice, it is murder.<sup>2</sup> Plainly this is the ordinary doctrine, yet probably a form of manslaughter may appear, admitting of this accessory;<sup>3</sup> as, if one should order a servant to do a thing endangering life, yet not so directly as to make a death from the doing murder, it might be manslaughter, — then, why should not the master be an accessory before the fact in the homicide? And —

**Principals of Second Degree.** — There may be principals of the second degree in manslaughter.<sup>4</sup> Also, —

**In Murder of Second Degree.** — Murder of the second degree admits of accessories before the fact.<sup>5</sup> And —

**Wife.** — A wife may be an accessory before the fact in a crime by the husband.<sup>6</sup>

§ 679. **Petit Larceny.** — In England, when our country was settled, larceny was divided into grand and petit, — the former being committed where the goods stolen were over twelve pence in value; the latter, where they were of the value of twelve pence or under. “And this,” observes Lord Coke, “was the ancient law before the Conquest.”<sup>7</sup> In the year 1275, the statute of Westm. 1 (3 Edw. 1), c. 15, mentioned the minor offence as “petty larceny that amounteth not above the value of twelve pence.”<sup>8</sup> “In these prosecutions,” says East, following Lord Coke, “the valuation ought to be reasonable; for, when the statute (of Westm. 1, c. 15)<sup>9</sup> was made, silver was but 20*d.* an ounce,

<sup>1</sup> Parke, J., in *Rex v. Cooper*, *supra*. See *Rex v. Giles*, 1 Moody, 166; *Commonwealth v. Glover*, 111 Mass. 395.

<sup>2</sup> *Bibit's Case*, 4 Co. 43*b*; *Goose's Case*, Sir F. Moore, 461; 2 Hawk. P. C. Curw. ed. p. 444, § 24. See *Reg. v. Gaylor*, Dears. & B. 288, 7 Cox C. C. 253, 40 Eng. L. & Eq. 556; *Stipp v. The State*, 11 Ind. 62.

<sup>3</sup> *Reg. v. Taylor*, Law Rep. 2 C. C. 147, 13 Cox C. C. 68.

<sup>4</sup> *The State v. Coleman*, 5 Port. 32.

And, under the Ohio statute, *Hagan v. The State*, 10 Ohio State, 459; under the Indiana statute, *Goff v. Prime*, 26 Ind. 196.

<sup>5</sup> *Jones v. The State*, 13 Texas, 168.

<sup>6</sup> *Reg. v. Manning*, 2 Car. & K. 887.

<sup>7</sup> 3 Inst. 109.

<sup>8</sup> And see 2 Russ. Crimes, 3*d* Eng. ed. 1, and note; 11 Law Mag. & Rev. 268.

<sup>9</sup> Mr. East, by misprint, gives the Stat. as Westm. 2, c. 25.

and at the time Lord Coke wrote it was worth 5s., and it is now higher.”<sup>1</sup>

**How punished — Abolished in England.** — The leading distinction between grand and petit larceny was in the punishment; both were felonies; but the latter was never visited by death. The penalty was “only to be whipped, or some such corporal punishment,”<sup>2</sup> understood afterward to be imprisonment,<sup>3</sup> together with the same forfeiture of goods<sup>4</sup> as in grand larceny. Petit larceny was, in England, elevated to the higher degree by Stat. 7 & 8, Geo. 4, c. 29, § 2.<sup>5</sup>

**Petit Larceny in our States.** — In this country, the distinction has been recognized as having a common-law existence, and in some of the States it seems fully to prevail, though perhaps more or less modified by legislation.<sup>6</sup> There are States in which petit larceny is even reduced to misdemeanor.<sup>7</sup> In North Carolina, a statute makes thefts of all kinds petit larcenies; obliterating the distinction between the two grades, in a manner the opposite of that adopted in England.<sup>8</sup> In various other States, the distinction has ceased to be of importance.

§ 680. **No Accessories.** — Where petit larceny is felony, still, in consequence of the smallness of the offence,<sup>9</sup> it has no accessories. Those who, in grand larceny, would be accessories before the fact, are principals in petit larceny;<sup>10</sup> those who would be accessories after are not, it has been held, deemed criminal at all in petit

<sup>1</sup> 2 East P. C. 736, referring to 2 Inst. 189, where Lord Coke says: “The things stolen are to be reasonably valued, for the ounce of silver, at the making of this act, was at the value of 20d., and now it is at the value of 5s. and above.” And see 4 Bl. Com. 289.

<sup>2</sup> 1 Hale P. C. 530.

<sup>3</sup> 2 East P. C. 737; 3 Inst. 218.

<sup>4</sup> Ante, § 615.

<sup>5</sup> 2 Russ. Crimes, 3d Eng. ed. 1, 82.

<sup>6</sup> The State v. Larumbo, Harper, 183; The State v. Wilson, 3 McCord, 187; The State v. Spurgin, 1 McCord, 252; The State v. Wood, 1 Mill, 29; The State v. Bennet, 2 Tread. 693; Ward v. The People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144; The State v. Goode, 1 Hawks, 463; The State v. Barden, 1 Dev. 518; Carpenter v. Nixon, 5 Hill, N. Y. 260; The

State v. Murphy, 8 Blackf. 498; The State v. Smith, Brayt. 143; The State v. Wheeler, 15 Rich. 362; Montgomery v. The State, 7 Ohio State, 107; Jenkins v. The State, 50 Ga. 258.

<sup>7</sup> Shay v. People, 22 N. Y. 317; People v. Adler, 3 Parker C. C. 249, 254; People v. Rawson, 61 Barb. 619; The State v. Gray, 14 Rich. 174; The State v. Hurt, 7 Misso. 321.

<sup>8</sup> The State v. Gaston, 73 N. C. 93. And see The State v. Minton, Phillips, 196.

<sup>9</sup> See ante, § 212 et seq.; The State v. Goode, 1 Hawks, 463; Chancellor Walworth, in Ward v. People, 6 Hill, N. Y. 144; Lasington's Case, Cro. Eliz. 750.

<sup>10</sup> The State v. Barden, 1 Dev. 518; 2 East P. C. 743; Ward v. People, 3 Hill, N. Y. 395, 6 Hill N. Y. 144.

larceny.<sup>1</sup> In North Carolina, these rules apply to all larcenies, even of things of the greatest value; because they are all by statute made petit.<sup>2</sup> How it is of larcenies of small sums under statutes of a different sort in other States, and the late English enactment, we are not informed by adjudication.

### III. *In Treason.*

§ 681. **In General.**—In petit treason, never known in this country and abolished in England,<sup>3</sup> there were accessories the same as in felony.<sup>4</sup> But in high treason, now simply termed treason, there are, say the books, no accessories either before or after the fact; those who would be accessories in felony and petit treason being principals.<sup>5</sup> This proposition, however, does not accord with the adjudged law as to the accessory after the fact;<sup>6</sup> and, as to the accessory before, it requires some observation, though the present author accepts it as correct.

§ 682. **No Accessories before.**—To repeat, there are no accessories before the fact in treason, but they who in felony would be such accessories are principals.<sup>7</sup> Let us see what this doctrine implies.

**Regarded as Doers**—(**How the Indictment**).—The consequence of this doctrine is, that, at the election of the pleader, the indictment may allege the criminal thing to have been done through the agency of another, or, omitting this, charge it directly as the act of him who procured the doing, the proofs at the trial to proceed on the rule that what one does by an agent is in law his own act,<sup>8</sup>—either method according with the established

<sup>1</sup> *The State v. Goode*, 1 Hawks, 463.

<sup>2</sup> *The State v. Gaston*, 73 N. C. 93.

<sup>3</sup> Ante, § 611.

<sup>4</sup> 4 Bl. Com. 36; 1 East P. C. 338; 1 Hawk. P. C. Curw. ed. p. 105, § 5; Anonymous, Dalison, 16.

<sup>5</sup> 1 Hale P. C. 233, 237, 613; 3 Inst. 16, 138; Foster, 341; 4 Bl. Com. 35, 36; 1 Hawk. P. C. Curw. ed. p. 15, § 39; 2 Ib. p. 437, § 1; 1 Hume Crim. Law, 2d ed. 525, 526, note, where the Scotch law appears to be the same; Charge on Law

of Treason, 2 Wal. Jr. 134, 137; United States v. Hanway, 2 Wal. Jr. 139, 195; Anonymous, Dalison, 16; Anonymous, J. Kel. 19, Dalison, 14; Throgmorton's Case, 1 Dy. 98 b, pl. 56; 1 East P. C. 93, 178, 186; Reg. v. Tracy, 6 Mod. 30, 32, 12 Co. 81; Whitaker v. English, 1 Bay, 15; Chanet v. Parker, 1 Mill, 333; Rex v. Bear, 2 Salk. 417; s. c. nom. Rex v. Beare, 1 Ld. Raym. 414; Somerville's Case, 1 Anderson, 109.

<sup>6</sup> Post, § 701.

<sup>7</sup> Ante, § 681.

<sup>8</sup> Ante, § 673.

practice in all other pleadings, civil<sup>1</sup> and criminal.<sup>2</sup> That such is the only meaning which this doctrine can have is plain; because the distinction between the accessory before the fact and his principal, in felony, is merely in the form of the allegation, and in the order of the trial; while, as we have seen,<sup>3</sup> the accessory would be a principal but for a technical rule of the old common law, introduced into it by a blunder, against reason, and against all its other teachings in both civil and criminal procedure.

§ 683. **So in Authority.** — The authorities also seem to establish, that the allegation in the indictment against one who has procured a treason may be in form as above stated.<sup>4</sup> But —

**Contrary — (Order of Trial).** — Lord Hale has transmitted to us his private opinion, not based on adjudication, that, in the order of trial, the procurer should not be convicted except after or with the person who did the act.<sup>5</sup> This expression has been echoed by later writers:<sup>6</sup> and, on the trial of Aaron Burr before Marshall, C. J., for the high treason of levying war against the United States, the counsel for the defendant argued that the English law is so; the counsel for the United States, quite against the interest of the prosecution, conceded the point; and the learned chief-justice, in his opinion, fell into the current; not, however, deciding absolutely the question.<sup>7</sup>

<sup>1</sup> *Brucker v. Fromont*, 6 T. R. 659; *Heys v. Heseltine*, 2 Camp. 604; *Collis v. Emmett*, 1 H. Bl. 313, 321; *Feltmakers v. Davis*, 1 B. & P. 98, 102; 2 Chit. Plead. 117, note; *Lawes on Assumpsit*, 110, 111.

<sup>2</sup> *Reg. v. Tracy*, 6 Mod. 30, 32; *United States v. Morrow*, 4 Wash. C. C. 733; and other cases cited post, § 685, 686; *Crim. Proced. I.* § 332.

<sup>3</sup> Ante, § 673.

<sup>4</sup> 1 Hale P. C. 214, 238; 1 Gab. *Crim. Law*, 895; 1 East P. C. 127; *Reg. v. Tracy*, 6 Mod. 30, 32; *Rex v. Foy*, Vern. & S. 540. See *United States v. Burr*, 4 Cranch, 469, 470, 496-498.

<sup>5</sup> 2 Hale P. C. 223.

<sup>6</sup> *Foster*, 346; 1 East P. C. 100, 101; 1 Gab. *Crim. Law*, 889. Hawkins, however, lays down the true doctrine; but one of his editors, Leach, following Lord Hale, sets him *wrong*. 2 Hawk. P. C. 6th ed. c. 29, § 2, Curw. ed. p. 437, § 1 and note.

<sup>7</sup> *United States v. Burr*, 4 Cranch, 469, 504, *Burr's Trial*, *passim*. Too many Counsel and too Eminent. — This was a case of immense public interest and notoriety; and, on each side, were employed several very eminent lawyers. The reader, therefore, need not be surprised at finding it within the common fact, that, in proportion as a case attracts the public attention, and the counsel engaged in it are multiplied, it increases in learned fervor, but diminishes in true wisdom and the genuine learning of the law. A principal reason is, that no one of the half-dozen or dozen lawyers on a side feels a particular responsibility for those parts of the performance which, with the honor following, are necessarily shared in common; while each is impelled, by the instincts which go out after fame, to lift his individual light as high as possible, in the presence of a community better able to

§ 684. **Further Explanation.** — Lord Hale, to whom the misapprehension is thus traced, says, in another place, the same thing of the principal in the second degree in felony; namely, that he should not be tried in advance of the principal in the first degree.<sup>1</sup> But this doctrine, we have seen,<sup>2</sup> was long ago exploded. As to treason, the mistake of this eminent person may have arisen from not distinguishing the procurer of the treason from him who afterward receives the traitor.<sup>3</sup> And it is believed, that, in spite of the doubts created by Burr's case, a man may, according to the law of this country, commit treason without being present at the overt act; and may be prosecuted in advance of those who were present.<sup>4</sup> Still the authorities to this proposition are not very distinct.

#### IV. *In Misdemeanor.*

§ 685. **All are Principals — (How Procurers indicted).** — The authorities concur, that, in misdemeanor, there are no accessories either in name or in the order of the prosecution. When, there-

judge of eloquence than of law. Besides, a man who is not answerable for the whole of even a subdivision cannot well bring his mind to so minute and exact a study of the entire case as is often indispensable to his seeing any one object, in any one part of it, correctly and clearly. This may be an infirmity of his nature; but it is inherent in the human mind, and no integrity, station, calling, or learning can rise entirely superior to it. Again, if the lawyers employed are men who feel themselves to be very eminent, the care of each, which is necessarily given most to what is most important, is to sustain his position, rather than evolve true legal doctrine and win a just cause. A great case requires more lawyers than one on a side, because it involves more hard work than one can do. But they should not be unduly multiplied. And an eminent lawyer is not so good as a truly able one. Occasionally a lawyer is both able and eminent; then, in a trial, his ability is of service, but his eminence is an impediment. An eminent lawyer without ability is always a damage. Judge and jury resist what they deem the danger of

being captured by his wiles; and, when they find nothing proceeding from him worthy of regard, they conclude that the fault is in his cause, and lean against it, and forbear to exercise their own ingenuity in the discovery of merits which otherwise they might see. It would be interesting to draw, as I might, illustrations of these views from several notorious cases, but I forbear.

<sup>1</sup> 1 Hale P. C. 613.

<sup>2</sup> Ante, § 648.

<sup>3</sup> See post, § 692.

<sup>4</sup> Charge on Law of Treason, 2 Wal. Jr. 134, 137; *United States v. Hanway*, 2 Wal. Jr. 139, 195; *Ex parte Bollman*, 4 Cranch, 75. And see *Throgmorton's Case*, 1 Dy. 98, pl. 56. Judge Tucker combats this doctrine. See 4 Bl. Com. Tucker ed. Appendix, 49, and at various other places. The following from Lord Coke is as sound in common sense as in law: "All agree, that procurers of such treason to be done, before the fact done, if after the fact be done accordingly, in case of treason, are principals; *for that they are participes criminis in the very act.*" 3 Inst. 138.

fore, one sustains in misdemeanor a relation which in felony makes an accessory before the fact, if what he does is of sufficient magnitude,<sup>1</sup> he is to be treated as a principal; the indictment charges him as such, and, unless the pleader chooses, it does not mention that the act was through another;<sup>2</sup> and he may be proceeded against either in advance of the doer, or afterward, or jointly with him.<sup>3</sup> Thus,—

§ 686. **Assault and Battery — Betting on Election — Passing Counterfeits — False Imprisonment — Selling Liquor — Obstructing Way — Burning Building — False Pretences — Bawdy-House.** — If one employs another to commit an assault and battery;<sup>4</sup> or to bet for him on an election;<sup>5</sup> or to pass counterfeit money, where this offence is misdemeanor;<sup>6</sup> or to make an arrest, amounting to an indictable false imprisonment;<sup>7</sup> or to sell, contrary to a statute, intoxicating liquor without license;<sup>8</sup> or to throw dirt into the highway, being a common-law nuisance;<sup>9</sup> or to set fire to a building, where the burning is misdemeanor;<sup>10</sup> or to obtain money for him by false pretences;<sup>11</sup> or to keep a bawdy-house;<sup>12</sup> the employer may be indicted, as doing the thing, either before or after or with the person whom he employs.

<sup>1</sup> Ante, § 212 et seq.

<sup>2</sup> See ante, § 682.

<sup>3</sup> 2 Hawk. P. C. Curw. ed. p. 437, § 2; *The State v. Cheek*, 13 Ire. 114; *The State v. Westfield*, 1 Bailey, 182; *Williams v. The State*, 12 Sm. & M. 58; *United States v. Morrow*, 4 Wash. C. C. 733; *Floyd v. The State*, 7 Eng. 43; *Curlin v. The State*, 4 Yerg. 143; *Reg. v. Clayton*, 1 Car. & K. 128; *Rex v. Dixon*, 3 M. & S. 11, 14; *Commonwealth v. McAtee*, 8 Dana, 28; *The State v. Lymburn*, 1 Brev. 397; *Reg. v. Tracy*, 6 Mod. 30, 32; *Reg. v. Greenwood*, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535; *Reg. v. Moland*, 2 Moody, 276; *United States v. Mills*, 7 Pet. 138; *Rex v. Douglas*, 7 Car. & P. 644; *Rex v. Jackson*, 1 Lev. 124; *Uhl v. Commonwealth*, 6 Grat. 706; *Commonwealth v. Gillespie*, 7 S. & R. 469, 478; *Sanders v. The State*, 18 Ark. 198; *Stratton v. The State*, 45 Ind. 468; *Lowenstein v. People*, 54 Barb. 299; *Riley v. The State*, 43 Missis. 397.

<sup>4</sup> *The State v. Lymburn*, 1 Brev. 397; *Rex v. Jackson*, 1 Lev. 124; *Bell v. Mil-*

*ler*, 5 Ohio, 250, a civil case; *Greer v. Emerson*, 1 Tenn. 12, a civil case; *Baker v. The State*, 12 Ohio State, 214.

<sup>5</sup> *Williams v. The State*, 12 Sm. & M. 58.

<sup>6</sup> 2 East P. C. 973; *United States v. Morrow*, 4 Wash. C. C. 733; *The State v. Cheek*, 13 Ire. 114; *Reg. v. Greenwood*, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535.

<sup>7</sup> *Floyd v. The State*, 7 Eng. 43; *Reg. v. Tracy*, 6 Mod. 178.

<sup>8</sup> *The State v. Dow*, 21 Vt. 484; *Commonwealth v. Nichols*, 10 Met. 259; *Schmidt v. The State*, 14 Misso. 137; *The State v. Anone*, 2 Nott & McC. 27; *The State v. Borgman*, 2 Nott & McC. 34, note; *Smith v. Adrian*, 1 Mich. 495. And see *The State v. Brown*, 31 Maine, 520; *The State v. Stewart*, 31 Maine, 515; ante, § 658.

<sup>9</sup> *Tuberville v. Stampe*, 1 Ld. Raym. 264.

<sup>10</sup> *Reg. v. Clayton*, 1 Car. & K. 128.

<sup>11</sup> *Reg. v. Moland*, 2 Moody, 276.

<sup>12</sup> *Ross v. Commonwealth*, 2 B. Monr. 417.

§ 687. **Intent to concur with Act.** — For one to be guilty, his intent must concur sufficiently with his act.<sup>1</sup> And —

§ 688. **Small Offences — (Liquor Selling).** — For reasons already mentioned,<sup>2</sup> the accessorial act must draw closer to the principal one as the misdemeanor is lighter. Yet in a small offence, like the selling of intoxicating liquor without license,<sup>3</sup> if the one who instigates to the act is also to be benefited by it, he is, though absent, criminally responsible.<sup>4</sup> The agent in these cases is likewise, we have seen, responsible.<sup>5</sup> Again, —

**Preventing Inquest — (Mistake of Law).** — Where the captain of a man of war, mistaking his legal duty,<sup>6</sup> had prevented the coroner from taking an inquest on the body of a man hanged in his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order.<sup>7</sup> Yet an information is in a measure discretionary with the court, and on an indictment it may be the boatswain would have been deemed liable.

§ 689. **Crimes of Peculiar Nature.** — There are crimes which in their nature can be committed only by a personal doing of the forbidden thing.<sup>8</sup> They are probably not so numerous as might seem on the first impression. Thus, —

**Rape.** — A boy physically incapable or a woman may become a principal offender in rape, by abetting a capable person.<sup>9</sup> Surely, therefore, most other offences can be committed in like manner. And —

**Statutory Offences.** — The offences of this sort are chiefly such as are created by the special terms of a statute.<sup>10</sup>

<sup>1</sup> Ante, § 628 et seq.; *The State v. Pollok*, 4 Ire. 303; *The State v. Hunter*, 5 Ire. 369.

<sup>2</sup> Ante, § 212 et seq. 657-659.

<sup>3</sup> See ante, § 685, 686, and the authorities there cited.

<sup>4</sup> Stat. Crimes, § 1024. And see ante, § 673.

<sup>6</sup> Ante, § 658; Stat. Crimes, § 1024.

<sup>6</sup> Ante, § 294.

<sup>7</sup> *Rex v. Soleguard*, Andr. 231, 234, 235.

<sup>8</sup> See Stat. Crimes, § 145; ante, § 364, 369; *Rex v. Douglas*, 7 Car. & P. 644; *Commonwealth v. Dean*, 1 Pick. 387; *Mount v. The State*, 7 Sm. & M. 277; *O'Blennis v. The State*, 12 Misso. 311; *Vaughn v. The State*, 4 Misso. 530.

<sup>9</sup> Vol. II. § 1135; *The State v. Jones*, 83 N. C. 605.

<sup>10</sup> See the first note to this section; ante, § 657, 658; *Stamper v. Commonwealth*, 7 Bush, 612.



## CHAPTER XLVIII.

THE ACCESSORY AFTER THE FACT, AND THE LIKE.<sup>1</sup>

§ 690, 691.	Introduction.
692-700 <i>a.</i>	As to Felony.
701-704.	As to Treason.
705-708.	As to Misdemeanor.

§ 690. **Scope of this Chapter.** — On the “Diagram of Crime,”<sup>2</sup> the subject of this chapter is represented within E F L M. It includes the accessory after the fact proper in felony, and those who sustain the like relation in treason and misdemeanor.

§ 691. **How divided.** — Having, under the first sub-title of the last chapter, considered the general law of the accessory, we shall, in this chapter, examine the special doctrines pertaining to the accessory after the fact, I. As to Felony; II. As to Treason; III. As to Misdemeanor.

I. *As to Felony.*

§ 692. **Accessory after defined.** — An accessory after the fact is a person who, knowing a felony to have been committed, harbors the felon, or renders him any other assistance to elude punishment.<sup>3</sup>

**On what Principle punished — (Concurring Act and Intent).** — According to general principles, we have seen, one by corruptly consenting to a criminal fact already accomplished by another does not become a partaker in the guilt of the doer; because, only when an act and evil intent concur in point of time, is a crime committed.<sup>4</sup> An accessory after the fact is not one who is made answerable for the principal's offence in violation of this

<sup>1</sup> See Crim. Proc. II. § 1 et seq.

<sup>2</sup> Ante, § 602.

<sup>3</sup> *Rex v. Greenacre*, 8 Car. & P. 35;

*Wren v. Commonwealth*, 26 Grat. 952;

*White v. People*, 81 Ill. 333. Blackstone, following 1 Hale P. C. 618, defines such

accessory as a person who, “knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.”

<sup>4</sup> *Bl. Com.* 37. <sup>5</sup> Ante, § 207, 642.

rule. An accessory before is within the rule itself, but an accessory after is different. The ground of his liability seems to be, that the harboring or assisting constitutes a separate crime. And we may presume, as explaining the origin of the doctrine, that anciently the helping of a felon to elude punishment was deemed worthy of the same condemnation as the act of him who was helped;<sup>1</sup> that the judges, who gave shape to our common law, thought it not safe, in a capital case, to convict the one rendering the assistance in advance of the one assisted; and, therefore, this second offence, philosophically independent of the first, was called accessorial, and its perpetrator an accessory. To distinguish him from an accessory before the fact, who is punishable from a different reason,<sup>2</sup> he was termed an accessory after the fact. The law on this subject is not easily vindicated if this view of it is not correct.<sup>3</sup>

§ 693. **Felony completed.** — If, when one assists a felon, the felony is not fully accomplished, he becomes a principal with the other.<sup>4</sup> It is only help given subsequently to the completion of the felony that can make him an accessory after the fact.<sup>5</sup> And, —

**Guilt known.** — To be an accessory after the fact, a man must be aware of the guilt of his principal.<sup>6</sup> Therefore —

**Helping escape.** — One cannot become such an accessory by helping a prisoner convicted of felony to escape, unless he has notice of the conviction, or, at least, of the felony committed.<sup>7</sup> So, —

**In Homicide.** — On this ground, and also, according to some opinions, because of the non-completion of the felony, if a man

<sup>1</sup> Ante, § 321, 673.

<sup>2</sup> Ante, § 673.

<sup>3</sup> **Austrian Law of Accessory.** — According to the penal code of Austria, "The immediate criminal is not alone guilty of a crime, but also he who, by command, counsel, instruction, or praise, prepares the offence, or intentionally has rendered assistance towards the execution of the same, or towards removing the obstacles to its commission; lastly, he who has stipulated with the offender beforehand to give him criminal assistance after the deed, or to participate with him in the gain arising therefrom.

Whoever *after* the commission of the crime, and without preliminary stipulation, gives assistance to the criminal, or divides the spoils with him, is not equally guilty, but by those acts becomes guilty of another and special crime." Sanford Penal Codes in Europe, 96.

<sup>4</sup> Ante, § 642, 649, 650.

<sup>5</sup> 4 Bl. Com. 38.

<sup>6</sup> *Rex v. Burridge*, 3 P. Wms. 439, 403; *Rex v. Greenacre*, 8 Car. & P. 35; 4 Bl. Com. 37; 1 Hale P. C. 323, 622; *Reg. v. Butterfield*, 1 Cox C. C. 39; ante, § 301-303.

<sup>7</sup> *Rex v. Burridge*, *supra*.

has of malice aforethought inflicted a blow on another, a third cannot become an accessory after the fact in the murder, by harboring the murderer, until death has rendered the result of the blow certain.<sup>1</sup>

§ 694. **How far Assistance proceed — (Compounding — Misprision).** — Compounding a felony,<sup>2</sup> and a misprision of it,<sup>3</sup> are severally wrongs of the like nature with that of becoming an accessory after the fact in it, but are less helpful to the felon and of milder degrees of turpitude. When, therefore, the thing done amounts to no more than a compounding of the felony, or a misprision of it, the doer will not be an accessory. Thus —

**Neglect to prosecute or arrest — Taking back Goods stolen, &c.** — A person will not be such, who merely neglects to make known to the authorities that a felony has been committed, or forbears to arrest the felon,<sup>4</sup> or agrees not to prosecute him. *A fortiori*, one does not become an accessory who merely receives back his own stolen goods,<sup>5</sup> or charitably supplies a prisoner with food;<sup>6</sup> for neither of these acts is any offence.

§ 695. **The Test.** — The true test, whether one is an accessory after the fact or not, is, whether what he did was by way of personal help to his principal, to elude punishment, — the kind of help being unimportant.<sup>7</sup> Thus, —

**Escape — Money — Victuals — Instruments to break Prison — Bribing Jailer.** — He is an accessory who, with the requisite knowledge and intent, furnishes the principal felon “with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes a man an accessory to the felony.”<sup>8</sup> But —

**Keeping Witness away.** — One is not thus chargeable who, by persuasion or intimidation, keeps a witness from appearing against

<sup>1</sup> 2 Hawk. P. C. Curw. ed. p. 448, § 35; Harrel v. The State, 39 Missis. 702. As to whether the blow is murder before death, see ante, § 113–115 and note; Reg. v. O'Brian, 1 Den. C. C. 9, 3 Car. & K. 115.

<sup>2</sup> Post, § 709 et seq.

<sup>3</sup> Post, § 716 et seq.

<sup>4</sup> 1 Hale P. C. 618, 619; 2 Hawk. P. C.

Curw. ed. p. 444, § 23, and p. 447, § 29; Wren v. Commonwealth, 25 Grat. 789.

<sup>5</sup> 1 Hale P. C. 619; 2 East P. C. 743.

<sup>6</sup> 1 Hale P. C. 620; 4 Bl. Com. 38.

<sup>7</sup> See 2 Hawk. P. C. Curw. ed. p. 445–447, § 26–31; Rex v. Lee, 6 Car. & P. 536; Reg. v. Chapple, 9 Car. & P. 355; Loyd v. The State, 42 Ga. 221.

<sup>8</sup> 4 Bl. Com. 38; Vol. II. § 1066–1069.

the felon on his trial;<sup>1</sup> though such conduct is punishable as a misdemeanor.<sup>2</sup>

§ 696. **Substantive Felony.**—A substantive felony is one depending on itself alone, and not on another felony to be first established by the conviction of the person who directly committed it.<sup>3</sup> Now,—

**Accessories distinguished.**—We should not confound the guilt of him who commits a substantive offence with his who becomes an accessory after the fact. Yet, in various circumstances, the prosecuting power may hold an offender for the one or the other, at its election. Thus,—

§ 697. **Prison Breach, Rescue, Escape.**—In discussing prison breach, rescue, and escape, in the second volume, we shall see illustrations of this.<sup>4</sup> One mode of helping a felon is to rescue him from lawful confinement, either before or after his conviction; and the rescuer may be indicted for the substantive offence of rescue, or for being an accessory after the fact in the other's felony, at the election of the prosecutor.<sup>5</sup> The idea on which the prosecution proceeds differs a little in the two forms, but not essentially. If a man is committed on a charge of felony, though only awaiting his trial, the rescuing of him, or helping of him to break prison, is a distinct felony, equally whether he is guilty or not: when the commitment is on a charge of misdemeanor, it is, irrespective of the question of his guilt, a misdemeanor.<sup>6</sup> Still, where the commitment is for felony, the rescuer is also, or may be, an accessory after the fact in it; and, as the crime of the accessory is itself felony,<sup>7</sup> it is immaterial with which form of felony he is charged.

§ 698. **Accessory after to Accessory before.**—Since, also, accessories in felony, whether before or after the fact, are felons,<sup>8</sup> a man may become an accessory after, by helping the accessory

<sup>1</sup> Roberts's Case, 3 Inst. 139; Reg. v. Chapple, 9 Car. & P. 355.

<sup>2</sup> Roberts's Case, *supra*; ante, § 468.

<sup>3</sup> The State v. Ricker, 29 Maine, 84.

<sup>4</sup> Vol. II. § 1064 et seq.

<sup>5</sup> See, as affording much light on this question, Rex v. Burrigge, 3 P. Wms. 439, 483-485, 493; Commonwealth v. Miller, 2 Ashm. 61.

<sup>6</sup> 1 Gab. Crim. Law, 805, 810; Jenk.

Cent. 171; ante, § 321; Anonymous, 1 Dy. 99, pl. 60; Kyle v. The State, 10 Ala. 236; The State v. Murray, 15 Maine, 100; Reg. v. Allan, Car. & M. 295; People v. Duell, 3 Johns. 449; Rex v. Stokes, 5 Car. & P. 148; Commonwealth v. Miller, 2 Ashm. 61; Rex v. Haswell, Russ. & Ry. 458.

<sup>7</sup> Ante, § 678; post, § 700 a.

<sup>8</sup> Ante, § 673.

before, the same as by helping the principal felon, to elude justice.<sup>1</sup> And such accessory after is deemed an accessory to the principal felon.<sup>2</sup> He would seem, on principle, to be likewise an accessory to the other accessory.

**How in Manslaughter.** — We have seen, that, in general, manslaughter admits of no accessories before the fact;<sup>3</sup> it does, however, admit of accessories after the fact.<sup>4</sup>

§ 699. **Receiving Stolen Goods.** — The receiver of stolen goods, knowing them to be stolen, is not, within our definition, an accessory; because he renders no personal help to the thief.<sup>5</sup> At common law he is indictable for the misprision<sup>6</sup> of knowing the felon and neglecting to prosecute him; or, if he had agreed not to prosecute him, or to pursue him but faintly, his offence would be compounding felony.<sup>7</sup> But, in England, by 3 Will. & Mary, c. 9, § 4, the receiver was made an accessory after the fact;<sup>8</sup> the consequence of which was, that he could be punished only as an accessory, agreeably to the rule stated in "Statutory Crimes,"<sup>9</sup> that, when a misdemeanor is by statute made a felony, the offence is no longer indictable as a misdemeanor.<sup>10</sup> Stat. 5 Anne, c. 31, § 5, confirmed that of William & Mary; and § 6, as also 1 Anne, stat. 2, c. 9, § 2, provided, that, where the principal felon could not be taken, the receiver of the stolen goods might be prosecuted separately for the misdemeanor.<sup>11</sup> By the later and present English law, the receiver of stolen goods may be proceeded against for felony, as a substantive offence, without any reference to the principal offender.<sup>12</sup>

§ 700. **How in our States.** — The statutes just mentioned, of

<sup>1</sup> 2 Hawk. P. C. Curw. ed. p. 436, § 1.

See as to the law of Tennessee, *The State v. Payne*, 1 Swan, Tenn. 383.

<sup>2</sup> *Rex v. Jarvis*, 2 Moody & R. 40; *Reg. v. Parr*, 2 Moody & R. 346; *Cassels v. The State*, 4 Yerg. 149; *Wright v. The State*, 5 Yerg. 154. And see ante, § 677.

<sup>3</sup> Ante, § 678.

<sup>4</sup> *Rex v. Greenacre*, 8 Car. & P. 35.

<sup>5</sup> *Loyd v. The State*, 42 Ga. 221; *People v. Stakem*, 40 Cal. 699.

<sup>6</sup> Post, § 717 et seq.

<sup>7</sup> 2 East P. C. 743, 744; 4 Bl. Com. 88, 183; 1 Hale P. C. 619; 2 Hawk. P. C. Curw. ed. p. 447, § 30; *Foster*, 373.

<sup>8</sup> *The State v. Butler*, 3 McCord, 383.

<sup>9</sup> Stat. Crimes, § 174.

<sup>10</sup> 2 East P. C. 744; *Foster*, 373; 4 Bl. Com. 133.

<sup>11</sup> 2 East P. C. 744, 745; *Foster*, 373, 374; 4 Bl. Com. 133. And see *Rex v. Wilkes*, 1 Leach, 4th ed. 103, 2 East P. C. 746; *Rex v. Pollard*, 8 Mod. 264, 265. See ante, § 668.

<sup>12</sup> *Rex v. Solomons*, 1 Moody, 292; *Rex v. Pulham*, 9 Car. & P. 280; *Rex v. Wheeler*, 7 Car. & P. 170; *Rex v. Hartall*, 7 Car. & P. 475; *Rex v. Austin*, 7 Car. & P. 796. And see *Rex v. Wyer*, 1 Leach, 4th ed. 480. The crime of the receiver, however, is not, like that of the principal, larceny. *People v. Maxwell*, 24 Cal. 14.

William & Mary, and of Anne (A. D. 1691–1706), are subsequent to the settlement of the older colonies which became our original States; therefore, on principle, they are common law in not all of the States.<sup>1</sup> But in most, and perhaps all, the legislative power has made provisions, following the English ones, whereby the receiving of stolen goods is punishable separately from the larceny of them, either as felony or as misdemeanor.<sup>2</sup>

§ 700 *a.* **Offence of Accessory is Felony.** — The offence of an accessory, whether before or after the fact, is, like his principal's, felony.<sup>3</sup>

## II. *As to Treason.*

§ 701. **In General.** — The books tell us, that there are no accessories after the fact in treason; but they who in felony would be such, are, in treason, principals. Yet these persons are practically treated, by whatever name called, in every particular as accessories; the charge in the indictment against them must specify the accessorial nature of their offence, and they cannot be convicted in advance of the one by whose direct volition the traitorous act was performed.<sup>4</sup> Evidently, therefore, it is a mere abuse of terms to call them principals; for they are really accessories. The English common law, however, makes them traitors;<sup>5</sup> just as it makes accessories after the fact in felony felons.

<sup>1</sup> Kilty, in his Report of Statutes, says: "The 4th section [of the statute of William & Mary], which made the receiver of stolen goods an accessory to the felony, did extend to the province [of Maryland], as appears by cases of prosecutions under it, as did also those of 1 Anne, c. 9, and 5 Anne, c. 31, by which such receiver was liable to be prosecuted for a misdemeanor before the conviction of the principal offender; but both these cases are provided for by the act of 1809, c. 138." p. 179, 180. And see *The State v. Butler*, 3 McCord, 383; *Loyd v. The State*, 42 Ga. 221.

<sup>2</sup> See *People v. Wiley*, 3 Hill, N. Y. 194; *Rohan v. Sawin*, 5 Cush. 281; *Commonwealth v. Andrews*, 2 Mass. 14; *The State v. S. L.*, 2 Tyler, 249; *The State v. Council*, Harper, 53; *The State v. Butler*, 3 McCord, 383; *The State v. Scovel*, 1 Mill, 274; *The State v. Harkness*, 1 Brev.

276; *The State v. Sanford*, 1 Nott & McC. 512; *The State v. Coppenburg*, 2 Strob. 273; *Commonwealth v. Frye*, 1 Va. Cas. 19; *The State v. Weston*, 9 Conn. 527; *Cassels v. The State*, 4 Yerg. 149; *Wright v. The State*, 5 Yerg. 154; *Swaggerty v. The State*, 9 Yerg. 338; *The State v. Ives*, 13 Ire. 338; *Commonwealth v. Elisha*, 3 Gray, 460; *Bieber v. The State*, 45 Ga. 569.

<sup>3</sup> 4 Bl. Com. 39; 2 Hawk. P. C. c. 20, § 11; *Crim. Proced.* II. § 7. And see *Long v. The State*, 1 Swan, Tenn. 287; ante, § 673.

<sup>4</sup> 1 Hale P. C. 233, 237, 238; 2 Hawk. P. C. Curw. ed. p. 437, 441, § 3, 14; 1 East P. C. 101; *Foster*, 341 et seq.

<sup>5</sup> *Bensted's Case*, Cro. Car. 588. There was doubt anciently, whether the guilt of the receiver of a traitor rose above misdemeanor. 1 Hale P. C. 238, 234; 2 Hawk. P. C. Curw. ed. p. 437, § 3.

§ 702. **How in Statutory Treasons.** — The English statutes of treason were evidently intended to abolish all common-law treasons; <sup>1</sup> yet they have not been always, in all respects, so interpreted. <sup>2</sup> And if the view, that the accessory after the fact is really guilty, not of his principal's crime, but of a distinct one of his own, suggested several sections back, <sup>3</sup> is correct, it follows, that, where the treason is statutory, he is not a traitor under the statute, but at the common law: just as, when a legislative enactment forbids a thing, yet provides no penalty, the person violating it is indictable at the common law, not under the enactment; or as an unsuccessful attempt to commit a statutory crime is a common-law offence, — doctrines already explained in these pages. <sup>4</sup>

§ 703. **Under United States Constitution — (State Constitutions).** — From this view it follows, that, under the Constitution of the United States, and State constitutions on the same pattern, the accessory after the fact is not a traitor. As against the United States, we have seen, not only there are no common-law crimes, <sup>5</sup> but the Constitution prohibits any thing not mentioned in it from being made treason. Its words are: "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." <sup>6</sup> But —

**Misprision.** — Doubtless the receiver of a traitor is guilty of a misdemeanor, within the act of Congress concerning misprision of treason. <sup>7</sup>

§ 704. **In States having Common-law Offences.** — Even in States where the common law prevails, — if the question arises under a constitution providing that treason against the State shall consist *only*, &c., — the effect of the negative "only" must be to exclude

<sup>1</sup> See *Rex v. Speke*, 8 Salk. 358; 1 Hale P. C. 86, 89; 1 Gab. Crim. Law, 882; 4 Bl. Com. 76; 1 East P. C. 55; 1 Hawk. P. C. Curw. ed. p. 7, § 2.

<sup>2</sup> 4 Bl. Com. Tucker ed. App. 16; 1 Hale P. C. 236, 237; 1 Gab. Crim. Law, 885. "You are deceived to conclude all treasons be by the statute of 25 Edw. 3; for that statute is but a declaration of certain treasons, which were treasons before at the common law. Even so there do remain divers other treasons at this day at the common law, which be not expressed by that statute, as the judges can declare." *Throckmorton's Case*, 1

Harg. St. Tr. 63, 72, 1 Howell St. Tr. 869, 889. And Lord Coke, with this statute before him, said: "High treason is either by the common law or by act of Parliament;" and he went on to mention the receiving, comforting, and aiding of "any man who committeth high treason," as an "example" of treason at the common law. 3 Inst. 138.

<sup>3</sup> Ante, § 692.

<sup>4</sup> Stat. Crimes, § 138; ante, § 237. And see 1 East P. C. 96.

<sup>5</sup> Ante, § 198.

<sup>6</sup> Const. U. S. art. 3, § 3.

<sup>7</sup> Post, § 722.

common-law treasons.<sup>1</sup> But in such States it would seem, from principles already laid down,<sup>2</sup> that the accessory after the fact to the treason is a felon. Yet his felony must remain accessorial to the treason, and retain also the peculiar quality of admitting the procurer to sustain to it the same legal relation as the doer.<sup>3</sup> This question, however, both as concerns the States and the United States, is one on which we have no light of authority; only there has been manifested an undefined repugnance to accepting in this country the entire English doctrine of accessorial treason.<sup>4</sup>

### III. *As to Misdemeanors.*

§ 705. **In General.** — Those who would be accessories after the fact in felony and treason are not such in misdemeanor. When their offence is cognizable at all by the criminal law, it is itself a distinct misdemeanor.<sup>5</sup>

§ 706. **Small Offences.** — There are under this head things too small for the law's notice.<sup>6</sup> Therefore —

**Receiving Vagrant** — **One charged with Bastardy.** — No indictment lies for entertaining a vagrant knowingly;<sup>7</sup> or for harboring one against whom there is a warrant in a bastardy case, knowing him to be guilty.<sup>8</sup> Indeed, —

§ 707. **Receiver in Other Misdemeanors.** — If we were to look merely for direct adjudications, we might doubt whether the assisting of a person, guilty of any mere misdemeanor, to elude justice, is cognizable by the criminal law. But —

**Escapes in Misdemeanor.** — A constable has been held to be indictable for suffering a street-walker, delivered to his custody by one of the night watch, to escape.<sup>9</sup> And we have seen,<sup>10</sup> that, generally, escapes and prison breaches are punishable when the offence charged or committed is a misdemeanor, the same as when it is a felony.<sup>11</sup>

<sup>1</sup> Stat. Crimes, § 151, 152.

<sup>2</sup> Ante, § 612.

<sup>3</sup> Ante, § 612, 698.

<sup>4</sup> United States v. Burr, 4 Cranch, 469, 470.

<sup>5</sup> 2 Hawk. P. C. Curw. ed. p. 438, § 4; 1 Hale P. C. 684; 2 East P. C. 978; Commonwealth v. Macomber, 3 Mass. 254; Commonwealth v. Barlow, 4 Mass. 439; Stratton v. The State, 45 Ind. 468.

<sup>6</sup> Ante, § 212 et seq.

<sup>7</sup> Rex v. Langley, 2 Ld. Raym. 790.

<sup>8</sup> Vaughan's Case, Popham, 134, 2 Rol. Abr. 75.

<sup>9</sup> Rex v. Bootie, 2 Bur. 864; s. c. nom.

Rex v. Booty, 2 Keny. 575.

<sup>10</sup> Ante, § 697.

<sup>11</sup> And see Rex v. Stokes, 5 Car. & P. 148; Reg. v. Allan, Car. & M. 295.



**In Principle.** — What is conclusive in principle is, that, as we shall see in the next chapter, the compounding of the higher misdemeanors is indictable; and compounding is precisely of the same nature as harboring, yet one degree further removed from the act of the principal offender.<sup>1</sup> Since, therefore, the agreement not to prosecute a person guilty of a high misdemeanor is indictable, much more must be the assisting of him to elude justice.

§ 708. **Law of this Sub-title little cultivated.** — There is a reason why this branch of the law has been practically neglected in England; namely, that the statutes taking away clergy from specific felonies did not usually extend to accessories after the fact;<sup>2</sup> therefore, if such accessories were convicted, they could not be punished to any effect. So it became common to overlook their offence altogether; and, this being the course in felony, the same thing would naturally follow in misdemeanor, else he who had harbored a small offender would be in a worse condition than he who had harbored a great one.

<sup>1</sup> Ante, § 694.

<sup>2</sup> 4 Bl. Com. 39.

## CHAPTER XLIX.

## COMPOUNDING.

§ 709. **Scope of this Chapter.** — The subject of this chapter is indicated on the “Diagram of Crime”<sup>1</sup> by F G K L. We there see that compounding is a misdemeanor, and it extends through the entire regions of Treason and Felony, and in part through that of Misdemeanor.

§ 710. **How defined.** — Compounding crime is an agreeing with one who has committed an offence not to prosecute him.<sup>2</sup>

**Theft Bote.** — A species of compounding was anciently called *theft bote*, “which,” says Blackstone, “is where the party robbed, not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute.”<sup>3</sup> In very early times, contrary to the later and present law, a person so conducting was held to be an accessory after the fact.<sup>4</sup>

**How accessorial.** — Still, in the sense discussed in the last chapter, the offence of compounding is accessorial,<sup>5</sup> not after the manner of felony and treason,<sup>6</sup> but of misdemeanor,<sup>7</sup> where the offender may be proceeded against without reference to any prosecution of the principal.<sup>8</sup>

§ 711. **Compounding of Treason, Felony, Misdemeanor.** — The language of the books is general, that the taking of money to forbear or stifle a criminal prosecution of any sort, whether for felony or misdemeanor, or, of course, treason, is an indictable offence.<sup>9</sup> Yet —

<sup>1</sup> Ante, § 602.

<sup>2</sup> The State v. Duhammel, 2 Harring. Del. 532; Bothwell v. Brown, 51 Ill. 284.

<sup>3</sup> 4 Bl. Com. 133; 2 East P. C. 743, 790; 1 Hawk. P. C. Curw. ed. p. 74, § 5.

<sup>4</sup> Anonymous, Sir F. Moore, 8; 1 Hawk. P. C. Curw. ed. p. 74, § 7.

<sup>5</sup> The State v. Duhammel, 2 Harring. Del. 532; The State v. Henning, 33 Ind. 189.

<sup>6</sup> Ante, § 692, 701.

<sup>7</sup> Ante, § 705.

<sup>8</sup> People v. Buckland, 13 Wend. 592.

<sup>9</sup> Jones v. Rice, 18 Pick. 440; Commonwealth v. Pease, 16 Mass. 91; Plumer v. Smith, 5 N. H. 553; Rex v. Stone, 4 Car. & P. 379; Collins v. Blantern, 2 Wils. 341, 349; Johnson v. Ogilby, 3 P. Wms. 277, commented on, 6 Q. B. 316; Train & Heard Prec. 136. And see Por-

**Small Offences.**— Various teachings of the criminal common law, already considered, show, that a misdemeanor may be so small, or so much of the nature of a private injury,<sup>1</sup> as will render the compounding of it not indictable. But we have almost no direct authority on this question.<sup>2</sup>

§ 712. **Compounding Penalties** — (18 Eliz.). — The English statute of 18 Eliz. c. 5, provided, says Blackstone, “that, if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent of commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit £10, shall stand two hours in the pillory, and shall be for ever disabled to sue on any popular or penal statute.”<sup>3</sup>

**How in our States.**— This statute is sufficiently early to be common law in our States, while yet it is of a penal class not generally so regarded. We have no decisions on the direct question of its common-law force,<sup>4</sup> or informing us what was the anterior common law; but we have, from an American judge, a dictum, that “the compounding of penalties is an offence at common law,”<sup>5</sup> — which, if in any degree correct, must be accepted with modifications.<sup>6</sup> A penal statute, imposing only a pecuniary penalty, should make it very heavy to cause a compounding under it, especially if the prohibited act is not *malum in se*, indictable, according to just principles of jurisprudence. But, —

§ 713. **Private Settlement under Sanction of Court.** — In the language of Blackstone, “it is not uncommon, when a person is convicted of a misdemeanor which principally and more immediately

ter v. Jones, 6 Coldw. 318; Chandler v. Johnson, 39 Ga. 85; Brown v. Padgett, 86 Ga. 609; Cannon v. Rands, 11 Cox C. C. 631; Golden v. The State, 49 Ind. 424.

<sup>1</sup> Ante, § 212 et seq., 237, 247.

<sup>2</sup> See Fallowes v. Taylor, 7 T. R. 475; Keir v. Leeman, 6 Q. B. 308; Golden v. The State, 49 Ind. 424.

<sup>3</sup> 4 Bl. Com. 136; 1 Russ. Crimes, 3d Eng. ed. 132; 1 Deac. Crim. Law, 269; Rex v. Crisp, 1 B. & Ald. 282; Rex v. Southerton, 6 East, 126; Rex v. Gotley, Russ. & Ry. 84, 1 Russ. Crimes, 3d Eng. ed. 133; Reg. v. Best, 2 Moody, 124, 9 Car. & P. 368.

<sup>4</sup> Kilty deems that a part of this statute, not saying what part, was received in Maryland. Kilty Rep. Stats. 235. The Pennsylvania judges do not mention it among the statutes accepted in the latter State. Report of Judges, 3 Binn. 593, 621.

<sup>5</sup> Collamer, J., in Hinesburgh v. Sumner, 9 Vt. 23, 26. And see Edgcombe v. Rodd, 5 East, 294.

<sup>6</sup> See Rex v. Crisp, 1 B. & Ald. 282; Rex v. Southerton, 6 East, 126; ante, § 711.

affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor* before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment," — a proceeding, however, which this commentator considers dangerous, except in particular cases, before the higher courts.<sup>1</sup> Yet the proceeding is well established by English authority.<sup>2</sup> And, —

**Amends Mitigating Punishment.** — Both in England and the United States, the court will take into its consideration, in determining the amount of punishment, that the offender has shown repentance by doing all in his power to repair the wrong.<sup>3</sup> Moreover, —

**Statutes authorizing Private Settlement.** — In some of our States, legislation has provided for the discharge of the wrong-doer altogether, in a few special offences, on his making full reparation to the injured person.<sup>4</sup>

§ 714. **Reclaiming Stolen Goods — Taking Amends.** — We have seen,<sup>5</sup> that one from whom goods have been stolen may lawfully

<sup>1</sup> 4 Bl. Com. 363.

<sup>2</sup> 1 Russ. Crimes, 3d Eng. ed. 132; *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt. 422; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Rex v. England*, Cas. temp. Hardw. 158; *Reg. v. Roxburgh*, 12 Cox C. C. 8, 2 Eng. Rep. 165. Where a part of the penalty was going to the crown, a motion to permit the defendant to compound with the prosecutor was denied after verdict of guilty; "for the king's moiety of the penalty is vested by the conviction, and then it is too late to compound." *Brery v. Levy*, 1 W. Bl. 443.

<sup>3</sup> *Beeley v. Wingfield*, 11 East, 46, 48; *Rex v. Grey*, 2 Keny. 307. See post, § 948-950.

<sup>4</sup> See *People v. Bishop*, 5 Wend. 111; *Bradway v. Le Worthy*, 9 Johns. 251; *Price v. Van Doren*, 2 Southard, 578. In Georgia the statute provides, that "it shall be lawful in all criminal offences against the person or property of the citizen, not punishable by fine and imprisonment, or by a more severe penalty, for the offender to settle the case with the prosecutor, upon the consent of the injured party being obtained, at any time

before verdict." The statutory offence of trading with a slave has been held not to be so exclusively "against the person or property of the citizen" as to come within the provision. *Dunn v. The State*, 15 Ga. 419. And see *McDaniel v. The State*, 27 Ga. 197; *Chandler v. Johnson*, 39 Ga. 85; *Statham v. The State*, 41 Ga. 507. In Louisiana: "In all cases of assault and battery and misdemeanors, when the parties compromise, and the prosecution is withdrawn, no charges shall be brought against the parish; the parties compromising shall pay all costs in such cases; it shall be lawful for the Attorney-General or District Attorney to enter a nolle prosequi." And, *Nolle Prosequi*. — The court has held, that the prosecuting officer is not bound, under this statute, to enter as of course a nolle prosequi whenever a case for assault and battery has been compromised between the parties: he is to consult the public good, and act as in his judgment it demands. *The State v. Hunter*, 14 La. An. 71. See also *Bone v. The State*, 18 Ark. 109.

<sup>5</sup> Ante, § 694. And see ante, § 699.

receive them back, but he must not also agree to forbear prosecuting the offender. And it is believed that the right to take amends applies in all other private injuries from public wrongs.<sup>1</sup> Yet this does not justify a compounding under the guise of amends.

**Enforcing Agreements to forbear Prosecution.**—Under what circumstances a court will decline to enforce a private undertaking to pay damages for acts done in committing a public offence, as being calculated to obstruct the course of justice,<sup>2</sup> is an inquiry not lying in our present path. If, in a particular case, the plaintiff is not permitted to prevail in his civil suit, he may still not be indictable.

§ 715. **Extortion.**—There are extortions by officers, and other obstructions of public justice by persons in and out of office, analogous to compounding, and punishable on nearly the same grounds, while not usually classed under this title.<sup>3</sup>

<sup>1</sup> *Plumer v. Smith*, 5 N. H. 553; *Beeley v. Wingfield*, 11 East, 46, 48; *Baker v. Townsend*, 7 Taunt. 422, 426.

<sup>2</sup> See *Bell v. Wood*, 1 Bay, 249; *Mattocks v. Owen*, 5 Vt. 42; *Plumer v. Smith*, 5 N. H. 553; *Cameron v. McFarland*, 2 Car. Law Repos. 415; *Corley v. Williams*, 1 Bailey, 588; *Hinesburgh v. Sumner*, 9 Vt. 23, 26; *Bailey v. Buck*, 11 Vt. 252; *State Bank v. Moore*, 2 Southard, 470; *Murphy v. Bottomer*, 40 Misso. 67; *Ford v. Cratty*, 52 Ill. 313; *Brown v. Padgett*, 36 Ga. 609; *Porter v. Jones*, 6 Coldw. 313; *Collins v. Blantern*, 2 Wils. 341, 350; *Edgcombe v. Rodd*, 5 East, 294; *Keir v. Leeman*, 6 Q. B. 308, where there is a general review of the authorities; *Fallowes v. Taylor*, 7 T. R. 475; *Kingsbury v. Ellis*, 4 Cush. 578; *Daimouth v. Bennett*, 15 Barb. 541; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Loomis v. Cline*,

4 Barb. 453. A man accused his cashier of stealing money, but did not set on foot any prosecution; the cashier acknowledged that he had omitted to enter certain sums, begged the employer not to expose him, and gave his note, secured by his father's indorsement and mortgage, for the amount which he said he had taken. The employer made no agreement not to prosecute, neither did he agree that the amount so secured was all which had been taken. And it was held, that the note was not extorted by threats, and was not given to compound a felony. *Catlin v. Henton*, 9 Wis. 476. And see *Reg. v. Daly*, 9 Car. & P. 342.

<sup>3</sup> See *Rex v. Harrison*, 1 East P. C. 382; *Rex v. Buckle*, 1 Russ. Crimes, 3d Eng. ed. 408; *Reg. v. Loughran*, 1 Crawf. & Dix C. C. 79.

## CHAPTER L.

## MISPRISION.

§ 716. **Scope of this Chapter.** — On the “Diagram of Crime,”<sup>1</sup> the subject of this chapter is represented by G H K. It extends through the regions of treason and felony, but not into misdemeanor.

§ 717. **Meaning of “Misprision.”** — The word misprision is sometimes employed to denote “all such high offences as are under the degree of capital, but nearly bordering thereon.”<sup>2</sup> The term “high misdemeanor,” however, better conveys this meaning, while the precision of our language is promoted by restricting “misprision” to neglects; and such, it is believed, is the better modern usage.

**How defined.** — Misprision of felony, therefore, is a criminal neglect, either to prevent a felony from being committed, or to bring to justice the offender after its commission.<sup>3</sup> Misprision of treason is the same of treason.

**Misprision of Misdemeanor** — is unknown equally in the facts and the language of the law; because, for reasons already explained,<sup>4</sup> it is too trifling a dereliction from duty to engage the attention of the tribunals.

**Is Misdemeanor.** — Misprision of treason, on the other hand, being an appendage to the highest crime, was anciently held to be a common-law treason; but now both it and misprision of felony are misdemeanors.<sup>5</sup>

§ 718. **Two Forms.** — The reader perceives, that the neglect which constitutes a misprision may be in either of two forms, — a neglect to prevent a treason or felony, or to bring to justice its

<sup>1</sup> Ante, § 602.

<sup>2</sup> 4 Bl. Com. 119. See further, as to the meaning of the word, ante, § 624.

<sup>3</sup> 1 Hale P. C. 484.

<sup>4</sup> Ante, § 212 et seq. 267. “It may be the duty of a citizen,” said Marshall, C. J., “to accuse every offender, and to proclaim every offence which comes to

his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.” *Marbury v. Brooks*, 7 Wheat. 556, 575.

<sup>5</sup> 4 Bl. Com. 120; *Eden Penal Law*, 3d ed. 202. And see 1 Hale P. C. 371. And see ante, § 710.

perpetrator. Our law treats the two forms as of equal turpitude, though few would regard them so in morals. By the laws of Egypt, observes a learned historian, "whoever had it in his power to save the life of a citizen, and neglected that duty, was punished as a murderer," — a provision which the same authority deems "remarkably severe."<sup>1</sup> By our law, it is not murder even for one to stand by and see another murdered, without interfering, where his will does not contribute to what is done.<sup>2</sup> It is only misprision of felony. But any law would be regarded as something more than "severe" which should condemn to the gallows a man who was merely too slothful or too humane to procure the execution of another guilty of a capital crime.

§ 719. **Misprision as to Libel.** — Lord Coke says: "It was resolved in the Star-chamber, in Halliwood's Case, that, if one finds a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a magistrate; but, if it concerns a magistrate or other public person, the finder ought presently to deliver it to a magistrate, to the intent, that, by examination and industry, the author may be found out and punished."<sup>3</sup> This seems to carry the doctrine into cases of aggravated misdemeanor; but there is no ground for believing that any courts of the present day would follow this lead of the old Star-chamber.

§ 720. **Doctrine of Misprision, stated.** — The doctrine of misprision, as now understood, is as follows: A man, to be responsible for a crime directly committed by another, must give to the criminal act some contribution from his own will.<sup>4</sup> But, if it is treason or felony, and he stands by while it is done without using means in his power to prevent it, though his will does not concur in it;<sup>5</sup> or, if he knows of its having been done in his absence, yet neither makes disclosure of it to the authorities, nor does any thing to bring the offender to punishment, — the law holds him to be guilty of a breach of the duty due to the community and the government.<sup>6</sup>

<sup>1</sup> 1 Tytler's History, Boston ed. of 1844, p. 37.

<sup>2</sup> *Connaughty v. The State*, 1 Wis. 159; *Burrell v. The State*, 18 Texas, 713; ante, § 633, 634.

<sup>3</sup> *Case de Libellis Famosis*, 5 Co. 125.

<sup>4</sup> Ante, § 629; 2 Hawk. P. C. Curw.

ed. p. 440, § 10; Foster, 350; *The State v. Hildreth*, 9 Ire. 440.

<sup>5</sup> 1 East P. C. 377; 1 Russ. Crimes, 3d Eng. ed. 45; 2 Hawk. P. C. Curw. ed. p. 440, § 10; Foster, 350.

<sup>6</sup> 1 Russ. Crimes, 3d Eng. ed. 45; 1 East P. C. 139, 140; 2 Hawk. P. C. Curw.

§ 721. **Limit of Duty as to Misprision.**—How much a man, to avoid the guilt of misprision, must do to prevent a crime, or bring the offender to punishment, it is difficult to state; and doubtless the rule will vary with the nature and magnitude of the offence, and the kind and degree of public provision made for searching out and prosecuting offenders.<sup>1</sup> Russell observes, in accordance with the general language of the English books, that “a man is bound to discover the crime to a magistrate with all possible expedition;”<sup>2</sup> and Lord Coke says, that, “if any be present when a man is slain, and omit to apprehend the slayer, it is a misprision.”<sup>3</sup> We saw in “Criminal Procedure” what a private person may do to arrest offenders; but one is not always indictable for not doing all that the law permits.<sup>4</sup>

§ 722. **United States Statutes.**—The statutes of the United States make punishable both misprision of felony,<sup>5</sup> and misprision of treason,<sup>6</sup> against the general government.

ed. p. 444, 447, § 23, 29; 1 Hawk. P. C. The State *v.* Leigh, 3 Dev. & Bat. 127; Curw. ed. p. 73, § 2; 4 Bl. Com. 121, 1 Long *v.* The State, 12 Ga. 293.  
Hale P. C. 371, 374. And see ante, § 267-276.

<sup>3</sup> 3 Inst. 139.

<sup>4</sup> Crim. Proced. I. § 164-172.

<sup>5</sup> R. S. of U. S. § 5390.

<sup>6</sup> *Ib.* § 5333.

<sup>1</sup> And see ante, § 271.

<sup>2</sup> 1 Russ. Crimes, 3d Eng. ed. 45. And see 1 East P. C. 139; 1 Hale P. C. 372;



## CHAPTER II.

ATTEMPT.<sup>1</sup>

- § 723-726. Introduction.  
 727-730. General Doctrine of Attempt.  
 731-736. The Kind of Intent.  
 737-769. Kind and Extent of Act.  
 770, 771. Combination of Act and Intent.  
 772, 772 *a*. Degree of the Offence.

§ 723. **Scope of this Chapter.**—The subject of this chapter is indicated on the “Diagram of Crime”<sup>2</sup> by A B P. Attempt, it is seen, is misdemeanor, extending through the Regions of Treason and Felony, and partly through that of Misdemeanor.

§ 724. **Indictable Endeavor short of Attempt.**—In England, the courts speak of indictable endeavors, which are too remote from the accomplished crime intended to be termed attempts.<sup>3</sup> No satisfactory reason appears why they should not be so termed, but there is ample reason why they should be.<sup>4</sup> In no American case, the writer believes, has this English distinction been made. And it is to be hoped that no judge among us will ever undertake to introduce a refinement so absolutely without practical advantage. If it were accepted, the thing thus receiving a new name would be indicated on the “Diagram of Crime” by a line drawn from some point between A and B to some point between P and A. The change would not enlarge the criminal field, but assign to a minuter space in it a new name.

§ 725. **Subject Intricate and Important.**—The subject of this chapter is alike intricate and important. The reports are full of cases upon it, yet it is but imperfectly understood by the courts. As for text-books, there was no one, English or American, until the present author wrote, which contained more than a few para-

<sup>1</sup> For the pleading, evidence, and practice in attempt, see *Crim. Proced.* II. § 71 et seq.

<sup>2</sup> Ante, § 602.

<sup>3</sup> Ante, § 435, 436.

<sup>4</sup> *Crim Proced.* II. § 71.

graphs of loose and inadequate statements of doctrine. The reader, therefore, will not object if in this chapter he is delayed more with discussion than in some others.

§ 726. **Order of the Chapter.** — We shall consider, I. The General Doctrine of Attempt; II. The Kind of Intent; III. The Kind and Extent of Act; IV. The Combination of Act and Intent; V. The Degree of the Offence.

### I. *The General Doctrine of Attempt.*

§ 727. **Why indictable.** — If a man undertakes to do a particular wrong of the indictable sort, and does some act toward it but fails to complete what he meant, his evil intent and act together constitute what is shown in the foregoing discussions to be a common-law crime; <sup>1</sup> provided the act is not too trivial and small for the law's notice.<sup>2</sup> For the intent is sufficient, and the adequacy of the act is the only further object of inquiry.<sup>3</sup> Therefore, —

§ 728. **How defined.** — An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient, both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small. Or, more briefly, an attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended.<sup>4</sup>

§ 729. **Two Elements.** — An attempt, therefore, is, like any other crime, composed of the two elements of an evil intent and a simultaneous resulting act. As to —

**The Act.** — We have seen,<sup>5</sup> that an act may be evil in itself, or evil by reason of the intent prompting it,<sup>6</sup> or being in itself evil may be rendered more so by the intent. Now, in attempt, the act may be either evil or indifferent in itself; but, whether the one or the other, its special reprehensible quality, as an element in this form of indictable wrong, is derived from the particular

<sup>1</sup> Ante, § 204-207, 435.

<sup>2</sup> Ante, § 212, 223 et seq.

<sup>3</sup> *People v. Lawton*, 56 Barb. 126;  
*Cunningham v. The State*, 49 Missis. 685.

<sup>4</sup> See *Johnson v. The State*, 14 Ga. 55; 370.

*The State v. Marshall*, 14 Ala. 411; *Cunningham v. The State*, 49 Missis. 685.

<sup>5</sup> Ante, § 434 et seq. and other places.

<sup>6</sup> *Rex v. Sutton*, Cas. temp. Hardw.

intent whence it proceeds. An act which, whether more or less evil in itself, is punishable when done simply from general malevolence, is not classed with attempt, but is a substantive offence. If a man, from this sort of wicked impulse, does less of such an act than the law requires to constitute the substantive offence, he incurs no criminal liability. But, —

**Specific Intent.** — An attempt is committed only when there is a specific intent to do a particular criminal thing, which intent imparts a special culpability to the act performed toward the doing.<sup>1</sup> It cannot be founded on mere general malevolence. When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it; and proceeded a certain way in the doing. The intent in the mind covers the thing in full;<sup>2</sup> the act covers it only in part. Thus, —

§ 730. **Murder — Attempt to Murder.** — To constitute murder, the guilty person need not intend to take life;<sup>3</sup> but, to constitute an attempt to murder, he must so intend.<sup>4</sup>

**Further Course of Discussion.** — The object of this introductory sub-title is to give the reader a general view of the subject before entering on its minuter consideration. But what is said here will be in substance repeated in the subsequent discussions of this chapter.

## II. *The Kind of Intent.*

§ 731. **To do what, if done, would be Substantive Crime.** — It is but another form of foregoing propositions to say, that, in attempt, the intent must be specific to do some act, which, if it were fully performed, would constitute a substantive crime.<sup>5</sup> Therefore, as just seen, —

**General Malevolence** — is not sufficient, even though of a sort

<sup>1</sup> *Cunningham v. The State*, 49 Missis. 685.

<sup>2</sup> Post, § 735, 736; *Eden Penal Law*, 3d ed. 86, 87; *Rex v. Boyce*, 1 Moody, 29; *Commonwealth v. Martin*, 17 Mass. 359; *The State v. Mitchell*, 5 Ire. 350; *Reg. v. Stanton*, 1 Car. & K. 415; *Roberts v. People*, 19 Mich. 401; *The State v. Jefferson*, 3 Harring. Del. 571; *Reg. v. Cox*, 1 Fost. & F. 664. And see *Reg. v. Adams*, Car. & M. 299; *Reg. v. Fretwell*,

*Leigh & C.* 443, 9 Cox C. C. 471; *Sullivan v. The State*, 3 Eng. 400.

<sup>3</sup> Vol. II. § 676.

<sup>4</sup> Vol. II. § 741; post, § 736; *Maher v. People*, 10 Mich. 212; *Slatterly v. People*, 58 N. Y. 354; *Reg. v. Lallement*, 6 Cox C. C. 204; *Henderson v. The State*, 12 Texas, 525; *Reg. v. Donovan*, 4 Cox C. C. 399.

<sup>5</sup> As to what is meant by "substantive crime," see ante, § 696.

which, added to the appropriate act, would constitute an ordinary substantive offence. So —

**Civil Wrong.** — We saw, under a previous title,<sup>1</sup> that sometimes an act is indictable when the intent is no more than to commit a mere civil wrong. That doctrine applies only to substantive offences, not to attempts. But, —

**Entire Crime — (Rape).** — The offender's purpose must be to commit an entire substantive crime; as, if the alleged offence is an assault with intent to commit rape, he must, to be guilty, have meant to use force, should it be necessary, to overcome the woman's will.<sup>2</sup>

§ 732. **Change of Purpose.** — A crime, once committed, may be pardoned, but it cannot be obliterated by repentance.<sup>3</sup> In reason, therefore, if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose.<sup>4</sup> This doctrine may not be established absolutely beyond controversy by the authorities, but it is reasonably so. Thus, —

§ 733. **In Rape.** — If a man assaults a woman fully intending to ravish her, but this intent subsides before the act is committed, and he desists, he may still be guilty of assault with intent to commit rape.<sup>5</sup> Or if, after he has made the assault with the

<sup>1</sup> Ante, § 208.

<sup>2</sup> Taylor v. The State, 50 Ga. 79; Reg. v. Wright, 4 Fost. & F. 967.

<sup>3</sup> Vol. II. § 1028, 1122; Commonwealth v. Tobin, 108 Mass. 426, 429.

<sup>4</sup> See the cases to the next section; also The State v. McDaniel, Winston, No. 1, 249; observations of Gibson, C. J., in Shannon v. Commonwealth, 2 Harris, Pa. 226. **Under Foreign Codes.** — The Prussian penal code, following that of France, declares, as stated by Mr. Sanford, that "an attempt is only punishable when the same is manifested by acts which constitute a commencement of execution, and when the consummation is hindered only by circumstances, independent of the will of the author." Sanford Penal Codes in Europe, 61. So, by the penal code of Spain, "Criminal attempt is a direct commencement of execution, by external acts, the realization of which is hindered by causes indepen-

dent of the will of the author." Ib. 122. And by the Austrian code, "Criminal attempt is punishable when the criminal has committed an action leading to the commission of a crime, which crime, however, was hindered by some circumstances independent of the will of the author. . . . An attempt exists also when a person endeavors to persuade another to a crime which he does not commit." Ib. 96. But these codes cannot control the principles of an unwritten jurisprudence.

<sup>5</sup> Lewis v. The State, 35 Ala. 380, 389. In delivering the opinion of the court, Stone, J., said: "If the attempt was in fact made, and had progressed far enough to put Miss Ozlery [the prosecutrix] in terror, and render it necessary for her to save herself from the consummation of the attempted outrage by flight, then the attempt was complete; and an after-abandonment by the de-

intent to ravish, the woman, who had resisted, yields voluntarily, so that there is no rape, the offence of assault with intent to commit rape, which had been perpetrated, remains.<sup>1</sup> But —

**Purpose abandoned before Attempt.** — If, in these cases, the criminal purpose is abandoned before enough of the evil act is done to constitute an attempt, guilt, of course, is not incurred.<sup>2</sup>

§ 734. **Intent presumed — Tendency of Act.** — It is a rule of criminal evidence, that a man is presumed to intend the natural, necessary, and even probable consequences of what he intentionally does; and that, in some circumstances, the presumption is conclusive.<sup>3</sup> Upon this principle, —

**Substantive Crimes — (Libel — Bawdy-house — Forgery — Perjury — Hindering Witness, &c.).** — Some acts are made substantive crimes, not so much on account of their inherent evil, as of their tendency to promote ulterior mischief. Thus, libels are indictable, because they *tend* to break the peace,<sup>4</sup> or to corrupt the public morals, or to stir up sedition against the government;<sup>5</sup> bawdy-houses, because their tendency is to corrupt the public morals; forgeries, as tending to defraud individuals<sup>6</sup> or the public; false oaths and affidavits employed in judicial proceedings,<sup>7</sup> preventing the attendance of witnesses,<sup>8</sup> and the like, because they are calculated to pervert public justice; and illustrations of this sort might be multiplied indefinitely.<sup>9</sup> Here, if a man intentionally does the thing, he cannot be heard to say, in his defence, that he did not intend the ulterior mischief.<sup>10</sup> And thence it is that these wrongs are substantive crimes, instead of attempts.

fendant of his wicked purpose, if he had proceeded thus far, could not purge the crime." See *Taylor v. The State*, 50 Ga. 79. So, if one endeavoring to ravish a woman is frightened off by persons coming in answer to her cries, he is still liable for attempting to commit rape. *The State v. Elick*, 7 Jones, N. C. 68.

<sup>1</sup> *The State v. Cross*, 12 Iowa, 66; post, § 766.

<sup>2</sup> *Pinkard v. The State*, 30 Ga. 757.

<sup>3</sup> *Crim. Proced. I.* § 1060.

<sup>4</sup> *Hodges v. The State*, 5 Humph. 112; *Reg. v. Nun*, 10 Mod. 186.

<sup>5</sup> *Rex v. Woodfall, Loft*, 776; *Reg. v. Lovett*, 9 Car. & P. 462.

<sup>6</sup> *Reg. v. Marcus*, 2 Car. & K. 356;

*Rex v. Ward*, 2 Ld. Raym. 1461, 1469; *People v. Genung*, 11 Wend. 18.

<sup>7</sup> *Omealy v. Newell*, 8 East, 364; *Hamper's Case*, 3 Leon. 230.

<sup>8</sup> *The State v. Carpenter*, 20 Vt. 9.

<sup>9</sup> See *Williams v. East India Company*, 3 East, 192, 201; *Reg. v. Chapman*, 1 Den. C. C. 432; *The State v. Taylor*, 3 Brev. 243; *Smith v. The State*, 1 Stew. 506; *Holmes's Case*, Cro. Car. 376; *Barefield v. The State*, 14 Ala. 603; *Reg. v. Darby*, 7 Mod. 100; *Rex v. Philipps*, 6 East, 464; *Reg. v. Renshaw*, 11 Jur. 615; *Smith's Case*, 1 Broun, 240; *Gibson's Case*, 2 Broun, 366.

<sup>10</sup> And see *Reg. v. Gathercole*, 2 Lewin, 237; *The State v. Nixon*, 18 Vt. 70; *Rex v. Farrington, Russ. & Ry.* 207.

§ 735. **Tendency of Act as Evidence of Intent.**—On an indictment for a technical attempt, the jury may take into view the nature of an act proved, to determine the intent which prompted it. And the court will instruct them, that the defendant should be presumed to have intended the natural and probable consequences of his act.<sup>1</sup> But—

**Intent in Fact—(Intent in Law not adequate).**—They cannot go further. The doctrine of an intent in law, differing from the intent in fact, is not applicable to these technical attempts; and, if the prisoner's real purpose were not the same which the indictment specifies, he must, according to views already explained,<sup>2</sup> be acquitted.<sup>3</sup> To hold otherwise would be unjust and absurd. For the charge is, that the defendant put forth an act whose criminal quality or aggravation proceeded from a specially evil intent prompting it;<sup>4</sup> and, in reason, we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it. There are a few cases<sup>5</sup> which seem to overlook this truth, and even possibly to deny it; but it is sustained by the clear preponderance of judicial authority, English and American.<sup>6</sup> Thus,—

<sup>1</sup> *Reg. v. Jones*, 9 Car. & P. 258; *The State v. Davis*, 2 Ire. 153; *Cole v. The State*, 5 Eng. 318; *Rex v. Howlett*, 7 Car. & P. 274; *Rex v. Holt*, 7 Car. & P. 518; *Jeff v. The State*, 37 Missis. 321; *Jeff v. The State*, 39 Missis. 593. And see *Rex v. Moore*, 3 B. & Ad. 184; *Rex v. Bailey*, Russ. & Ry. 1; *Southworth v. The State*, 5 Conn. 325; *The State v. Jefferson*, 3 Harring. Del. 571; *Dains v. The State*, 2 Humph. 439. Said Campbell, J., in a Michigan case: "The intent to kill must undoubtedly be established as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which, to their minds, fairly proves its existence. Intentions can only be proved by acts, as juries cannot look into the breast of the criminal." *People v. Scott*, 6 Mich. 287, 296.

<sup>2</sup> Ante, § 728-730.

<sup>3</sup> *Reg. v. Ryan*, 2 Moody & R. 213, overruling *Rex v. Lewis*, 6 Car. & P. 161; *Rex v. Duffin*, Russ. & Ry. 365; *Rex v. Thomas*, 1 Leach, 4th ed. 330, 1 East P.

C. 417; *Rex v. Holt*, 7 Car. & P. 518; *Mooney v. The State*, 33 Ala. 419; *Ogle-tree v. The State*, 28 Ala. 693; and cases cited ante, § 729.

<sup>4</sup> Ante, § 729.

<sup>5</sup> *The State v. Bullock*, 13 Ala. 413; *McCoy v. The State*, 3 Eng. 451; *Rex v. Jarvis*, 2 Moody & R. 40; *The State v. Boyden*, 13 Ire. 505.

<sup>6</sup> *The State v. Jefferson*, 3 Harring. Del. 571; *Moore v. The State*, 18 Ala. 532; *Reg. v. Sullivan*, Car. & M. 209; *Reg. v. Cruse*, 8 Car. & P. 541; *Rex v. Holt*, 7 Car. & P. 518; *Rex v. McIlhone*, 1 Crawf. & Dix C. C. 156; *Rex v. Kelly*, 1 Crawf. & Dix C. C. 186; *People v. Shaw*, 1 Parker C. C. 327; *Davidson v. The State*, 9 Humph. 455; and see *The State v. Hailstock*, 2 Blackf. 257; *Dains v. The State*, 2 Humph. 439; *Cole v. The State*, 5 Eng. 318; *Rex v. Hunt*, 1 Moody, 93; *Reg. v. Stringer*, 2 Moody, 261; *Reg. v. Nicholls*, 9 Car. & P. 267; *Reg. v. Griffiths*, 8 Car. & P. 248; *Rex v. Davis*, 1 Car. & P. 306; *Rex v. Mogg*, 4 Car. & P. 364; *Roberts v. People*, 19 Mich. 401; *People v. Woody*, 48 Cal. 80.

§ 736. **In Homicide.**—There are, as already said, circumstances wherein the unintended taking of human life is murder.<sup>1</sup> Yet there can be no attempt to murder, except where the death of the victim was meant.<sup>2</sup> For example, "if one from a housetop recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be by the common law murder. But if, instead of killing, it inflicts only a slight injury, the party could not be convicted of an assault with intent to commit murder;"<sup>3</sup> since, in fact, murder was not intended. Again,—

**In Burglary.**—If one, to commit a misdemeanor in another's dwelling-house, breaks and enters it at night, he does not thereby become guilty of burglary, which requires an intent to commit a felony,<sup>4</sup> though unintentionally his act therein amounts to a felony. He may be convicted of the unintended felony done therein, but not of burglary.<sup>5</sup> On the other hand, —

**Name of Crime — Thing meant no Crime.**—The name of a crime is no part of it.<sup>6</sup> Therefore one, to be guilty of an attempt, is not required to have in mind the name of a wrong meant. He need only contemplate the doing of a thing which the law holds to be an offence. And he is guiltless of the attempt if it is not such, though he supposes it is.<sup>7</sup> Thus, —

**Attempts at Murder and Manslaughter, distinguished.**—One who assaults another, meaning to take his life, becomes guilty of an

And see the cases in a previous note to this section, and ante, § 729.

<sup>1</sup> Ante, § 314, 730.

<sup>2</sup> *Simpson v. The State*, 59 Ala. 1; *Smith v. The State*, 2 Lea, 614, 617; *The State v. Seymour*, 1 Houst. Crim. 508; *Washington v. The State*, 53 Ala. 29; *The State v. Neal*, 37 Maine, 468; *Seitz v. The State*, 23 Ala. 42; *Rapp v. Commonwealth*, 14 B. Monr. 614; *The State v. Beaver*, 5 Harring. Del. 508; *Ogletree v. The State*, 28 Ala. 693; *Jeff v. The State*, 37 Missis. 321; *Walker v. The State*, 8 Ind. 290; *Morman v. The State*, 24 Missis. 54; *The State v. Stewart*, 29 Misso. 419; *King v. The State*, 21 Ga. 220. **Statutory Modifications.**—There are States in which this doctrine is more or less modified by statutes; as, in Texas, "Whenever it appears upon a trial for assault with intent to murder, that the offence would have been murder had death resulted therefrom, the person

committing such assault is deemed to have done the same with that intent."

*Wilson v. The State*, 4 Texas Ap. 637, 641; *Daniels v. The State*, 4 Texas Ap. 429, 430. And see *Pugh v. The State*, 2 Texas Ap. 539; *Stapp v. The State*, 3 Texas Ap. 138; *Gay v. The State*, 3 Texas Ap. 168; *King v. The State*, 4 Texas Ap. 54; *Ewing v. The State*, 4 Texas Ap. 417; *Johnson v. The State*, 4 Texas Ap. 598; *Ferguson v. The State*, 6 Texas Ap. 504; *Walker v. The State*, 7 Texas Ap. 627.

<sup>3</sup> *Moore v. The State*, 18 Ala. 532.

<sup>4</sup> Ante, § 559; Vol. II. § 90.

<sup>5</sup> 2 East P. C. 509; *Rex v. Dobbs*, 2 East P. C. 513. And see *Rex v. Thomas*, 1 Leach, 4th ed 330, 1 East P. C. 417; *Rex v. Trusty*, 1 East P. C. 418; *The State v. Eaton*, 3 Harring. Del. 554.

<sup>6</sup> *Crim. Proced. I.* § 416; ante, § 599.

<sup>7</sup> Post, § 747, 748, 753; *The State v. Brooks*, 76 N. C. 1. See *United States v. Tharp*, 5 Cranch C. C. 390.

assault with intent to commit murder, or to commit manslaughter, according as the killing would be the one or the other if effected; and it is neither, if, under the circumstances, the killing would not be an offence.<sup>1</sup> To illustrate: where an officer, having a proper warrant, undertakes to arrest a man, the latter by killing him to prevent being taken, commits murder;<sup>2</sup> or, if the assault which was meant to kill fails, the offence is assault with intent to murder; while yet the offender may not know whether the officer has a warrant or not, and therefore whether he is himself endeavoring to perpetrate murder or manslaughter. But if the officer, where a warrant is required, has none, then the offence of the man who meant to kill him and failed will be assault with intent to commit manslaughter. He cannot be convicted of assault with intent to murder.<sup>3</sup> For a like reason, —

**In Rape.** — One does not become guilty of assault with intent to commit rape, where, under the circumstances, an actual violation of the woman's person would not be rape.<sup>4</sup> Again, —

**Shooting at One to kill Another.** — If a man, to murder A, shoots at B, whom he mistakes for him, still, though he intends to take the life of A, he also intends to take the life of the one at whom he shoots, namely, B; and, if the charge from his gun inflicts only a wound, he may be convicted of wounding B with the intent to murder B.<sup>5</sup> And, —

**Shooting into Crowd.** — If he discharges loaded arms into a group, to inflict grievous bodily harm generally, and wounds one, he becomes guilty of wounding this one with intent to do him grievous bodily harm.<sup>6</sup> The greater includes the less.

<sup>1</sup> And see *Vandermark v. People*, 47 Ill. 122.

<sup>2</sup> Vol. II. § 652.

<sup>3</sup> *Commonwealth v. McLaughlin*, 12 Cush. 615; *Mitton's Case*, 1 East P. C. 411. And see *Rex v. Payne*, 4 Car. & P. 558; *Rex v. Curran*, 3 Car. & P. 397; *Sharp v. The State*, 19 Ohio, 379; *Nancy v. The State*, 6 Ala. 483. **Intent to Kill.** — There is a difference between an intent to kill and an intent to murder: the former may exist where the party intends only such killing as amounts to manslaughter. *People v. Shaw*, 1 Parker C. C. 327; *The State v. Nichols*, 8 Conn. 496; *Nancy v. The State*, 6 Ala. 483; *Bonfanti v. The State*, 2 Minn. 123. It seems, however, to be the doctrine in Mississippi, that by an intent to kill is

meant an intent to murder. *Bradley v. The State*, 10 Sm. & M. 618. See *Morman v. The State*, 24 Missis. 54; post, § 747.

<sup>4</sup> *People v. Quin*, 50 Barb. 128; *Rhodes v. The State*, 1 Coldw. 351; *People v. Brown*, 47 Cal. 447; *The State v. Brooks*, 76 N. C. 1; *Johnson v. The State*, 63 Ga. 355; post, § 746.

<sup>5</sup> *Reg. v. Smith*, Dears. 559, 25 Law J. n. s. M. C. 29, 7 Cox C. C. 51, 1 Jur. n. s. 1116, 33 Eng. L. & Eq. 567; *Reg. v. Stopford*, 11 Cox C. C. 643; *The State v. Gilman*, 69 Maine, 163. But see *Lacefield v. The State*, 34 Ark. 275. See *Commonwealth v. Morgan*, 11 Bush, 601. *Reg. v. Hewlett*, 1 Fost. & F. 91.

<sup>6</sup> *Reg. v. Fretwell*, Leigh & C. 443, 9 Cox C. C. 471. And see *The State v. Sloanaker*, 1 Houst. Crim. 62.



### III. *The Kind and Extent of the Act.*

§ 737. **In General.** — Questions of the gravest difficulty, involving some conflicts of judicial opinion, and a few departures from sound doctrine, present themselves under this sub-title. But the general proposition is plain, that any act sufficient in turpitude for the law's notice, and near enough to the offence intended to create an apparent danger of its commission, will, when done in pursuance of the intent described under the last sub-title, complete the criminal attempt. But this proposition can furnish practical help only as it is made definite by a comparison with the adjudications and the other principles governing them.

**Offender in Condition to perform.** — It is of no consequence that the person accused was not in a condition to do the criminal thing which he meant,<sup>1</sup> if he appeared to be, and thus created the reasonable apprehension required.

§ 738. **Adaptation of Means.** — Some of the cases, particularly some of the English ones, seem to proceed on the idea, that the means employed must be really adapted to the accomplishment of the end, and not merely apparently so.<sup>2</sup> But this, we shall see,<sup>3</sup> is not the true doctrine; for the alarm created by the endeavor is the same whether the means are really adapted or only appear to be. And generally the reason why an attempt is not effectual is because of some occult inefficacy of the means. This doctrine would overturn the law of attempt itself. But, —

§ 739. **Act foreign to Purpose — Too Remote.** — If one, from a wicked purpose, does an act quite foreign to what he intends, he creates no apparent danger that his intent will be executed, and

<sup>1</sup> In the Indiana case of *Kunkle v. The State*, 32 Ind. 220, 230, 231, Elliott, J., after referring to the earlier case of *The State v. Swails*, 8 Ind. 524, observes: "If the case is to be understood as laying down the broad proposition that, to constitute an assault, or an assault and battery, with intent to commit a felony, the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval. . . . Suppose an assault and bat-

tery is perpetrated on a woman, with intent to ravish, and she proves the stronger of the two, and thereby prevents the accomplishment of the object intended. The failure results alone from the want of the present ability to accomplish the end; and would it be contended that the party could not, in such a case, be convicted of the felonious intent?"

<sup>2</sup> *Reg. v. Sheppard*, 11 Cox C. C. 302; *The State v. Napper*, 6 Nev. 113.

<sup>3</sup> *Post*, § 749 et seq.

evidently he does not become guilty of an attempt. And it is the same if an act, though adapted, does not proceed far enough for the law's notice.<sup>1</sup>

§ 740. **How, in Principle, determine Indictability.** — The following view will be helpful. An intent to commit a substantive crime having been shown to exist, the prisoner cannot, as we have seen,<sup>2</sup> complain though he is made to suffer the full punishment for the act intended, while yet he has been unable to take even one step toward its performance. And, as said in an old case, "*in foro conscientie* the attempt is equal with the execution of it."<sup>3</sup> But, to justify the government in punishing the intent, it must have developed itself in something done, whereby society has received an injury.<sup>4</sup> There are cases, as disclosed in a previous chapter,<sup>5</sup> wherein, while a person is intending to do one wrong, he, failing in it, does another; and then, as a general rule, he is punishable for the wrong done, as a substantive offence. But where the thing done does not amount to such substantive offence, it is a criminal attempt, if the doing has proceeded far enough for the law's notice, and is also of a kind from which the community suffers. And the community suffers from a mere alarm of crime.

§ 741. *Discussions of Cases and Doctrines:—*

**Attempted Pocket-picking and Abortion in England.** — The cases are not all reconcilable with any uniform principle. Thus, in England, some defendants having been, in 1864, convicted of an attempt to commit larceny from a woman by picking her pocket, the conviction was held to be wrong, because no evidence had been produced, nor was it submitted to the jury to find, that she had in her pocket any thing which was the subject of larceny.<sup>6</sup> But, in 1846, it having been made punishable by 7 Will. 4 & 1 Vict. c. 85, § 6, unlawfully to "use any instrument" "with intent to procure the miscarriage of any woman," one was held to be guilty, though the evidence showed affirmatively that the woman, supposed to be pregnant, was not so in fact.<sup>7</sup> The acut-

<sup>1</sup> Ante, § 112 et seq.

<sup>2</sup> Ante, § 325 et seq.

<sup>3</sup> *Rex v. Kinnersley*, 1 Stra. 193, 196.

<sup>4</sup> Ante, § 204, 334.

<sup>5</sup> Ante, § 323 et seq.

<sup>6</sup> *Reg. v. Collins*, Leigh & C. 471. Contra, in the United States. See post, § 743, 744. The English text-books have since

intimated that this would be punishable on the distinction stated ante, § 435, 436, 724. 1 Russ. Crimes, 5th Eng. ed. 192, note; Archb. Crim. Pl. & Ev. 19th ed. 382.

<sup>7</sup> *Reg. v. Goodhall*, 1 Den. C. C. 187; s. c. nom. *Reg. v. Goodall*, 2 Cox C. C. 41; s. c. nom. *Reg. v. Goodchild*, 2 Car. & K. 293. In the earlier case of *Rex v.*

est understanding could not reconcile these two cases, — the one, for putting the hand into the pocket, but not finding there any thing to be removed ; the other, for penetrating to the womb, yet not discovering an embryo or foetus to be taken away — and the differing decisions must have sprung from opposite views in the two benches of judges. But he who adopts the line of argument indicated in our last section will readily choose between the two decisions. It being accepted truth, that the defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether, in the unseen depths of the pocket or the womb, what was supposed to exist was really present or not.<sup>1</sup>

Scudder, 1 Moody, 216, the indictment being for administering a drug to a woman with intent to procure an abortion, contrary to 43 Geo. 3, c. 58, § 2, it was held, “that,” in the language of the report, “the statute did not apply when it appeared negatively that the woman was not with child.” But the terms of the statute were, “with intent, &c., to cause and procure the miscarriage of any woman *then being quick with child*.” Obviously this decision was required by the express statutory words. See also *Rex v. Phillips*, 3 Camp. 76; *Rex v. Phillips*, 3 Camp. 73.

<sup>1</sup> 1. In the second edition of Bennett & Heard’s “Leading Criminal Cases,” vol. ii. p. 482, 483, Mr. Heard has fallen into a singular misapprehension, which, as it occurs in a book of much value, extensively before the profession, it becomes necessary for me to correct. He quotes this section of mine, and adds: “Obviously the decision in *Regina v. Goodhall* [miscarriage] was required by the express language of the statute. [The writer’s reference to a statute, at this place, has nothing to do with the case, as perhaps he did not mean to be understood that it had; it having been enacted fifteen years after the decision was pronounced.] And it is equally obvious that the decision in *Regina v. Collins* [pocket-picking] was required by the express language of the indictment. The two cases are thus reconciled. During the argument in *Regina v. Collins*,

Crompton, J., said: ‘It is important to notice how the indictment is framed. The prisoners are charged with putting their hands into the pocket “with intent the property of the said woman *in the said gown pocket then being* from the person of the said woman to steal.”’ As the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common-law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case. And the counsel for the prisoner argued, ‘if the goods had not been specified as in the said gown pocket then being, an indictment might perhaps have been framed which would have been supported by the evidence.’ Cockburn, C. J.: ‘This case is governed by *Regina v. McPherson*, Dears. & B. C. C. 197, 7 Cox C. C. 281. That case proceeds on the ground that you must prove the property as laid.’ 9 Cox C. C. at p. 499.”

2. I shall now show that Mr. Heard is mistaken in both branches of his proposition. The decision in *Reg. v. Goodhall* was not required by the express language of the statute, nor did it proceed on any such ground; and the decision in *Reg. v. Collins* was not required in fact, and was not understood by the judges to be required, by the express language of the indictment.

3. As to the latter case, it contains no two such connected sentences as Mr.

§ 742. **Unseen Impediments, in Reason how regarded.** — A further word, as to how an unseen impediment should in legal reason be

Heard puts into the mouth of Cockburn, C. J., or their equivalent in meaning, but the contrary. As Mr. Heard relies on the report in Cox, whose series is not deemed regular, or consequently of the highest authority, whatever be its intrinsic merit, I shall quote from this source the whole of the mature opinion of the court, as delivered by Cockburn, C. J., at the rendering of final judgment. He said: "We are all of opinion that this conviction cannot be sustained; and, in so holding, it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was any thing in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of the court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny? We are far from saying, that, if the question whether there was any thing in the pocket of the prosecutrix had been left to the jury, there was not evidence on which they might have found that there was, and in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. The case is governed by that of *Reg. v. McPherson*, and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there is nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed and there-

fore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the jury in this case, either directly, or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed." And that this learned Chief Justice expressed no such idea as the words interpolated by Mr. Heard import, but quite the contrary, is further apparent from what appears in the same report of the ground taken by the counsel for the defendants. "For the defence, it was contended that to put a hand into an empty pocket was not an attempt to commit felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence." p. 497.

4. But Mr. Heard professes to tell us what Cockburn, C. J., said *at the argument*. If he said any thing contrary to his deliberate opinion pronounced at the rendering of final judgment, it should be disregarded. But he did not. According to Cox, when the case of *Reg. v. McPherson* was mentioned at the argument, he remarked: "That case proceeds on the ground that you must prove the property as laid." He is not reported to have observed also at this time that the case under consideration must be governed by that one. He said so, indeed, at the rendering of final judgment. But he never said the two things in connection, as Mr. Heard reports him to have done. Now, if the reader will look into *Reg. v. McPherson* (Dears. & B. 197, post, § 757), he will see the explanation. Two points were discussed in it: first, whether the matter as proved constituted in law a criminal attempt; secondly, whether, if it did, there could be a conviction on the indictment as drawn. And the judges intimated opinions in the negative on both these points. When, there

regarded, will be helpful on this most difficult part of the doctrine of attempt. We have seen, that, if what a man contemplates

fore, at the argument of *Reg. v. Collins*, this case of *McPherson* was alluded to, and the learned Chief Justice used the words reported, he had one point in mind; and, when he referred to it in delivering final judgment, he had in mind the other point. This is an obvious explanation, assuming the report in *Cox* to be correct, which quite likely it is. But as these words, if employed at the argument, might mislead a reader who did not look into *McPherson's* case, when this case of *Collins* came to be reported in the regular series (*Leigh & C.* 471), the learned Chief Justice seems to have taken care that the words should be struck out. At all events, they are not to be found in the regular report.

5. Again; it is impossible that any legal tribunal could have seriously entertained so untenable a position as is attributed to this court by *Mr. Heard*. None of the reports of this case give the words of the indictment under marks of quotation; but, I have compared the reports of *Cox* and of *Leigh & Cave*, and they agree in saying, that the prisoners were tried, &c., "on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal, &c." Now, if it is in matter of law an offence to put the hand into a woman's gown pocket, supposed to contain property of hers, but in fact containing nothing, "with intent the property of the said woman in the said gown pocket there being" to steal, the person charged being mistaken in supposing there was in it such property, surely these words describe the offence as accurately as any words are capable of doing. They do not say, that, in fact, there was such property; but that the intent with which the hand was thrust into the pocket was to steal such property. If they did say

there was such property, and it was not in law necessary there should be any in order to constitute the offence, then this particular allegation would be simply surplusage. Thus, in this very case, the allegation puts one hand of each defendant into the pocket, and the proof was that only one hand of one of the defendants was actually there; yet no one thought that, therefore, the offence was not proved as laid. Consequently it is simply absurd to say that this was a case of variance between the allegation and the proof. To be sure, *Crompton, J.*, dropped, at the argument, a remark which possibly looks a little toward this idea; but it was not followed up by any other judge, it was evidently abandoned by him as untenable, if indeed he entertained the idea, and nothing came of it as nothing could come.

6. Let us now look into the other case, *Reg. v. Goodhall*, the decision in which *Mr. Heard* says "was required by the express language of the statute." This, the reader remembers, was an indictment for an attempt to commit an abortion; the proof showing that there was no fœtus to be removed, and the court holding that there need be none. The statute on which the indictment was framed (7 Will. 4 & 1 Vict. c. 85, § 6) is, in full, "that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." The reader can see for himself, that here is no "express language," as *Mr. Heard* says there is, rendering pregnancy in the woman unnecessary. Nor is there in the report any intimation that the case was adjudged on any such ground. To be sure, *Mr.*

doing would not be in law a crime, he cannot be said, in point of law, to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding, where the law holds it not to be such. His real intent being to do a particular thing, if the thing is not a crime he does not intend to commit one, whatever he may erroneously suppose.<sup>1</sup> But, where the thing he intends is a crime, and what he does is of a sort to create alarm, — in other words, excite apprehension that his evil intent will be carried out, — the incipient act which the law of attempt takes cognizance of, is, in reason, committed. Should a man mistake an effigy in female dress for a real woman, and undertake to ravish it,<sup>2</sup> he would not even intend to commit rape, because the law holds the ravishment of an inanimate object not to be rape; but, if a real woman occupied the place of the effigy, and he undertook to ravish her, yet, unknown to him, she carried a revolver, and with it disabled him, so that he could not effect his object, surely, in reason, and, it is believed, in law also, he would commit a criminal attempt. Again, if a man undertakes to rob one who, contrary to appearances, has no money, by reason of which the undertaking miscarries, shall he, after having throttled, stripped, and searched his victim, be permitted to deny his intent to commit robbery? The victim was a real person capable of being robbed, on whom he reasonably expected to find money; and, had it not been for the accident of no money being there, his offence would have been the completed crime of robbery. There is no analogy between this case and one in which an outrage is attempted on a mere inanimate substance.<sup>3</sup> Therefore, —

Heard, in his report, p. 446, says the judges were of opinion the question of pregnancy was immaterial “under this statute,” and the authoritative report in Denison (1 Den. C. C. 187) says it was deemed immaterial under this “*indictment*,” — but I do not consider the particular wording of the report, in this instance, important. Thus the matter stands in fact. But, at the place where Mr. Heard says this decision “was required by the express language of the statute,” he has the following note: “The statute 24 & 25 Vict. c. 100, in terms makes it immaterial whether the

woman was or was not with child, in accordance with the decision in *Regina v. Goodhall*.” A hasty reader might understand this to be the statute which governed the case. I am not clear that Mr. Heard fell into the error; I think he did not. At all events, this statute of Victoria was enacted in 1861, and *Reg. v. Goodhall* was decided in 1846, so that the statute could not have governed the decision.

<sup>1</sup> Ante, § 736.

<sup>2</sup> See, for the principle, ante, § 441.

<sup>3</sup> Post, § 744.

**Rule in Reason.** — In reason the rule is, that, if there is an intent to do what in law constitutes a substantive crime, and the person intending such crime proceeds in its commission till interrupted by some unforeseen impediment or lack, outside of himself, special to the particular case, and not open to observation, he commits the indictable attempt.

§ 743. **American Doctrine** — (**Pocket-picking, continued**). — In mere form of words, the foregoing exposition may not be found among the judicial utterances, but it is believed to embody the American — or, at least, the better American — doctrine. Thus, in Pennsylvania, it was held, contrary to the English adjudication, that an indictment for assault with intent to steal from the pocket is good, though it contains no setting out of any thing in the pocket to be stolen. And Duncan, J., in delivering the opinion of the court, said: “The intention of the person was to pick the pocket of whatever he found in it; and, although there might be nothing in the pocket, the intention to steal is the same.”<sup>1</sup> Afterward, in Massachusetts, the same question arose on a statute which, in affirmation of the common law, provided a punishment for “every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same.”<sup>2</sup> And it was held, that the indictment for an attempted pocket-picking need not allege, and the prosecutor need not prove, that there was in the pocket any thing which could be the subject of larceny. Said Fletcher, J., speaking for the whole court: “To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains nevertheless chargeable with the attempt, and with the act done toward the commission of the theft. So a man may make an attempt, an experiment, to pick a pocket, by thrusting his hand into it, and not succeed, because there happens to be nothing in the pocket. Still he has clearly made the attempt, and done the act towards the commission of the offence. So, in the present case, it is not

<sup>1</sup> Commonwealth v. Rogers, 5 S. & R. 463.

<sup>2</sup> Mass. R. S. c. 133, § 12.

probable that the defendant had in view any particular article, or had any knowledge whether or not there was any thing in the pocket of the unknown person; but he attempted to pick the pocket of whatever he might find in it, if haply he should find any thing; and the attempt, with the act done of thrusting his hand into the pocket, made the offence complete. It was an experiment, and an experiment which, in the language of the statute, failed; and it is as much within the terms and meaning of the statute, if it failed by reason of there being nothing in the pocket, as if it had failed from any other cause.”<sup>1</sup>

§ 744. *Continued.* — Afterward, in a pocket-picking case in Connecticut, the same doctrine was affirmed. “It would be a startling proposition,” said Butler, J., “that a known pick-pocket might pass around in a crowd, in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present, with intent to steal, and yet not be liable to arrest or punishment, until the policeman had first ascertained that there was in fact money or valuables in some one of the pockets on which the thief had experimented.”<sup>2</sup> This observation opens to view what the author has set down in these sections<sup>3</sup> to be the true legal reason for the conclusion; namely, that the defendant, with the criminal intent, has performed an act tending to disturb the public repose. On every principle of law, therefore, the act is indictable. Again, —

**Attempted Robbery.** — The Indiana court, following the Pennsylvania, Massachusetts, and Connecticut doctrine, has held, that an assault on one with intent to rob him of his money may be committed, though he has no money in possession.<sup>4</sup>

§ 745. **Further of Reasons in Pocket-picking.** — The principle on which the English judges hold the attempt to steal not committed when the pocket contains no money appears to be, that, —

“If successful, Full Offence.” — “There must,” in the words of Cockburn, C. J., “be an attempt which, if successful, constitutes the full offence.”<sup>5</sup> There can be no doubt of the soundness of this doctrine. We have even seen,<sup>6</sup> that, in law, a man does not

<sup>1</sup> Commonwealth v. McDonald, 5 Cush. 365; affirmed in Commonwealth v. Jacobs, 9 Allen, 274.

<sup>2</sup> The State v. Wilson, 80 Conn. 500, 506.

<sup>3</sup> Ante, § 740, 742.

<sup>4</sup> Hamilton v. The State, 36 Ind. 280.

<sup>5</sup> Reg. v. Collins, Leigh & C. 471, 474; ante, § 741, note.

<sup>6</sup> Ante, § 736, 742.



intend to commit a particular offence, if the act he intends would not, when fully performed, constitute such offence. But if, in these pocket-picking cases, the accused persons had found the money they meant to steal, they would have been guilty of a substantive offence: not finding it, their crime was, by this accident, interrupting their operations, reduced to attempt.

§ 746. **Legal Incapacity of Accused Person.** — One without legal capacity to commit a crime cannot, in law, intend its commission.<sup>1</sup> Nor can he do any act toward it; because, as he cannot accomplish the whole, so neither can he a part. Thus, —

**Attempted Rape by Boy.** — A boy under fourteen is, as we have seen,<sup>2</sup> incapable in law of committing rape, whatever be his physical abilities in fact; therefore he cannot be guilty of assault with intent to commit rape.<sup>3</sup>

§ 747. **Where All meant is no Crime in Law.** — It is but repeating what is already laid down<sup>4</sup> to say, that, if all which the accused person intended, would, had it been done, constitute no substantive crime, it cannot be a crime under the name attempt, to do, with the same purpose, a part of this thing. One reason is, that the specific intent, which, we have seen,<sup>5</sup> is always necessary in a criminal attempt, is wanting. Another reason relates to the act; namely, if a series of acts together will not constitute an offence, one of the series alone will not. Thus, —

§ 748. **In Robbery.** — A person who by violence compels another to write an order for money or goods, intending to take it away, but is intercepted, does not commit an assault with intent to rob; because, if he had got off with the order, the transaction would not in law be robbery.<sup>6</sup> Again, —

**In Forgery.** — Forgery, which is a substantive offence, is partly in the nature of attempt.<sup>7</sup> And, though it may be of a fictitious name,<sup>8</sup> yet, if there is in existence no being or corporation to be

<sup>1</sup> Ante, § 736.

<sup>2</sup> Ante, § 373; Vol. II. § 1117.

<sup>3</sup> Reg. v. Philips, 8 Car. & P. 736; Rex v. Eldershaw, 3 Car. & P. 396; Williams v. The State, 14 Ohio, 222; The State v. Handy, 4 Harring. Del. 566; People v. Randolph, 2 Parker C. C. 213; The State v. Sam, Winston, No. 1, 300. Contra, Commonwealth v. Green, 2 Pick. 880, Parker, C. J., dissenting. See Smith v. The State, 12 Ohio State, 466; Vol. II. § 1136; ante, § 736.

<sup>4</sup> Ante, § 736, 745, 746.

<sup>5</sup> Ante, § 728-730, 735, 736.

<sup>6</sup> Rex v. Edwards, 6 Car. & P. 521.

<sup>7</sup> Ante, § 572 and note; Vol. II. § 168, 521.

<sup>8</sup> The State v. Givens, 5 Ala. 747; Rex v. Taylor, 1 Leach, 4th ed. 214, 2 East P. C. 960; Rex v. Bolland, 1 Leach, 4th ed. 83, 2 East P. C. 958; Vol. II. § 543.

injured by the cheat,<sup>1</sup>—or, if the forged writing, were it genuine, would be neither apparently nor really valid in law,<sup>2</sup>—or if, for any other reason, it could not defraud any one,<sup>3</sup>—the transaction is not forgery.

§ 749. **Means adapted.** — We have seen something of the doctrine, that, to constitute attempt, the means employed must have some adaptation to accomplish the intended result;<sup>4</sup> for, without this element, they create no alarm, and the public repose is not threatened.<sup>5</sup> Yet if the means are apparently adapted, that, in reason, and on the better authorities, is sufficient; while there are cases which seem to require, contrary to principle, a real and complete adaptation.<sup>6</sup>

§ 750. **Perfectness of Adaptation.** — Nor can we split hairs here, and say that, even to outward appearance, the adaptation of means to the proposed end must in all circumstances be perfect; for thus we should nearly do away with the doctrine of attempt as a practical element in the law. In most cases, the reason why the means employed proved unsuccessful is, that, as a looker-on might have seen, there was some defect in the arrangement, or in the tools, or in the steps taken in carrying out the plan, by reason of which the enterprise failed. Overlooking these obvious views,—

**Defect in Loading of Fire-arms — (Attempted Homicide).** — The Indiana court once held, that a man does not commit the offence of shooting at another with intent to murder, if, contrary to his belief, the charge contains no ball, and the person shot at is distant forty feet; because, it was said, where the present ability to commit the act contemplated is wanting, the offence of attempting to commit it is not complete.<sup>7</sup> In a subsequent Indiana case,

<sup>1</sup> Reg. v. Tylney, 1 Den. C. C. 319; People v. Peabody, 25 Wend. 472; The State v. Givens, 5 Ala. 747; Vol. II. § 599.

<sup>2</sup> Rex v. Burke, Russ. & Ry. 496; People v. Harrison, 8 Barb. 560; Vol. II. § 583 et seq.

<sup>3</sup> Reg. v. Marcus, 2 Car. & K. 356, concerning which see Reg. v. Nash, 2 Den. C. C. 493, 12 Eng. L. & Eq. 578; Rex v. Knight, 1 Salk. 375, 1 Ld. Raym. 527; Barnum v. The State, 15 Ohio, 717; Vol. II. § 592-595.

<sup>4</sup> Ante, § 738.

<sup>5</sup> Ante, § 740, 742.

<sup>6</sup> See and compare Kunkle v. The State, 32 Ind. 220; Mullen v. The State, 45 Ala. 43; The State v. Napper, 6 Nev. 113; Reg. v. Gamble, 10 Cox C. C. 545; The State v. Epperson, 27 Misso. 255; Reg. v. Dale, 6 Cox C. C. 14; Sumpter v. The State, 11 Fla. 274; People v. Blake, 1 Wheeler Crim. Cas. 490; Reg. v. Goodman, 22 U. C. C. P. 338.

<sup>7</sup> The State v. Swails, 8 Ind. 524, 525. See, as perhaps contra, Johnson v. The State, 26 Ga. 611. And see Allen v. The State, 28 Ga. 395. In matter of statutory

this court in effect overrule this doctrine, accepting the views of the present and accompanying sections as sound.<sup>1</sup> Again, —

§ 751. **Indiscriminate Shooting — (No Person in Range).** — In a Scotch case, it was held to be a crime wickedly and culpably to discharge loaded fire-arms into an inhabited house, to the apparent danger of lives within. And the lord justice-clerk said: "It was not necessary, under the present libel, to prove real danger to individuals within the house. The mere firing of the gun into the house constituted the crime, the panel having taken his chance of the consequences. It would therefore be no defence that the inmates of the house had accidentally left the room when the shot was fired into it, far less that there happened to be a screen which possibly might shield them from danger. If a person standing upon one side of a wall, and hearing the noise of a crowd collected upon the other, threw over some heavy substance, the act was equally criminal, though the crowd chanced at the moment to have moved back from the wall. In the present case, the act done was one by which lives were endangered, and would in all probability have been lost had it not been for circumstances which the panel could not have foreseen."<sup>2</sup> Again, —

§ 752. **Demanding Thing of one not having it.** — In Ireland, the statute of 9 Geo. 4, c. 55, § 6, having made punishable any person who "shall with menaces or by force demand any such property (being any chattel, money, or valuable security) of any other person, with intent to steal the same;" a defendant was adjudged to be rightly convicted who, with the required intent, demanded a gun, at the house of its owner, of his housekeeper, while neither the owner nor the gun was in fact in the house.<sup>3</sup> And, on the whole, we may deem the true doctrine to be, that, —

**Rule for these Cases.** — Where the intended criminal result is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the criminal attempt is

interpretation, perhaps such an act would not be deemed, in England, discharging "loaded arms." Post, § 758.

<sup>1</sup> Kunkle v. The State, 32 Ind. 220, 282.

<sup>2</sup> Smith's Case, 1 Broun, 240. See

also Rex v. Coe, 6 Car. & P. 403; Rex v. Crooke, 2 Stra. 901.

<sup>3</sup> Rex v. McBennet, Jebb, 148. Compare, with this case, Rex v. Jenks, 2 Leach, 4th ed. 774, 2 East P. C. 514; Rex v. Lyons, 2 East P. C. 497, 498, 1 Leach, 4th ed. 185.

committed. This doctrine, which was thus educed by the author in the earlier editions of this work, has been adopted by the Massachusetts court; Gray, J., expressing it in the following words: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."<sup>1</sup> The Indiana court adopted it in the terms of the author.<sup>2</sup>

§ 753. **Impossibility — (of Law — Fact).** — Another form of stating some of the foregoing doctrines is, that, as a man will not in fact attempt, so neither will the law treat him as attempting, what he knows he cannot do.<sup>3</sup> And, all being conclusively presumed to understand the law,<sup>4</sup> no man can legally intend what is legally impossible. An instance of this is, that, as already stated,<sup>5</sup> since a boy under fourteen cannot in law commit rape, he cannot incur the legal guilt of attempting it. This is an impossibility of law. But the doctrines of the foregoing sections disclose, that, in various circumstances, the attempt may be indictable when an impossibility of fact prevented the commission of the substantive offence.

§ 754. **Mistake of Fact.** — Not only may there be an impossibility of fact, but also a mistake of fact. The pocket-picking cases and several others, before mentioned, involve this consideration. On principle, the doctrine is.—

**Doctrine stated.** — The necessary intent existing, the act must

<sup>1</sup> *Commonwealth v. Jacobs*, 9 Allen, 274, 275. **Enticing out of State to enlist.** — In this case the indictment was upon the second clause of the following statute: "It shall not be lawful for any person within this Commonwealth to recruit for or enlist in military service, or, &c.; nor to entice or solicit any person to leave the Commonwealth for the purpose of entering upon or enlisting, or offering themselves as substitutes for drafted persons, in any military service elsewhere." And it was held that a conviction might be maintained, although

the person solicited thus to leave the State was not fit to become a soldier, "there being no evidence that his unfitness for military service was manifest or known at the time of this unlawful act." p. 276.

<sup>2</sup> *Kunkle v. The State*, 32 Ind. 220, 232. See ante, § 750 and note.

<sup>3</sup> *Rex v. Edwards*, 6 Car. & P. 515 And see *Nugent v. The State*, 18 Ala 521.

<sup>4</sup> Ante, § 294.

<sup>5</sup> Ante, § 746.

have some adaptation to accomplish the thing intended. But the adaptation need only be apparent; because the evil to be corrected relates to apparent danger, rather than to actual injury sustained. If the thing meant were accomplished, the offence would be a substantive one; but, not being accomplished, the danger as it appears to outside observation is the matter indictable under the name attempt.<sup>1</sup>

**Why?** — The reasons for this doctrine will sufficiently appear in the foregoing discussions under the present sub-title.

§ 755. *Special Terms of the Statute or Indictment*: —

**Statutory and Common-law Attempts similar.** — Statutes are construed conformably with the common law, except where their express words otherwise require.<sup>2</sup> Therefore, in cases not within this exception, statutory attempts are subject in all respects to the same rules as those at the common law; and, on the other hand, constructions under the statutes govern also attempts at the common law. But —

**Exceptional Statutes.** — Occasionally we meet with a statute in special terms, taking it out of the common-law interpretations; for express words cannot be disregarded. Also, —

**Form of Indictment.** — Sometimes a pleader incautiously draws the indictment in such form as to restrict the proofs, or confine their effects, within narrower limits than the common law would do. And —

**Mixed Cases.** — There are cases of a mixed nature, proceeding either upon grounds peculiar to themselves, or partly on the common-law rules and partly on special terms in the statute or indictment. These are to be decided, in a measure, on special considerations. The decisions, therefore, are of little weight in other cases.

§ 756. *Special Terms.* — Let us call to mind some special terms already interpreted by the courts. Thus, —

**"Attempt to poison."** — An "attempt to poison" is not committed by administering a substance not poisonous, yet believed to be; because, if it kills the man, he is not poisoned to death.<sup>3</sup>

<sup>1</sup> This enunciation of doctrine was copied and followed in *Kunkle v. The State*, 32 Ind. 220, 232. And see ante, § 750.

<sup>2</sup> Stat. Crimes, § 88, 114, 119, 141, 144, 155.

<sup>3</sup> The *State v. Clarissa*, 11 Ala. 57. And see, as illustrative, *Commonwealth v. Manley*, 12 Pick. 173; *Rex v. Coe*, 6 Car. & P. 403; *Reg. v. Williams*, 1 Den. C. C. 39; *Rex v. Hughes*, 5 Car. & P. 126; *Reg. v. Leddington*, 9 Car. & P. 79.

This is the English doctrine; but those who have read the foregoing discussions will see, that the question lies very near the debatable ground. For, if the substance administered should resemble poison, and appear to ordinary observation to be such, while yet it could be scientifically ascertained not to be, the requirements of the statute would be filled to ordinary apprehension, in a case where the principles of the common law would demand a conviction.

§ 757. **Attempting to steal Particular Goods — Burglary.** — The English statute of 14 & 15 Vict. c. 100, § 9, having provided, that, "if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same;" a prisoner, indicted for the burglary of breaking and entering a dwelling-house and *stealing therein certain goods specified*, was held to be wrongly convicted of the attempt, where the particular goods were not in the dwelling-house. The reason for this decision is not quite certain: it may be brought into accord with the late English doctrine as to pocket-picking; and, indeed, that doctrine was professedly derived from this case.<sup>1</sup> But, except for the later exposition, we might suppose the judges deemed the allegation, specifying articles as having been stolen, not sustained, even though the facts constituted a criminal attempt; while possibly they did not think the facts indictable as such attempt. In truth, both these points appear in the case.<sup>2</sup> Again, it is held that —

§ 758. "**Shoot at.**" — One does not "shoot at any person" <sup>3</sup> who is not, in fact, in the place toward which the gun is pointed, or within reach of the charge, though believed to be so.<sup>4</sup>

"**Loaded Arms.**" — Neither does one attempt to discharge "loaded arms," if the touch-hole is so plugged that the gun can-

<sup>1</sup> Ante, § 741 and note.

<sup>2</sup> Reg. v. McPherson, Dears. & B. 197.

<sup>3</sup> Stat. 9 Geo. 4, c. 31, § 12.

<sup>4</sup> Rex v. Lovel, 2 Moody & R. 39.

And see Rex v. Kitchen, Russ. & Ry. 95; Henry v. The State, 18 Ohio, 32. Yet

under this statute it has been ruled, that, if the shot hit the person mentioned in the indictment, it is sufficient, though the defendant aimed his gun at another. Rex v. Jarvis, 2 Moody & R. 40.

not possibly be fired; <sup>1</sup> or if, from not being primed or otherwise, it does not contain a charge capable of doing the mischief intended.<sup>2</sup> In such a case the "arms" are not "loaded." Yet, scarcely in harmony with this interpretation, or, as lying close on the line between this class of cases and another, —

**"Poison" in Form not Harmful.** — The English judges have held, under a statute against administering "poison or other destructive thing" with intent to kill, that coculus indicus berries, in their exterior unbroken pod, given to a child nine weeks old, are "poison;" though, by reason of the pod covering the poisonous part, they could not, as they did not, harm the child.<sup>3</sup>

**"Personating."** — There cannot be a "personating" of a supposed individual who never existed; <sup>4</sup> there can be, of one who has lived and is dead.<sup>5</sup>

§ 759. *Magnitude of the Act and its Nearness to the consummation of the substantive offence intended:* —

**Small or Remote.** — An attempt may be too small a thing, or proceed too short a way toward its accomplishment, for the law to notice.<sup>6</sup> How great it must be, and how far progress, is matter not reducible to exact rule.<sup>7</sup>

**Attempt to commit Misdemeanor — Felony — Treason.** — It seems to have been formerly supposed by some, that no attempt to commit a mere misdemeanor is indictable; <sup>8</sup> but, if this was ever law, it has not been in modern times. As generally stated, the doctrine is, that every attempt to commit any crime,<sup>9</sup> whether

<sup>1</sup> *Rex v. Harris*, 5 Car. & P. 159; Stat. Crimes, § 322.

<sup>2</sup> *Rex v. Carr*, Russ. & Ry. 377; *Whitley's Case*, 1 Lewin, 123; *Reg. v. Oxford*, 9 Car. & P. 525; 1 East P. C. 412; *Reg. v. Gamble*, 10 Cox C. C. 545; Stat. Crimes, § 322; *Vaughan v. The State*, 3 Sm. & M. 553. And see *Reg. v. Lewis*, 9 Car. & P. 523; *Shaw v. The State*, 18 Ala. 547; *Rex v. Mountford*, 7 Car. & P. 242, 1 Moody, 441; *Henry v. The State*, 18 Ohio, 32; *Rex v. Kitchen*, Russ. & Ry. 95. See as illustrative, in regard to assaults, *The State v. Cherry*, 11 Ire. 475; *The State v. Sims*, 3 Strob. 137; *Reg. v. St. George*, 9 Car. & P. 483; *The State v. Smith*, 2 Humph. 457.

<sup>3</sup> *Reg. v. Cluderay*, 1 Den. C. C. 514, Temp. & M. 219, 14 Jur. 71; s. c. nom.

*Reg. v. Cluderoy*, 2 Car. & K. 907. And see *The State v. Clarissa*, 11 Ala. 57; *Rex v. Phillips*, 3 Camp. 73. **Form of Indictment.** — An indictment for mixing sponge with milk, with intent to poison, was held bad for not setting out that the sponge was of a deleterious or poisonous nature. *Rex v. Powels*, 4 Car. & P. 571.

<sup>4</sup> *Rex v. Tannet*, Russ. & Ry. 351.

<sup>5</sup> *Rex v. Martin*, Russ. & Ry. 324; *Rex v. Cramp*, Russ. & Ry. 327.

<sup>6</sup> Ante, § 212 et seq.

<sup>7</sup> Ante, § 225.

<sup>8</sup> See observations in *Reg. v. Meredith*, 8 Car. & P. 589.

<sup>9</sup> *Rex v. Scofield*, Cald. 397, 403; *Rex v. Higgins*, 2 East, 5.

treason,<sup>1</sup> felony,<sup>2</sup> or misdemeanor,<sup>3</sup> existing either at the common law or under a statute,<sup>4</sup> is indictable as misdemeanor. Yet evidently, —

§ 760. **Magnitude of United Act and Intent** — (**Great and Small Offences**). — Though, in attempt, some act must accompany the special intent,<sup>5</sup> still, as the thing noticed by the law is the sum of both, the act may be less, and proceed less far, in proportion as the intent is in enormity greater. Hence, —

§ 761. **Too small for Attempt**. — There are offences which, because of their little magnitude, cannot have the appendage of attempt. This is so both in principle and authority.<sup>6</sup> Thus, —

**In Liquor-selling**. — A man is not indictable for attempting, or persuading to, the sale of a glass of intoxicating liquor without license;<sup>7</sup> or for making a mere contract to sell spirits, where only the selling is interdicted.<sup>8</sup> But —

**Procuring Obscene Print** — **Writing Libel**. — One is indictable who procures an obscene print, with the intent to publish it;<sup>9</sup> and, it seems, who writes any libel with such intent.<sup>10</sup>

§ 762. **As to Act being "Illegal."** — Lord Abinger once suggested, that, in an attempt to commit a misdemeanor, there must be some "illegal act." But, if he meant only that the act must be illegal by reason of the intent prompting it, such a rule would furnish no practical help; if his idea was, that it must be illegal

<sup>1</sup> *Rex v. Cowper*, 5 Mod. 206, Skin. 637; *Rex v. Fursey*, 6 Car. & P. 81.

<sup>2</sup> *The State v. Danforth*, 3 Conn. 112; *The State v. Boyden*, 13 Ire. 505; *Commonwealth v. Barlow*, 4 Mass. 439; 1 Hawk. P. C. Curw. ed. p. 72, § 3; *Holmes's Case*, Cro. Car. 376; *Rex v. Hughes*, 5 Car. & P. 126; *Reg. v. Clayton*, 1 Car. & K. 128; *Rex v. Higgins*, 2 East, 5; *The State v. Avery*, 7 Conn. 266.

<sup>3</sup> *Rex v. Scofield*, 2 East P. C. 1028, 1030; *Rex v. Burdett*, 4 B. & Ald. 95; *Reg. v. Martin*, 9 Car. & P. 215; *Reg. v. Martin*, 9 Car. & P. 213, 2 Moody, 123; *Commonwealth v. Kingsbury*, 5 Mass. 106, 108; *Reg. v. Meredith*, 8 Car. & P. 589; *Dugdale v. Reg.*, 1 Ellis & B. 435, 16 Eng. L. & Eq. 380; *Rex v. Phillips*, Cas. temp. Hardw. 241; *Ross v. Commonwealth*, 2 B. Monr. 417; *Reg. v. Chapman*, 1 Den. C. C. 432, 439.

<sup>4</sup> *Stat. Crimes*, § 139, 140; *Rex v. Cartwright*, Russ. & Ry. 106; *Rex v. Roderick*, 7 Car. & P. 795; *Rex v. Butler*, 6 Car. & P. 368; *The State v. Maner*, 2 Hill, S. C. 453; *The State v. Avery*, 7 Conn. 266.

<sup>5</sup> *Ante*, § 204 et seq.

<sup>6</sup> *Ante*, § 760; *Rex v. Upton*, 2 Stra. 816; *Rex v. Bryan*, 2 Stra. 866; *Dobkins v. The State*, 2 Humph. 424; *Commonwealth v. Willard*, 22 Pick. 476; *Pulse v. The State*, 5 Humph. 108; *Ross v. Commonwealth*, 2 B. Monr. 417. So also in the Scotch law. *McColl's Case*, 1 Scotch Sess. Cas. 4th ser. Just. 22, 23.

<sup>7</sup> *Commonwealth v. Willard*, 22 Pick. 476. And see *ante*, § 658 and note.

<sup>8</sup> *Pulse v. The State*, 5 Humph. 108.

<sup>9</sup> *Dugdale v. Reg.*, 16 Eng. L. & Eq. 380, 1 Ellis & B. 435; *ante*, § 206.

<sup>10</sup> *Rex v. Burdett*, 4 B. & Ald. 95, 159; Vol. II. § 927.



*per se*, such is not the adjudged law. The foundation principle in attempt is, we have seen,<sup>1</sup> that an act in itself innocent, or not completely criminal, is made "illegal," or its illegality enhanced, by the special evil intent whence it proceeds. The learned judge illustrated his suggestion thus:—

**Attempted Carnal Abuse.**— If a man, meaning carnally to abuse a girl between ten and twelve, "was to take his horse and ride to the place where the child was, that," said the judge, "would be a step towards the commission of the offence, but would not be indictable."<sup>2</sup> Assuming this not to be an indictable act, as probably no court would hold it to be, still the reason is plainly some other than that it is not illegal. If the man, instead of riding to the place, stole a rope with which to tie the girl, the larceny would be a sufficiently "illegal" act, yet Lord Abinger would doubtless not have deemed it indictable' under the name of attempt to commit a carnal abuse. Again,—

**Attempt to Charge with Crime.**— A conspiracy to charge one falsely with crime is punishable at the common law,<sup>3</sup> and in some circumstances it is so for a single individual to prefer the false accusation.<sup>4</sup> There may, therefore, be an indictable attempt to commit the latter offence; and the act will be sufficient if one puts into a man's pocket "three ducats, with a malicious intent to charge him with felony."<sup>5</sup> Here the act is proximate to the contemplated bringing of the accusation. It derives its criminal quality wholly from the intent; for the deed would be good if the man was poor, and the ducats were put into his pocket as a present.

**As to a Rule.**— It may be difficult to lay down a rule to determine when the act is in magnitude and proximity to the contemplated full offence adequate; it need not, certainly according to the American idea of attempt,<sup>6</sup> be the act next preceding the one which would complete the substantive crime intended;<sup>7</sup> and, in reason, the act may be less in magnitude and nearness as the crime is heavier.<sup>8</sup> Perhaps the only practicable method is for the judge, in each case, to consider the special facts without

<sup>1</sup> Ante, § 729.

<sup>2</sup> Reg. v. Meredith, 8 Car. & P. 589.

<sup>3</sup> Ante, § 591, note; Vol. II. § 216, 217, 220.

<sup>4</sup> Ante, § 591 and note.

<sup>5</sup> Rex v. Simmons, 1 Wils. 329.

<sup>6</sup> Ante, § 724.

<sup>7</sup> Post, § 764.

<sup>8</sup> Ante, § 760; Rex v. Cowper, 5 Mod. 206.

undertaking a complete generalization, and to give directions to the jury largely with reference to them.<sup>1</sup>

§ 763. **Preparation.** — It is probable that, in ordinary circumstances, the making of preparations, at a distance from the place where the substantive offence is to be committed, will not constitute an indictable attempt. Yet it would seem that some preparations of this sort, for the commission of some crimes, may be indictable at the common law;<sup>2</sup> and they would, with us, be called attempt,<sup>3</sup> though not known by this name in England. To illustrate, —

§ 764. **Attempted Battery — (Procuring Switch).** — If a man, not standing *in loco parentis*, should simply procure a switch to whip a child, it is not probable that any court would hold him to be indictable for this; though there may be an indictable attempt to commit a battery.<sup>4</sup> On the other hand, —

**“Last Proximate Act.”** — The act, as already intimated,<sup>5</sup> need “not be the last proximate act prior to the consummation of the felony attempted to be perpetrated.”<sup>6</sup> Still, if the offence, instead of being a felony, was the lowest misdemeanor which admits of the indictable attempt, doubtless the act, to be indictable, must be the “last proximate” one.

**Attempted Incestuous Marriage — (Preparation, continued).** — In a California case, declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to perform the ceremony, were held not to

<sup>1</sup> See *Uhl v. Commonwealth*, 6 Grat. 706; *Rex v. Taylor*, Holt, 534; *Reg. v. St. George*, 9 Car. & P. 483; *Reg. v. Lewis*, 9 Car. & P. 523; *United States v. Twenty-eight Packages*, Gilpin, 306; *The State v. Bruce*, 24 Maine, 71; *Rex v. Parfait*, 1 Leach, 4th ed. 19, 1 East P. C. 416, 417; *Sinclair's Case*, 2 Lewin, 49; *Reg. v. Renshaw*, 20 Eng. L. & Eq. 593, 2 Cox C. C. 285, 11 Jur. 615; *Gibson's Case*, 2 Broun, 366.

<sup>2</sup> Ante, § 435, 436. Lord Denman, C. J., once stated the doctrine in the very strong terms, that “any step taken with a view to the commission of a misdemeanor is a misdemeanor.” *Reg. v. Chapman*, 1 Den. C. C. 482, 489. In *Reg. v. Eagleton*, Dears. 515, 538, Parke, B., said: “The mere intention to commit a

misdemeanor is not criminal. Some act is required, and we do not think that *all* acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.”

<sup>3</sup> Ante, § 724.

<sup>4</sup> *United States v. Lyles*, 4 Cranch C. C. 469; the form of attempt being a solicitation. See Vol. II. § 62. See also, and query whether contra, *White v. The State*, 22 Texas, 608. And see *Bob v. The State*, 29 Ala. 20, 25.

<sup>5</sup> Ante, § 762.

<sup>6</sup> *Uhl v. Commonwealth*, 6 Grat. 706. And see post, § 768.

constitute the indictable attempt. It was even laid down, that, for the attempt to be punishable, it must have proceeded to some act which would end in the substantive offence, but for the intervention of circumstances independent of the will of the parties. In this case, the rule would require them to be standing before the magistrate about to begin the marriage ceremony. Field, C. J., added: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt."<sup>1</sup> It is believed that this case lies near the partition line between the indictable and the unindictable, and we cannot safely assume that it will be followed by all courts. Indeed, —

**Attempted Larceny.** — A Georgia case of attempt to commit a larceny cannot readily be brought into accord with this one, in principle. It was held, that, to take an impression of the key of a warehouse, and have a key made from it for use in committing a larceny therein, is a sufficient attempt, whether the offender means to commit the theft personally, or procure its commission by another. One judge dissented on the ground that, as the plan in that instance was to get another to commit the larceny, the defendant "was not guilty of an attempt to steal from the store," but rather of an attempt to procure another to steal.<sup>2</sup>

§ 765. *Further of the Kind of Act:* —

**Any Act.** — There is no doctrine limiting the act to any particular species. In general terms, any form of act, apparently adapted to the purpose, is sufficient. Thus, —

**Staking Counterfeits.** — The staking, at a gaming-table, of counterfeit coin as good, is an attempt to utter it.<sup>3</sup> So —

**Burning Own House to burn Neighbor's** — **Carnal Abuse.** — One may attempt to burn his neighbor's house, by burning his own;<sup>4</sup>

<sup>1</sup> *People v. Murray*, 14 Cal. 159, 160.

<sup>2</sup> *Griffin v. The State*, 26 Ga. 493.

<sup>3</sup> *The State v. Beeler*, 1 Brev. 482.

<sup>4</sup> *W. Jones*, 351; 2 East P. C. 1027.

**Arson** — **Match goes out.** — As to attempt to commit arson where the match goes out, see *Reg. v. Goodman*, 22 U. C. C. P. 338.

or, to carnally abuse a girl between ten and twelve years old, by doing with her consent what otherwise would be an assault,<sup>1</sup> — it being legally in the power of such a girl to consent to the assault but not the carnal act.<sup>2</sup>

§ 766. **Rape attempted where Woman yields.** — If a man, intending to ravish a woman, assaults her, but before penetration she yields, he is guilty of assault with intent to commit rape. Her consent does not undo what is done; for, observes Kellogg, J.: “The rules of the criminal law are not founded upon legal fictions; and the doctrine of relation, however useful it may be as a rule defining or regulating private rights in a civil suit, has no application in criminal proceedings.”<sup>3</sup> But this has already been illustrated.<sup>4</sup>

§ 767. **Solicitation.** — A common form of attempt is the soliciting of another to commit a crime; the act, which is a necessary ingredient in every offence,<sup>5</sup> consisting in the solicitation.<sup>6</sup> Thus, —

**To Larceny — Sodomy — Adultery — Bribery — Threatening Notice.** — To incite a servant to steal his master’s goods,<sup>7</sup> or other person to undertake a larceny;<sup>8</sup> to make overtures to one to commit sodomy,<sup>9</sup> or adultery where it is a statutory felony;<sup>10</sup> to offer, merely, a bribe;<sup>11</sup> to request, it seems, one to post up a threatening notice;<sup>12</sup> are severally indictable misdemeanors, though the person approached declines the persuasion.

**Conspiracy.** — A conspiracy to commit a crime is in some degree in the nature of a solicitation, though it is more; and it is, in part, within the rules which govern attempt.<sup>13</sup>

**Solicitation not nearest to Substantive Offence.** — A solicitation

<sup>1</sup> Reg. v. Martin, 9 Car. & P. 213, 2 Moody, 123.

<sup>2</sup> Stat. Crimes, § 480, 483, 491-493.

<sup>3</sup> The State v. Hartigan, 32 Vt. 607, 611; Vol. II. § 1122.

<sup>4</sup> Ante, § 733. See, also, Hull v. The State, 22 Wis. 580.

<sup>5</sup> Ante, § 204 et seq., 729.

<sup>6</sup> Rex v. Higgins, 2 East, 5; Reg. v. Turvy, Holt, 364, 365; People v. Bush, 4 Hill, N. Y. 133; The State v. Avery, 7 Conn. 266; Commonwealth v. Harrington, 3 Pick. 26; Reg. v. Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459.

<sup>7</sup> Rex v. Higgins, supra; Reg. v. Dan-

nell, 6 Mod. 99; s. c. nom. Reg. v. Daniel, 6 Mod. 182, 1 Salk. 380; Reg. v. Quail, 4 Fost. & F. 1076.

<sup>8</sup> Pennsylvania v. McGill, Addison, 21. See Reg. v. Collingwood, 6 Mod. 288.

<sup>9</sup> Rex v. Hickman, 1 Moody, 34; Reg. v. Rowed, 6 Jur. 396; post, § 768 b, 768 d.

<sup>10</sup> The State v. Avery, 7 Conn. 266.

<sup>11</sup> United States v. Worrall, 2 Dall. 384; Hefelton v. Lister, Cooke, 88; Vol. II. § 88, 89.

<sup>12</sup> Reg. v. Darcy, 1 Crawf. & Dix C. C. 33.

<sup>13</sup> See ante, § 432, 762-764; Vol. II. § 169, 173, 191-195.

does not stand so near the substantive offence intended as some other forms of attempt. It appears, properly viewed, to be the first of a series of steps toward the execution, — a “commencement of execution.”<sup>1</sup> While not “the last proximate act prior to the consummation,”<sup>2</sup> it need not be. Consequently, —

§ 768. **Solicitation to Lighter Offences.** — Though, to render a solicitation indictable, it is, as in other attempts,<sup>3</sup> immaterial in general whether the thing proposed to be done is technically a felony or a misdemeanor;<sup>4</sup> still, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained,<sup>5</sup> be of a graver nature than if the step lay further in advance. Thus, —

**To Adultery.** — In Connecticut, where adultery is felony, an unsuccessful enticement to it has been adjudged to be an indictable attempt;<sup>6</sup> but otherwise in Pennsylvania, where it is misdemeanor punishable by fine, and imprisonment not exceeding a year. And this contrariety of conclusion appears to proceed, not so much from differing views of the two courts, as from the differing enormity of the substantive offence in the two States.<sup>7</sup> On the other hand, —

§ 768 *a*. **Solicitations to Higher Offences.** — The illustrations previously given<sup>8</sup> show, that all sufficiently-direct solicitations to commit any of the heavier offences are punishable attempts. And it would be within established principles to hold, that, in proportion to the gravity of the particular crime, the solicitation, to come within the law’s cognizance, may be less direct. But of the latter distinction the explanatory instances are not very plentiful.

**Assassination.** — The English statute of 24 & 25 Vict. c. 100, § 4, goes but little, if at all, beyond a mere affirmance of the unwritten law in declaring, that “whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person, to murder any other person, whether he be a subject of

<sup>1</sup> Ante, § 732, note.

<sup>2</sup> *Ib.* And see, as illustrative, ante, § 339, 340; *Reg. v. Eagleton*, Dears. 515, 538, 24 Law J. N. S. M. C. 158, 1 Jur. N. S. 940, 33 Eng. L. & Eq. 540.

<sup>3</sup> Ante, § 764.

<sup>4</sup> See the cases cited to the last section.

<sup>5</sup> Ante, § 760, 764.

<sup>6</sup> Ante, § 767. *The State v. Avery*, 7 Conn. 266.

<sup>7</sup> *Smith v. Commonwealth*, 4 Smith, Pa. 209. As to a conspiracy to commit adultery, see Vol. II. § 184; *Shannon v. Commonwealth*, 2 Harris, Pa. 226; *Miles v. The State*, 58 Ala. 390.

<sup>8</sup> Ante, § 767.

her majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor." Thereupon, after the Emperor of Russia had been assassinated, a German paper in London published an article commending the act, and urging the following of the example in all other countries. For this the writer was indicted under the above statute, and the jury were directed to convict him if they thought that, by the publication, he intended to and did encourage or endeavor to persuade any person to murder any other person, whether a subject of her majesty or not, and whether within the queen's dominions or not. They found him guilty, and on a case reserved the direction was adjudged to be correct.<sup>1</sup> Still, if the offence commended had been greatly lighter, there might be ground to say, — the writer does not express any opinion whether or not it would be just, — that this general encouragement to repetitions, without mention of person, place, or time, was too remote for the law's cognizance.<sup>2</sup> Yet, —

§ 768 b. **Letter of Solicitation not read — (Sodomy).** — Where one wrote to a school-boy, enticing him to meet the writer for the purpose of committing sodomy, but the boy passed the letter to the school authorities unread, being in no way made aware of its contents, the English court held, on a case reserved, that the offence of attempt by solicitation was complete.<sup>3</sup> On the other hand, —

§ 768 c. **Denying that Solicitation is an Attempt.** — In one of the American cases, already stated and explained,<sup>4</sup> the learned judge who delivered the opinion uttered, in the way of argument, not as affecting the adjudication which is quite harmonious with the general doctrine, some propositions altogether in conflict with the other cases English and American. He denied that a solicitation is an attempt, or that the cases hold it to be. "The attempt," he said, "can only be made by an actual, ineffectual deed, done in pursuance of, and in furtherance of the design to commit the offence. I would have supposed that the case of *Rex v. Butler*<sup>5</sup> would have fallen within this rule; and yet it was held there that a count was not good, which charged that the

<sup>1</sup> *Reg. v. Most*, 7 Q. B. D. 244.

<sup>3</sup> *Reg. v. Ransford*, 13 Cox C. C. 9.

<sup>2</sup> See *Pool v. Sacheverall*, 1 P. Wms.

<sup>4</sup> *Smith v. Commonwealth*, 4 Smith, Pa. 209.

675, and *Plating Co. v. Farquharson*, 17 Ch. D. 49, commented on in this case.

<sup>5</sup> *Rex v. Butler*, 6 Car. & P. 368.

defendant 'did attempt to assault the said Sarah Vernon, by soliciting and persuading and inducing her to lie down upon a certain bed in the dwelling-house of him the said J. B. there situate, and getting upon the body of her the said S. V.' &c. This was soliciting and persuading with overt acts that clearly manifested the guilty intent; and, if solicitation with such indubitable acts be not indictable, it is quite necessary to conclude that mere solicitation without any overt acts is not indictable. It is easy to say that solicitation is an attempt, but a study of the cases will show that every case of attempt has included something more than mere solicitation."<sup>1</sup> Not often does the author suffer himself to copy *dicta* as loose as we have here, however they abound in the reports. But this exception seems necessary as a means of checking the spread of an error. The law *as adjudged* holds, and has held from the beginning, in all this class of cases, an indictment sufficient which simply charges that the defendant, at a time and place mentioned, "falsely, wickedly, and unlawfully did solicit and incite" a person named to commit the substantive offence, without any further specification of overt acts.<sup>2</sup> It is vain, then, to say, that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offence. In the very case to which the learned judge refers, Patteson, J., stated a case wherein it was held, that soliciting an engraver to engrave a plate for forgery is indictable. "I drew," he said, "the indictment . . . for soliciting the engraver to engrave the plate, and the prisoner was tried and convicted on it."<sup>3</sup> But plainly, in the principal case, the allegation, which in substance was, that the defendant solicited a woman to let him commit an assault upon her, would not be good; because her yielding to the solicitation would render the act no assault. Nor was the solicitation punishable as an attempt to commit adultery; because, in England, adultery is not an offence, so that an attempt to commit it is not. On the strength of the American case thus explained, and another,<sup>4</sup> and following the blunder of a writer, without looking into either case, —

§ 768 d. **Novel Distinction — (Incest — Sodomy).** — The Illinois

<sup>1</sup> *Smith v. Commonwealth*, supra, at p. 213.

<sup>2</sup> *Crim. Proced. II.* § 74.

<sup>3</sup> Anonymous, stated 6 Car. & P. 368.

<sup>4</sup> *Commonwealth v. Willard*, 22 Pick. 476.

court drew a distinction before unknown. It is, that solicitations to offences which are breaches of the peace, or corrupting to the body politic as interfering with public justice, are indictable attempts, but other solicitations to crime are not. According to this distinction, and contrary to the *dicta* copied into the last section, a solicitation may be an attempt. That case,<sup>1</sup> therefore, supposing it to be sound in every respect, is flat against the distinction. The other case cited by the Illinois court<sup>2</sup> simply affirms the doctrine as to the lighter offences<sup>3</sup> and statutory interpretation, that the purchaser of liquors sold by an unlicensed person contrary to a statute is not indictable. But in this very cited case the court expressly approves the doctrine that it is an offence to solicit a servant to steal his master's goods, — an act tending neither to a breach of the public peace nor to the corruption or public justice. The learned Illinois judge well observed, that “there are respectable authorities holding to a different rule” from the one which he was laying down. On the other hand, it is believed that there is no single authority, respectable or otherwise, prior to this Illinois one, even by implication maintaining the distinction. The particular application of the distinction drawn by the Illinois court was, that, a statute having made incest heavily punishable, a solicitation to commit it was still not an indictable attempt.<sup>4</sup> Directly contrary to this is a close analogy from the law of England, the source whence our jurisprudence is derived. A statute made sodomy heavily punishable.<sup>5</sup> Where it is committed between two men, or a man and woman contrary to nature, it is a sexual dereliction in principle not unlike incest.<sup>6</sup> And ever since the statute was passed, the English law has held a solicitation to sodomy to be an indictable common-law attempt.<sup>7</sup> No difference between classes of offences of equal turpitude, as measured by the law's standard the punishment, can in reason be assigned. Where the same legal consequence follows incest, buggery, adultery, and larceny, if a father should urge his son and daughter to commit incest, then go to a neighbor's house and she steal a silver pitcher while he engaged the woman in

<sup>1</sup> Smith v. Commonwealth, 4 Smith, Pa. 209.

<sup>2</sup> Commonwealth v. Willard, 22 Pick. 476.

<sup>3</sup> Ante, § 657–659, 688, 759–761, 768.

<sup>4</sup> Cox v. People, 82 Ill. 191.

<sup>5</sup> Ante, § 503.

<sup>6</sup> See McColl's Case, 1 Scotch Sess. Cas. 4th ser. Just. 22, 2 Couper, 538.

<sup>7</sup> Ante, § 767; Reg. v. Ransford, 13 Cox C. C. 9.



adultery, and lastly visit the stables, no just principle of law could make punishable the solicitation to one of the wrongs and not to another. "True," says the new doctrine, "nothing of this would be indictable; but let the solicitation be to inflict on a neighbor's boy a merited whipping for stealing the son's apples, or to dissuade the boy from attending court as a witness to the unlicensed sale of a gill of needed gin to the daughter, and the law would have something worthy of its notice! Verily that, would be a crime."<sup>1</sup>

§ 769. **Adaptation.** — From the doctrine of adaptation, already considered,<sup>2</sup> further illustrations may be drawn. If there is no aptitude, real or apparent, in the thing done to accomplish the criminal end meant, it does not approach sufficiently near the consummation to create the alarm against which the law of attempt protects us, and it is not indictable. Thus, —

**Similitude, &c. — (Forgery).** — In affirmance of common-law principles, but resting mainly on statutes, we have in forgery and counterfeiting the rule, that there must be in the false thing a similitude to the supposed original; else it could not probably accomplish any intended cheat.<sup>3</sup> And there are other derelictions within the like principle.<sup>4</sup> But, —

**Sort of Thing administered — (Abortion).** — Under a statute making it criminal to administer to a woman, with intent to procure an abortion, "any medicine or *other thing*," a learned judge intimated, that it was immaterial what the thing was, if given with the intent, though only "a bit of bread."<sup>5</sup> Yet should the prisoner know it to be incapable of producing the result, plainly he would not commit the crime; because he could not have the required evil intent.<sup>6</sup> And, at least, a little different wording of the statute would produce a contrary result.<sup>7</sup>

<sup>1</sup> And see post, § 772*a*; Int., long note.

<sup>2</sup> Ante, § 738 et seq.

<sup>3</sup> Rex v. Hoost, 2 East P. C. 950; Rex v. Elliot, 2 East P. C. 951; s. c. nom. Rex v. Elliot, 1 Leach, 4th ed. 175, 179; Rex v. Collicott, Russ. & Ry. 212, 2 Leach, 4th ed. 1048, 4 Taunt. 308, 309; Rex v. Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364; United States v. Morrow, 4 Wash. C. C. 733; Rasnick v. Commonwealth, 2 Va. Cas. 356; Rex v.

Varley, 1 Leach, 4th ed. 76, 1 East P. C. 164.

<sup>4</sup> Reg. v. Stringer, 1 Car. & K. 188; Rex v. Griffith, 1 Car. & P. 298.

<sup>5</sup> Rex v. Coe, 6 Car. & P. 403, Vaughan, B. And see The State v. Fitzgerald, 49 Iowa, 260; Commonwealth v. Morrison, 16 Gray, 224.

<sup>6</sup> Ante, § 763.

<sup>7</sup> Reg. v. Hennah, 13 Cox C. C. 547; People v. Van Deleer, 53 Cal. 147.

IV. *The Combination of Act and Intent.*

§ 770. **Both Act and Intent.** — We have seen,<sup>1</sup> that every thing indictable at the common law consists of a criminal intent and an act proceeding from it. But, in attempt, this is specially so; and what would be adequate as an intent in the greater part of the substantive offences is quite insufficient here.<sup>2</sup> Now, —

**Specific Intent.** — The specific intent, without which there can be no attempt, must, in reason, impel the act in every one of its essential parts. For example, if a man should, as in a case already supposed,<sup>3</sup> ride to a place where there was a girl between ten and twelve years of age, to commit a carnal abuse upon her, then should bind her under the changed purpose to murder her, then should resolve again upon carnal abuse, but, before taking any further steps should be frightened away, he could not be punished for the carnal attempt, whatever his liability might be for the attempt to murder. Therefore, —

§ 771. **Simultaneous.** — Whether or not, in all other cases of crime, the evil intent and act must be simultaneous,<sup>4</sup> plainly they must be in all attempts. And the special intent must combine with every part of the act which is essential to the attempt. Yet if enough is done while this intent prompts, no objection can be taken that something else, not essential, was done when it was not present.<sup>5</sup>

V. *The Degree of the Offence.*

§ 772. **Is Misdemeanor.** — In early times, an attempt to commit a felony was supposed to be felony.<sup>6</sup> But this idea was long ago exploded; and now all attempts to commit either statutory or common-law felony or misdemeanor are misdemeanors.<sup>7</sup> Therefore, —

**Counselling to Felony.** — If one counsels to a felonious act an-

<sup>1</sup> Ante, § 204–207, 287, 430 et seq.

<sup>2</sup> Ante, § 729, 730.

<sup>3</sup> Ante, § 762.

<sup>4</sup> Ante, § 207.

<sup>5</sup> Ante, § 339–341.

<sup>6</sup> 1 Hawk. P. C. Curw. ed. p. 72, § 3;

1 East P. C. 411; Dwar. Stat. 2d ed. 794.

<sup>7</sup> 1 East P. C. 85, 411, 415; Holmes's

Case, Cro. Car. 376; *The State v. Boyden*, 13 Ire. 565; *Commonwealth v. Barlow*, 4 Mass. 439; *Rex v. Scofield*, Cald. 397; *Hackett v. Commonwealth*, 3 Harris, Pa. 95; *Rex v. Kinnersley*, 1 Stra. 193; *Smith v. Commonwealth*, 4 Smith, Pa. 209; *Rice v. Commonwealth*, 3 Bush, 14; *The State v. Jordan*, 75 N. C. 27.

other who in his absence undertakes it and fails, both may be indicted together for the attempt;<sup>1</sup> though, had the effort succeeded, the one would have been an accessory before the fact, and the other a principal, in the felony; and the indictment could not have been in the same sense joint.<sup>2</sup>

**Attempts at Treason.** — Some of the English treasons, as the imagining of the sovereign's death, are so purely attempts as not to admit of technical attempts.<sup>3</sup> But it is believed that both of the forms of treason known with us, though in some sense attempts,<sup>4</sup> admit, in the States, of indictable attempts besides,<sup>5</sup> which are misdemeanors.<sup>6</sup>

**Under Statutes — (Punishment).** — In a note are cited some cases relating to the grade of attempt under statutes, and the punishment.<sup>7</sup> Among these statutory attempts are some felonies.

§ 772 a. **General Summary.** — In conclusion of this chapter, the doctrine, on this embarrassing subject of attempt, may be summed up as follows: An act toward an indictable wrong, if prompted by the intent to do it, partakes of the culpability of the doing. And if its not being done was caused by some intervening obstacle, while the evil purpose remained unchanged, the person attempting it is morally as reprehensible as if he had succeeded in what he meant. But the public has not suffered so much, therefore it will not punish him so heavily. Still, if there was an apparent danger of the thing meant being accomplished, it suffered more or less according to the particular facts. If such danger and suffering were too light for the law's notice, it would

<sup>1</sup> Reg. v. Clayton, 1 Car. & K. 128; ante, § 685, 686.

<sup>2</sup> Ante, § 663, 664; Train & Heard Prec. 15.

<sup>3</sup> Rex v. Jackson, 1 Crawf. & Dix C. C. 149; 1 Hawk. P. C. Curw. ed. p. 12, § 27, 30-33; Rex v. Tooke, 1 East P. C. 60; Reg. v. Harris, Car. & M. 661, note.

<sup>4</sup> Ante, § 437, 440; Rex v. Stone, 6 T. R. 527; Rex v. Gordon, 2 Doug. 590; 3 Inst. 9. And see *Respublica v. Roberts*, 1 Dall. 39.

<sup>5</sup> See 1 East P. C. 85. "If there be only a conspiracy to levy war, it is not treason." Holt, C. J., in *Freind's Case*, 13 Howell St. Tr. 1, 61. See ante, § 767; Rex v. Cowper, 5 Mod. 207.

<sup>6</sup> And see ante, § 717.

<sup>7</sup> Ex parte Max, 44 Cal. 579; *The State v. Swann*, 65 N. C. 330; *Mackay v. People*, 1 Parker C. C. 459; *Pinson v. The State*, 28 Texas. 579; *Usher v. Commonwealth*, 2 Duv. 394; *O'Neil v. People*, 15 Mich. 275; *Reg. v. Woodhall*, 12 Cox C. C. 240, 4 Eng. Rep. 529; *The State v. Archer*, 54 N. H. 465; *Hamilton v. The State*, 36 Ind. 280; *People v. Murat*, 45 Cal. 281; *Nevills v. The State*, 7 Coldw. 78; *Jones v. The State*, 3 Heisk. 445; *The State v. Scott*, 72 N. C. 461; *The State v. Brown*, 60 Misso. 141; *Hill v. The State*, 53 Ga. 125; *Meredith v. The State*, 60 Ala. 441; *The State v. Doering*, 48 Iowa, 650.

not visit the doer with punishment. If they were sufficient in degree, the punishment would be greater or less according to the circumstances; the rule being, that the sum of the evil in the intent and of the evil in the act would furnish the proper measure of the punishment. One whose attempt consists of unsuccessfully soliciting another to commit the proposed crime does not morally differ from him who, in felony, solicits successfully, and is termed an accessory before the fact. And his legal position is the same, except that the public has suffered less, so it punishes him less severely. In both cases, what was done was by operating on the will of another; in the one successfully, in the other not. The principle is identical in both. To turn now to the unindictable: where steps are taken of a sort to end in a substantive crime, and even steps which would so end were they not interrupted, yet he who takes them does not mean this result, the reasons thus stated do not control the case, because of the absence of the intent to do the wrong. An essential element is wanting. Either, therefore, the party is not punishable, or his offence is of some other class.

## CHAPTER LII.

## THE LAW'S METHODS OF DEFINING CRIME.

§ 773. **Course of Discussion.** — In this and the next following two chapters, we are to consider divisions of the criminal field not admitting of representation on our "Diagram of Crime." Some of the doctrines have already been stated in a general way.<sup>1</sup>

§ 774. **Surplusage of Wrong.** — In looking into any criminal transaction, we shall find more or less of wrongful things committed, of a sort not taken cognizance of by the law, or not entering into the particular crime of which the party may be accused. We have seen, that there may be a surplusage of criminal intents, and that an intent not essential does not vitiate an essential one, if it also exists.<sup>2</sup> And it is the same with the act. As a general rule, it is immaterial what wrongful things, whether made crimes by the law or not, a man may have committed in connection with the one charged against him; if he has committed this one, he should be convicted of it, otherwise not.

§ 775. **Unavoidable.** — It is not possible the law should be otherwise. It could not so completely adapt itself to all the facts of wrong-doing as to take cognizance of every shade of motive, and every minute variation of the act, which might attend upon each separate criminal transaction. The transactions of life are nearly limitless and constantly shifting. Even if the law-making power had prophetic vision, it could not so multiply inhibitions as fully to cover all future combinations of evil. It must draw its lines around particular things, and say: "These I forbid; and it is immaterial whether or not they are accompanied by things around which my lines are not drawn; whatever lies outside of my lines, I disregard."

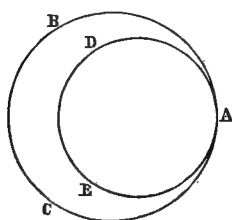
§ 776. **Specific Crime — Name.** — When the law-making power thus draws its lines around a particular combination of act and

<sup>1</sup> Ante, § 599-601.

<sup>2</sup> Ante, § 337-339.

intent, and prohibits the thing under a penalty, it creates a specific crime. It may give to the crime a name, or not. This has already been explained.<sup>1</sup>

§ 777. **Transaction and Crime distinguished.** — There is a difference between a crime and a criminal transaction. A criminal transaction is a series of acts proceeding from a single



impulse or connected series of impulses of the will, such that one or more of them will be indictable. A crime consists of whatever of these acts a single line of the law will enclose. To illustrate: If, in the figure here presented, A B C represents a particular criminal transaction, then A D E may repre-

sent a crime; A B C E D denoting so much of the transaction as is not indictable, or, if indictable, is not a part of the particular crime.

§ 778. **More Crimes than One in One Transaction.** — In reason, there may be more crimes than one in a single transaction. The law, in advance, draws its lines around a particular combination of act and intent, and makes what is within those lines punishable as a specific crime; then around another, and another, and so on, until it is deemed to have gone far enough, and stops. It is, therefore, found, not only theoretically, but practically, competent for a person to do, in one transaction, what will be within more than one of these circles of the law; and this fact the courts recognize in their adjudications.<sup>2</sup> But, —

**Punishing more than One.** — Whether a prosecution for one crime carved out of the one transaction should be held to bar an indictment for another, carved out of the same, is a different question; the authorities appear to be, that, in some circumstances, it will be, and in others it will not.<sup>3</sup>

<sup>1</sup> Ante, § 599.

<sup>2</sup> *Brown v. Commonwealth*, 26 Smith, Pa. 319; *Womack v. The State*, 7 Coldw. 508; *People v. Alibez*, 49 Cal. 452; *People v. Smith*, 57 Barb. 46; *Bonsall v. The State*, 35 Ind. 460; *Commonwealth v. Butterick*, 100 Mass. 1.

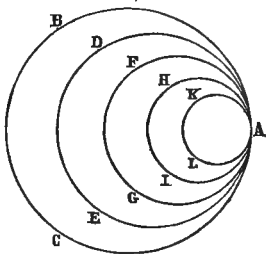
<sup>3</sup> *Stat. Crimes*, § 143; *The State v. Standifer*, 5 Port. 523; *The State v. Damon*, 2 Tyler, 387; *The State v. Fife*, 1 Bailey, 1; *Hinkle v. Commonwealth*, 4

*Dana*, 518; *Smith v. Commonwealth*, 7 Grat. 593; *The State v. Fayetteville*, 2 Murph. 371; *Rex v. Champneys*, 2 Moody & R. 26, 2 Lewin, 52; *The State v. Johnson*, 12 Ala. 840; *Holcomb v. Cornish*, 8 Conn. 375; *The State v. Squires*, 11 N. H. 37; *Commonwealth v. Tuck*, 20 Pick. 356; *Josslyn v. Commonwealth*, 6 Met. 236; *The State v. Thurston*, 2 McMullan, 382; *Reg. v. Brettell*, Car. & M. 609; *Rex v. Jones*, 4 Car. & P

§ 779. **Parting off Criminal Transaction into Specific Crimes.**— Often a criminal transaction presents combinations which leave a wide election in methods of dealing with the offender. In other transactions, the alternatives are but few, or even the prosecuting power may be without any choice. Let us look at some of the forms:—

**Law punishing Part only.**— If a son knows that his father, prompted by a special affection, has made a will providing for him more largely than for the other children, yet he meditates a series of frauds on the discovery of which he fears the will may be cancelled; and, to prevent this and gain immediate possession of the property, takes the father's life; the law cannot punish his meditated fraud, his ingratitude, or his want of filial duty. It can proceed against him only for simple murder, as it would against a stranger. If the son were also a servant, the English law, as it stood when this country was settled, not as it stands now in either country,<sup>1</sup> would hold him to be guilty of petit treason, which is murder aggravated by the single circumstance of the person whose life is taken being the master or husband of the offender;<sup>2</sup> but the other aggravating matter supposed could not be included in the charge against him in such a way as to enhance his legal guilt. Something like this was illustrated by the figure produced at a previous section.<sup>3</sup>

§ 780. **Crime enclosed within Crime.**— A common sort of combination occurs where one crime is, in a sense, enclosed within another, as represented in the figure here-to attached. Thus, A K L may represent a simple assault; A H I a battery, which includes an assault; A F G a manslaughter, produced by the assault and battery; A D E a murder of the second degree, where what constitutes manslaughter is aggravated by its being done of "malice aforethought;" and A B C murder of the first degree, where the "malice aforethought" is aggravated by being "deliberately premeditated."



§ 781. **Other Forms.**— But this doctrine is not limited to what

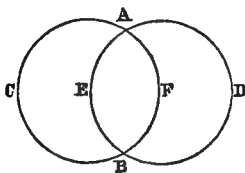
217; *Rex v. Britton*, 1 Moody & R. 297;  
*Lorton v. The State*, 7 Misso. 55.

<sup>2</sup> 1 Hawk P. C. 6th ed. c. 32, § 1, 2.

<sup>3</sup> Ante, § 777.

<sup>1</sup> Ante, § 611.

may be termed crimes within crimes. Here, therefore, is a figure more complicated than the preceding ones, and of a somewhat different nature. Suppose A C B D to comprehend the whole of what was done. The law may, or may not, have a way of dealing with the whole. If it has, then, perhaps, the prosecuting officer may elect to indict for the whole, or to indict for



A C B E, or for A E B F, or A F B D, or A C B F, or A E B D. For there may be, in one transaction, different offences which will be partly, not wholly, included within one another; or there may be different offences neither one of which will embrace any thing lying within any other. To illustrate the former sort, a man may be guilty of arson in burning a dwelling-house wherein a human being is consumed, and thus be guilty also, by the same act, of murder.<sup>1</sup> The murder and the arson are two offences, each one of which, in the particular instance, includes some element belonging to the other.<sup>2</sup>

§ 782. *Continued.* — There is really no limit to the variety of combinations. Thus, a man may be a common seller of intoxicating liquor without license, contrary to a statute making this punishable; and, in carrying on the business of common seller, he may be guilty of specific sales against another statute, which makes each particular sale an offence.<sup>3</sup> Or we may suppose, that the law has its lines so drawn as not to include, as constituting any one crime, the whole of a particular criminal transaction; but, instead, it cuts the transaction up into, it may be, three parts, while no one of them includes any thing which is also within another.<sup>4</sup>

§ 783. *Continued.* — No solid instruction can be drawn from further elucidations, in this connection, of particular forms. At the same time it should be borne in mind, that no limit can be set down to what is actual, or especially to what is possible, in these

<sup>1</sup> The State v. Cooper, 1 Green, N. J. 361.

<sup>2</sup> See post, § 815.

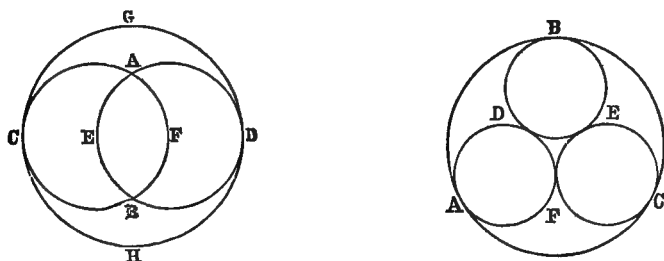
<sup>3</sup> The State v. Maher, 35 Maine, 225; The State v. Coombs, 32 Maine, 529. And see The State v. Bugbee, 22 Vt. 32; Commonwealth v. Perley, 2 Cush. 559; Rex v. Champneys, 2 Moody & R. 26,

2 Lewin, 52; Hinkle v. Commonwealth, 4 Dana, 518.

<sup>4</sup> See Torey v. The State, 13 Misso. 455; Wilson v. Commonwealth, 12 B. Monr. 2; Smith v. Commonwealth, 7 Grat. 593; The State v. Fayetteville, 2 Murph. 371; The State v. Fife, 1 Bailey 1; The State v. Standifer, 5 Port. 523.



combinations. Two further figures are here attached by way of suggestion. In them, the reader sees what may be ; and, to some



extent, what is. Suppose, for example, in the first of these figures, D G C H represents the whole criminal transaction, the law may make all indictable as one crime ; or it may make indictable G C A D, or A C B E, or A C B F, or A E B F, and so on. But these combinations require no further explanation.

§ 784. *Further of the Reason, &c.*—Let it be still borne in mind, that this appearance of the law cannot be avoided by any skill of scientific arrangement, or by legislation. The reason is, as already intimated, that, because of the diversity of human actions, no two acts, of the past or the present, viewed in reference to all their surroundings, and the inner motives prompting to them, are precisely alike. And no single future act, viewed with reference to all these things, can be foreseen. We can merely foresee, that, in its own minuter qualities, and in its relations to its surroundings, each future act will differ from every preceding one, and thus the course of events will continue for ever. The consequence is, that the law, statutory and common, must forbid things in terms broad enough to comprehend an infinite variety of shades and particular qualities of wrong-doing. The inhibition must also be specific, descending somewhat to the minute. When it thus descends, it, of course, can include only a part of the wrong things possible to be done. Then must follow another somewhat minute direction, then another, then another ; until the lawgiver thinks he has gone far enough. Each new defining or drawing of lines around a thing thus newly made indictable is just as likely to embrace within it some acts which were indictable before, by reason of lying within different lines, as to embrace what was not before indictable. The new and the old stand together, and a particular element of wrong

may thus be found to be within any number of the law's enclosing circles. And what is thus said applies, as mentioned already, to the common law as well as to the statutes. The common law would be the perfection of folly, instead of meriting the praise bestowed in days past upon it as the perfection of wisdom, if it attempted to divide the indictable into such classes of things that no one transaction would fall into more than a single class.

§ 785. **Committed in Different Ways.** — Some single offences may be committed in different ways. For example, a statute provided a punishment for "every person who shall buy, receive, or aid in the concealment of, any stolen goods, knowing the same to be stolen;" and the construction was, that it described only one offence, the guilt of which might be incurred by either buying, or receiving, or aiding in the concealment of, the goods; and, if an indictment alleged all three of these together, no objection could be taken to it as multifarious, though it might equally well have charged but one.<sup>1</sup> On a principle somewhat similar, frequently a man may be indicted for the same thing, either under a statute, or at the common law, at the election of the prosecuting power.<sup>2</sup>

<sup>1</sup> Crim. Proc. I. § 434-436; *Stevens v. Commonwealth*, 6 Met. 241; *The State v. Slocum*, 8 Blackf. 315. And see *Reg. v. Bird*, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94; *Commonwealth v. Tuck*, 20 Pick.

356; *The State v. Woodward*, 25 Vt. 616. But see *Miller v. The State*, 5 How. Missis. 250.

<sup>2</sup> Stat. Crimes, § 164, 173.

## CHAPTER LIII.

## MERGER OF OFFENCES.

§ 786. **To what applicable.** — The doctrine of merger is applicable to two classes of cases, — the one, where a criminal act falls within the definitions of two or more separate offences; the other, where offences are so graded that the less culpable are included in those involving a larger guilt, as shown at § 780 in our last chapter. The general rule is, as there explained,<sup>1</sup> that the prosecuting power may select for conviction any one of these offences, and the defendant cannot object though his guilt covers also a larger or different one. But —

**Merger.** — Merger, to be discussed in this chapter, creates a sort of exception to that doctrine.

§ 787. **Merger defined.** — Merger, in the criminal law, occurs where the same act of crime is within the definition of a misdemeanor and likewise of a felony, or of a felony and likewise of treason; and the rule is, that the lower grade of offence merges in the higher, so that the act can be punished only as felony in the one instance or treason in the other. Or, —

**More fully.** — There is, at the common law, a wide distinction between felony and misdemeanor.<sup>2</sup> It affects alike the punishment, the procedure, and several rules governing the crime itself. Out of this distinction grows the doctrine that the same precise act, viewed with reference to the same consequences, cannot be both a felony and a misdemeanor,<sup>3</sup> — a doctrine which applies only where the identical act constitutes both offences.<sup>4</sup> Hence, as seen in another connection,<sup>5</sup> if a statute creates a felony of what was before a misdemeanor, or a misdemeanor of what was

<sup>1</sup> And see post, § 791, 804.

<sup>2</sup> Ante, § 609, 616.

<sup>3</sup> Reg. v. Button, 11 Q. B. 929; Rex v. Harmwood, 1 East P. C. 411; Commonwealth v. Roby, 12 Pick. 496; Common-

wealth v. Parr, 5 Watts & S. 345; Johnson v. The State, 5 Dutcher, 453.

<sup>4</sup> Johnson v. The State, supra.

<sup>5</sup> Stat. Crimes, § 174.

before a felony, there can be no subsequent prosecution of the act for what it was before the statute. In like manner, if a statute elevates a felony to high treason, it is, as Sir Michael Foster observes, "absorbed in the treason."<sup>1</sup> For illustration, —

§ 788. **In Rape — Murder.** — An act which amounts to the common-law felony of a rape<sup>2</sup> or a murder<sup>3</sup> cannot, at the same time, be such an assault as is a misdemeanor. Yet, —

**Application of Doctrine.** — There is much obscurity in the books as to the application of this doctrine. We shall look again at this question in our next chapter.<sup>4</sup> The Connecticut court has held, that proof of a rape will sustain an indictment for an assault with intent to commit a rape.<sup>5</sup> But Hawkins says: "It seems that, if a man be indicted for a felony generally, and upon the evidence it plainly appear that the fact amounts to no more than a bare trespass [misdemeanor<sup>6</sup>], he cannot be found guilty of the trespass, but ought to be indicted anew."<sup>7</sup> Yet if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant be found guilty generally, and afterwards the court be of opinion that the fact doth not amount to felony, but only to an enormous trespass, it seems agreed, that judgment may be given as for a trespass only.<sup>8</sup> Also, if the jury find a special verdict on a general indictment for felony, and the crime be adjudged upon such verdict to be but a trespass, judgment may be given upon it as for a trespass only. Also, if on an indictment of trespass the fact appear to have been felonious, it hath been adjudged, that the defendant may be found guilty of the indictment as it is laid, because the king may proceed against the offender as he thinks fit, either as a trespasser or a felon.<sup>9</sup> But the contrary is said to have been holden by the late Chief Justice Holt."<sup>10</sup>

§ 789. **Statutes changing Common Law.** — The rule, that an act cannot be both felony and misdemeanor, may, of course, be altered by an express statute; and we have seen,<sup>11</sup> that it has

<sup>1</sup> Foster, 373.

<sup>2</sup> *Rex v. Harmwood*, 1 East P. C. 411; *The State v. Durham*, 72 N. C. 447. See, however, *Reg. v. Allen*, 2 Moody, 179.

<sup>3</sup> *Commonwealth v. Roby*, 12 Pick. 496.

<sup>4</sup> Post, § 804-815.

<sup>5</sup> *The State v. Shepard*, 7 Conn. 54. But see post, § 804-809.

<sup>6</sup> Ante, § 625.

<sup>7</sup> As to which see post, § 804 et seq.

<sup>8</sup> See post, § 810.

<sup>9</sup> See post, § 812-815.

<sup>10</sup> 2 Hawk. P. C. c. 47, § 6.

<sup>11</sup> Ante, § 699, 700.

been so altered as to prosecutions, under some circumstances, for knowingly receiving stolen goods.<sup>1</sup> And there are, in some of our States, statutes abrogating or modifying the rule in other cases.<sup>2</sup>

§ 790. **Course of Discussion — Conclusion.** — This subject will be continued in the next chapter, to which the present one is introductory.

<sup>1</sup> See also *Noland v. The State*, 19 Ohio, 131; *Foster v. People*, 1 Col. Ter. 293; *Canada v. Commonwealth*, 22 Grat. 899;

<sup>2</sup> *Commonwealth v. Dean*, 109 Mass. 349; *Stephen v. The State*, 11 Ga. 225; *Wolf v. The State*, 41 Ala. 412; *Hanna v. People*, 19 Mich. 316; *People v. Brady v. Commonwealth*, 17 Grat. 592; *tol*, 23 Mich. 118; post, § 808.

CHAPTER LIV.<sup>1</sup>THE RELATIONS OF THE SPECIFIC OFFENCES TO ONE ANOTHER  
AND TO THE CRIMINAL TRANSACTION.

§ 791. **Election of Offences.**—Subject to whatever exception may be found in the doctrine of merger, discussed in the last chapter, a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of his act. He is not to elect, but the prosecuting power is.<sup>2</sup> If the evidence shows him to be guilty of a higher offence than he stands indicted for, or of a lower, or of one differing in nature, whether under a statute or at the common law, he cannot be heard to complain,—the question being, whether it shows him to be guilty of the one charged.<sup>3</sup> Thus,—

§ 792. **In Conspiracy — Manslaughter — Larceny — Robbery — Malicious Mischief — Battery — Non-repair of Way — Accessory.**—Where the indictment is for a conspiracy to commit an offence, and the proofs establish that the conspirators actually committed it;<sup>4</sup> or for manslaughter, and murder is shown;<sup>5</sup> or for larceny,

<sup>1</sup> In connection with this chapter, consult *Crim. Proc.* I. § 415 et seq.

<sup>2</sup> *Cole v. The State*, 5 Eng. 318, 322; *Reg. v. White*, 9 Car. & P. 282; *Reg. v. Franklin*, 6 Mod. 220; *Reg. v. Brightside Bierlow*, 4 New Sess. Cas. 47, 14 Jur. 174; *The State v. Jesse*, 3 Dev. & Bat. 98; *Simpson v. The State*, 10 Yerg. 525; *Hickey v. The State*, 23 Ind. 21; *United States v. Grundy*, 3 Cranch, 337, and the cases cited in the remaining notes to this section and the next.

<sup>3</sup> *Reg. v. Neale*, 1 Car. & K. 591, 1 Den. C. C. 36; *Reg. v. Howell*, 9 Car. & P. 437, 454; *Lohman v. People*, 1 Comst. 379; *The State v. Sonnerkalb*, 2 Nott & McC. 280; *Thayer v. Boyle*, 30 Maine, 475; *Reg. v. White*, 20 Eng. L. & Eq. 585; *The State v. Keen*, 34 Maine, 500; *Rex*

*v. Davis*, 1 Car. & P. 306; *The State v. Coppenburg*, 2 Strob. 273; *Rex v. Wilkes*, 1 Leach, 4th ed. 103, 2 East P. C. 746; *Rex v. Cramp*, Russ. & Ry. 327; *Reg. v. Pringle*, 9 Car. & P. 408, 2 Moody, 127; *The State v. Parmelee*, 9 Conn. 259; *The State v. Munco*, 12 La. An. 625; *Johnson v. The State*, 14 Ga. 55; *The State v. Archer*, 54 N. H. 465; *Commonwealth v. Burke*, 14 Gray, 100; *Hardy v. Commonwealth*, 17 Grat. 592.

<sup>4</sup> *The State v. Murphy*, 6 Ala. 765; *People v. Mather*, 4 Wend. 229, 265; *The State v. Murray*, 15 Maine, 100; *Commonwealth v. Delany*, 1 Grant, Pa. 224; post, § 814.

<sup>5</sup> *Commonwealth v. McPike*, 3 Cush. 181; *Barnett v. People*, 54 Ill. 325.

and it was perpetrated in the course of a burglary<sup>1</sup> or a robbery;<sup>2</sup> or for malicious mischief, and the facts appearing would equally sustain a charge of larceny;<sup>3</sup> or for inflicting a battery on one man, when in truth the blow took effect on two;<sup>4</sup> or for the non-repair of one street, when the neglect covered several streets;<sup>5</sup> or for being accessory to one person, while more persons also were guilty of the principal offence,<sup>6</sup>—in these and the like cases, the prisoner may be convicted of what is charged against him, if, like what is not charged, it is sustained by the evidence.

§ 793. **Separating Transaction into Specific Offences.** — It is sometimes a nice question into what parts a criminal transaction is separable, and where the lines must run: We shall see something of this in the second volume, and in “Criminal Procedure” and “Statutory Crimes,” where the several offences are discussed. In all cases in which there is no merger of misdemeanor in felony or felony in treason, as shown in our last chapter, the transaction is divisible at whatever place it can be so cut that the part will fill the law’s definition of any crime. Again, when the division has been made, and the wrong-doer has been prosecuted for one offence, he may or may not be punishable for a second, properly carved out of his act,—a question for a future chapter.<sup>7</sup> Moreover, as a practical suggestion, the prosecuting power ought to be cautious how it carves; because, not only may a miscalculation in the exercise of the discretion result in a failure to convict, but in some circumstances it will enable the prisoner, after trial, to plead the prior proceedings in bar of any subsequent ones. These propositions need not be drawn out into their details in this connection; but a reference to some cases illustrating them will be convenient.<sup>8</sup>

<sup>1</sup> *Wyatt v. The State*, 1 Blackf. 257; *People v. Smith*, 57 Barb. 46.

<sup>2</sup> *Hickey v. The State*, 23 Ind. 21; *Bonsall v. The State*, 35 Ind. 460.

<sup>3</sup> *The State v. Leavitt*, 32 Maine, 183.

<sup>4</sup> *The State v. Damon*, 2 Tyler, 387.

<sup>5</sup> *The State v. Fayetteville*, 2 Murph. 371.

<sup>6</sup> *Stoops v. Commonwealth*, 7 S. & R. 491. And see ante, § 666.

<sup>7</sup> Post, § 978 et seq.

<sup>8</sup> *The State v. Moultrieville*, Rice, 158;

*The State v. Benham*, 7 Conn. 414; *The State v. Fife*, 1 Bailey, 1; *The State v. Fayetteville*, 2 Murph. 371; *The State v. Johnson*, 12 Ala. 840; *Rex v. Champneys*, 2 Moody & R. 26, 2 Lewin, 52; *Hinkle v. Commonwealth*, 4 Dana, 518; *The State v. Damon*, 2 Tyler, 387; *Holcomb v. Cornish*, 8 Conn. 375; *Frasier v. The State*, 6 Misso. 195; *People v. Ward*, 15 Wend. 231; *The State v. Cooper*, 1 Green, N. J. 361; *The State v. Plunkett*, 8 Harrison, 5; *The State v. Coombs*, 32

§ 794. **Offences within One Another — (The Indictment).**—Where offences are included one within another, as before explained,<sup>1</sup> a person indicted for a higher one may be convicted of any below it not merged in that for which he is indicted,<sup>2</sup> unless the allegation should happen to be in a form not charging the lower;<sup>3</sup> for, should this occur, contrary to the ordinary course of practice, the want of averment will be fatal to any verdict for the lower.<sup>4</sup> Thus, assuming the allegation for the heavier offence to be in such form as to include the lighter, —

§ 795. **In Homicide — Robbery — Assault with Intent — Mayhem — Carnal Ravishment — Adultery — Fornication — Rape — Incest — Riot — Second Offence — First Offence.** — One indicted for murder may be found guilty of manslaughter;<sup>5</sup> for robbery, may be convicted of larceny;<sup>6</sup> for an assault with an intent to commit

Maine, 529; *The State v. Maher*, 35 Maine, 225; *Smith v. Commonwealth*, 7 Grat. 593; *Rex v. O'Brian*, 7 Mod. 378; *Rex v. Reynell*, 6 East, 315; *The State v. Spurgin*, 1 McCord, 252; *Shaw v. The State*, 18 Ala. 547. **In Larceny.** — As to larcenies, see *Reg. v. Brettel*, Car. & M. 609; *Rex v. Jones*, 4 Car. & P. 217; *The State v. Williams*, 10 Humph. 101; *Lorton v. The State*, 7 Misso. 55; *Reg. v. Bleasdale*, 2 Car. & K. 765; *The State v. Nelson*, 29 Maine, 329; *The State v. Thurston*, 2 McMullan, 382; *Rex v. Birdseye*, 4 Car. & P. 386. **In Burglary.** — As to burglary, and the like, see *Commonwealth v. Hope*, 22 Pick. 1; *Josslyn v. Commonwealth*, 6 Met. 236; *The State v. Squires*, 11 N. H. 37; *Commonwealth v. Brown*, 3 Rawle, 207; *The State v. Brady*, 14 Vt. 353; *Jones v. The State*, 11 N. H. 269; *Stoops v. Commonwealth*, 7 S. & R. 491; *Rex v. Comer*, 1 Leach, 4th ed. 36; *Rex v. Vandercom*, 2 East P. C. 519; s. c. nom. *Rex v. Vandercomb*, 2 Leach, 4th ed. 708; *Commonwealth v. Tuck*, 20 Pick. 356; *The State v. Moore*, 12 N. H. 42; *Commonwealth v. Dove*, 2 Va. Cas. 26.

<sup>1</sup> Ante, § 780.

<sup>2</sup> Ante, § 787-789; post, § 804 et seq.

<sup>3</sup> Post, § 803.

<sup>4</sup> *Swinney v. The State*, 8 Sm. & M. 576; *Reg. v. Reid*, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181; *The State v. Nichols*, 8 Conn. 496; *Durham v. The State*, 1

*Blackf.* 33; *Wilson v. Commonwealth*, 12 B. Monr. 2; *Reg. v. Wynn*, 1 Den. C. C. 365, 2 Car. & K. 859; *Rex v. Compton*, 3 Car. & P. 418; *Commonwealth v. Harney*, 10 Met. 422; *Wills v. The State*, 4 Blackf. 457; *Reg. v. Yeadon*, Leigh & C. 81, 9 Cox C. C. 91; *Reg. v. Smith*, 34 U. C. Q. B. 552; *Heller v. The State*, 23 Ohio State, 582; *Hanna v. People*, 19 Mich. 316; *Wood v. The State*, 48 Ga. 192; *Reg. v. Canwell*, 11 Cox C. C. 263; *Reg. v. Taylor*, Law Rep. 1 C. C. 194, 11 Cox C. C. 261; *Reg. v. Dingman*, 22 U. C. Q. B. 283; and the other cases cited to sections next following. And see *Smitherman v. The State*, 27 Ala. 23; post, § 803; *Crim. Proced. I.* § 418, 419.

<sup>5</sup> *Lisle's Case*, J. Kel. 89-108; *The State v. Fleming*, 2 Strob. 464; *Reynolds v. The State*, 1 Kelly, 222; *King v. The State*, 5 How. Missis. 730; *Watson v. The State*, 5 Misso. 497; *Plummer v. The State*, 6 Misso. 231; *The State v. Gaffney*, Rice, 481; *Commonwealth v. Gable*, 7 S. & R. 423; *The State v. Arden*, 1 Bay, 487; *The State v. Flannigan*, 6 Md. 167; *Gordon v. The State*, 3 Iowa, 410; *Wroe v. The State*, 20 Ohio State, 460; *The State v. Huber*, 8 Kan. 447; *Davis v. The State*, 39 Md. 855; *The State v. Sloan*, 47 Misso. 604, 614.

<sup>6</sup> *Hickey v. The State*, 23 Ind. 21. And see *The State v. Taylor*, 3 Oregon, 10; *Hamilton v. The State*, 36 Ind. 280.



murder, or manslaughter,<sup>1</sup> or mayhem,<sup>2</sup> or a carnal ravishment,<sup>3</sup> may be convicted of either a simple assault or a compound assault of a less degree than that alleged;<sup>4</sup> indicted for adultery, may receive judgment for fornication;<sup>5</sup> indicted for rape on the person of his daughter, convicted of incest;<sup>6</sup> indicted for riot and assault, convicted of assault only;<sup>7</sup> indicted for larceny as a second offence, convicted of the larceny as a first offence.<sup>8</sup> Likewise, —

§ 796. **Burglary and Larceny, &c.** — In burglary and statutory breakings into shops and dwelling-houses, if the indictment sets forth a larceny within the building, as a part of the larger offence,<sup>9</sup> the conviction may be for the larceny alone.<sup>10</sup> But if the charge of burglary is simply that the defendant broke and entered the place with intent to steal, the want of allegation precludes his conviction for larceny.<sup>11</sup> Again, —

§ 797. **Murder of First and Second Degrees.** — Where, as in some of our States, murder is by statute divided into two degrees, one may be convicted of it in either degree if the indictment is in

<sup>1</sup> *Gardenheir v. The State*, 6 Texas, 348; *The State v. Stedman*, 7 Port. 495; *The State v. Coy*, 2 Aikens, 181; *Stewart v. The State*, 5 Ohio, 241; *Clark v. The State*, 12 Ga. 350.

<sup>2</sup> *McBride v. The State*, 2 Eng. 374.

<sup>3</sup> *Commonwealth v. Fischblatt*, 4 Met. 354; *Rex v. Dawson*, 3 Stark. 62; *People v. McDonald*, 9 Mich. 150.

<sup>4</sup> And see *Smith v. The State*, 35 Texas, 500; *The State v. Shepard*, 10 Iowa, 126; *White v. The State*, 13 Ohio State, 569.

<sup>5</sup> *Respublica v. Roberts*, 2 Dall. 124, 1 Yeates, 6; *The State v. Cowell*, 4 Ire. 231. And see *The State v. Pearce*, 2 Blackf. 318; *The State v. Cox*, N. C. Term R. 165.

<sup>6</sup> *Commonwealth v. Goodhue*, 2 Met. 193. And see *Crim. Proced. I.* § 419.

<sup>7</sup> *Rex v. Hemings*, 2 Show. 93; *The State v. Townsend*, 2 Harring. Del. 543; *Rex v. Heaps*, 2 Salk. 593. It would appear, however, that an indictment for riot may be so framed as, on the principle stated post, § 803, not to include an assault. *Reg. v. Ellis, Holt*, 636. And see *The State v. Allen*, 4 Hawks, 356; *Commonwealth v. Perdue*, 2 Va. Cas. 227; *Childs v. The State*, 15 Ark. 204.

<sup>8</sup> *Palmer v. People*, 5 Hill, N. Y. 427.

<sup>9</sup> *Stoops v. Commonwealth*, 7 S. & R. 491; *The State v. Squires*, 11 N. H. 37; *Crowley v. Commonwealth*, 11 Met. 575; *Kite v. Commonwealth*, 11 Met. 581; *Jones v. The State*, 11 N. H. 269; *Commonwealth v. Hope*, 22 Pick. 1; *Josslyn v. Commonwealth*, 6 Met. 236; *Commonwealth v. Tuck*, 20 Pick. 356; *Berry v. The State*, 10 Ga. 511; *The State v. Moore*, 12 N. H. 42; *Rex v. Comer*, 1 Leach, 4th ed. 36; *Rex v. Vandercom*, 2 East P. C. 519; s. c. nom. *Rex v. Vandercomb*, 2 Leach, 4th ed. 708; *Commonwealth v. Brown*, 3 Rawle, 207; *Clarke v. Commonwealth*, 25 Grat. 908; *The State v. Alexander*, 56 Misso. 131.

<sup>10</sup> *The State v. Brady*, 14 Vt. 353; *Anonymous*, 31 Maine, 592; *The State v. Grisham*, 1 Hayw. 12; *Rex v. Withal*, 1 Leach, 4th ed. 88, 2 East P. C. 515, 517; *Commonwealth v. Hope*, 22 Pick. 1; *The State v. Cocker*, 3 Harring. Del. 554; *Reg. v. Reid*, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181. See *Reg. v. Clarke*, 1 Car. & K. 421.

<sup>11</sup> *Fisher v. The State*, 46 Ala. 717; *Bell v. The State*, 48 Ala. 684; *People v. Garnett*, 29 Cal. 622.

terms to charge the higher; the statutes prescribing that the degree shall be specified in the verdict.<sup>1</sup> Or the conviction may be for any lower grade of killing.<sup>2</sup> And some of the courts have indulged in the strange absurdity of holding, in violation alike of the fundamental principles of pleading, of guarantees in the constitutions of most of our States, and of common sense, that, if an indictment does not contain any allegation of the aggravated facts which constitute murder in the first degree, still, in some mystic manner which no judge ever undertook to explain or himself saw, it is an indictment for murder of the first degree as well as the second; and, upon it, a conviction for the murder in this higher degree may be maintained. It happened in this way: the first court that considered this sort of statute made a blunder. Judges of other courts shut their eyes and followed the lead. Some other judges have latterly opened their eyes to look; and every one who has looked has refused to follow the old lead. It would be interesting to see any man, on the bench or off, after looking into the question so as to understand it, undertake to answer the argument which explodes the old error. No one ever did undertake it; no gift of prophecy is required to enable a writer to say, with absolute certainty, that no one ever will.<sup>3</sup>

§ 798. **General Result.** — The conclusion is, that, whatever the offence alleged, there may be a conviction for any other, if within the words of the allegation.<sup>4</sup> Exceptions to this rule will appear in subsequent sections.

§ 799. **Offences not within One Another.** — The rule is not confined to these cases of a crime within a crime, but it is general, that the defendant may receive judgment on so much of the allegation proved as constitutes an offence, whether what is thus

<sup>1</sup> *McGee v. The State*, 8 Misso. 495; *The State v. Dowd*, 19 Conn. 388; *People v. Doe*, 1 Mich. 451; *McPherson v. The State*, 9 Yerg. 279; *Thomas v. The State* 5 How. Missis. 20, 32; *Johnson v. The State*, 17 Ala. 618. And see *People v. White*, 22 Wend. 167; *The State v. Town, Wright*, 75; *The State v. Williams*, 3 Fost. N. H. 321.

<sup>2</sup> *Wroe v. The State*, 20 Ohio State, 460; *The State v. Huber*, 8 Kan. 447; *Davis v. The State*, 33 Md. 355; *The State v. Sloan*, 47 Misso. 604, 614.

<sup>3</sup> See, for a full view of this question; *Crim. Proced.* II. § 560-596. See, also, *Bishop First Book*, § 401 and note, 455; *Stat. Crimes*, § 371, 372, 471. And see *The State v. McCormick*, 27 Iowa, 402, where, in an able opinion, the court unanimously affirm the doctrine which I had laid down in *Crim. Proced.*

<sup>4</sup> *Crim. Proced.* I. § 415-420; *Benham v. The State*, 1 Iowa, 542; *Prinderville v. People*, 42 Ill. 217; *The State v. Butman*, 42 N. H. 490; *The State v. Dumphrey*, 4 Minn. 438.

proved is the same in degree as the entire matter charged, or different in degree, or in nature.<sup>1</sup> For example,—

**In Libel — Larceny (Grand and Petit) — Possessing Counterfeits.** — One indicted for printing and publishing a libel may be acquitted of the printing, and convicted of the publishing;<sup>2</sup> one charged with a larceny of property of more than one hundred dollars in value may be found guilty of the larceny in a less value; charged with having in possession, with intent to utter, more than ten pieces of counterfeit coin, may be found guilty of having less than ten.<sup>3</sup> So, on an indictment for grand larceny, — that is, a larceny in which the property stolen is alleged to be worth more than twelve pence,<sup>4</sup> — the conviction may be for petit larceny.<sup>5</sup> And —

**Alternative Clauses of Statute.** — We have seen,<sup>6</sup> that, when a statute makes punishable several things in the alternative, the indictment may be in one count for the whole, while the proof need cover only so much as constitutes a crime.<sup>7</sup>

§ 800. **Joint Indictment against Two or More.** — In like manner, where two or more persons are indicted together for one offence,<sup>8</sup> a part may be convicted and the rest acquitted;<sup>9</sup> or some may be found guilty of the offence in a higher degree, others in a lower.<sup>10</sup> But if the acquittal of one shows the others to be necessarily innocent, they will not be adjudged by the court to be guilty, though the jury find them so.<sup>11</sup> Therefore, —

§ 801. **In Conspiracy.** — Though one of two conspirators may be proceeded against after the other one is dead,<sup>12</sup> or they may

<sup>1</sup> *Rex v. Newton*, 2 Lev. 111, and the other cases cited to this section; also Stat. Crimes, § 491–498.

<sup>2</sup> *Rex v. Williams*, 2 Camp. 646.

<sup>3</sup> *Commonwealth v. Griffin*, 21 Pick. 523.

<sup>4</sup> See ante, § 679.

<sup>5</sup> *The State v. Bennet*, 3 Brev. 515, 2 Tread. 693; *The State v. Wood*, 1 Mill. 29; *The State v. Murphy*, 8 Blackf. 498; 2 Hawk. P. C. Curw. ed. p. 620, § 6. And see *The State v. Arlin*, 7 Fost. N. H. 116; *Wills v. The State*, 4 Blackf. 457.

<sup>6</sup> Stat. Crimes, § 383; ante, § 785.

<sup>7</sup> *Stevens v. Commonwealth*, 6 Met. 241.

<sup>8</sup> *Crim. Proced. I.* § 463.

<sup>9</sup> *Reg. v. Dovey*, 2 Den. C. C. 86, 2

*Eng. L. & Eq.* 532; *The State v. Allen*, 4 Hawks, 356; *Bloomhuff v. The State*, 8 Blackf. 205; *Ward v. The State*, 22 Ala. 16. And see *Commonwealth v. Perdue*, 2 Va. Cas. 227; *The State v. Allison*, 3 Yerg. 428.

<sup>10</sup> *Rex v. Butterworth*, Russ. & Ry. 520; *Shouse v. Commonwealth*, 5 Barr, 83; *The State v. Arden*, 1 Bay, 487. Query as to *Rex v. Quail*, 1 Crawf. & Dix C. C. 191.

<sup>11</sup> *Reg. v. Ellis*, Holt, 636; *The State v. Mainor*, 6 Ire. 340. As to the limitations of the rule, see *The State v. Allison*, 3 Yerg. 428. And see *Rex v. Hughes*, 4 Car. & P. 373.

<sup>12</sup> *Rex v. Nicolls*, 2 Stra. 1227; *People v. Olcott*, 2 Johns. Cas. 301.

have separate trials;<sup>1</sup> yet, if one is acquitted, where two only are charged in the allegation, this is in effect an acquittal of the other, it being legally impossible for a man to *conspire* alone.<sup>2</sup> And, —

**In Grand and Petit Larceny.** — If two are jointly indicted for stealing the same goods, one cannot receive judgment for grand larceny and the other for petit larceny, because the fact could not be so;<sup>3</sup> yet, when the proof shows a grand larceny, if, nevertheless, the jury return a verdict against both for petit larceny, they may have sentence accordingly, because the evidence is for the jury, and there is no impossibility of record against this finding.<sup>4</sup>

§ 802. **Charge Joint or Several.** — When two are on trial for an offence laid in a single count as committed jointly,<sup>5</sup> and each is shown to have done the whole while acting separate from the other, in disconnected transactions, a verdict should not be taken against both; because the conviction of one exhausts the indictment, and no charge remains for the other.<sup>6</sup> But when the allegation is of an offence committed severally, the word “severally” separates the defendants, so that all may be convicted on the one indictment; unless the court interferes with this form of proceeding in the earlier stages of the cause.<sup>7</sup>

§ 803. **Allegation to be Sufficient.** — The law never condemns without accusation. So that, as already mentioned,<sup>8</sup> the foregoing doctrines do not apply where the thing proved is not adequately set down in allegation.<sup>9</sup> Therefore, for example, —

**Principal and Accessory — Assaults — Battery.** — One indicted as principal in a felony cannot be convicted of being an accessory

<sup>1</sup> Crim. Proced. I. § 1022.

<sup>2</sup> The State v. Tom, 2 Dev. 569; Rex v. Hilbers, 2 Chit. 163; Commonwealth v. Manson, 2 Ashm. 31. And see Reg. v. Gompertz, 9 Q. B. 824; The State v. Covington, 4 Ala. 603.

<sup>3</sup> Wilson v. Davis, 3 McCord, 187.

<sup>4</sup> The State v. Bennet, 2 Tread. 693, 3 Brev. 515; Crim. Proced. II. § 988; ante, § 799.

<sup>5</sup> Crim. Proced. I. § 471.

<sup>6</sup> Stephens v. The State, 14 Ohio, 386; Reg. v. Dovey, 2 Den. C. C. 86, 2 Eng. L. & Eq. 532. See also Elliott v. The State, 26 Ala. 78.

<sup>7</sup> 1 Stark. Crim. Plead. 2d ed. 43, 44; Crim. Proced. I. § 473-475.

<sup>8</sup> Ante, § 794, 798.

<sup>9</sup> The State v. Shoemaker, 7 Misso. 177; Rex v. Hughes, 4 Car. & P. 373; Rex v. Furnival, Russ. & Ry. 445; Reg. v. Paice, 1 Car. & K. 73; Vanvalkenburg v. The State, 11 Ohio, 404; The State v. Jesse, 3 Dev. & Bat. 98; Reg. v. Reid, 2 Den. C. C. 88, 1 Eng. L. & Eq. 595; Reg. v. Holcroft, 2 Car. & K. 341; Carpenter v. People, 4 Scam. 197; Commonwealth v. Fischblatt, 4 Met. 354; The State v. Raines, 3 McCord, 533; Childs v. The State, 15 Ark. 204.

before the fact;<sup>1</sup> or, indicted as such accessory, cannot be found guilty as a principal felon;<sup>2</sup> or, indicted for an *assault* with intent to murder, cannot be convicted, not only of a simple assault, but also of a *battery*.<sup>3</sup>

§ 804. *Exceptions and Limitations:—*

**Merger — Rights of Defendants in Felony and Misdemeanor.** — Let us now go back to the doctrine of merger, discussed in the last chapter. It appeared there to be very uncertain in its limits and nature. The proposition,<sup>4</sup> that the same act cannot be both felony and misdemeanor, is only a particular deduction from a principle familiar in the interpretation of criminal statutes, whereby two statutes punishing a thing differently cannot stand together, but one must be adjudged repealed or void.<sup>5</sup> Another proposition brought to view under the head of merger is, that, on an indictment for felony, there can be no conviction for a misdemeanor included within it; though, we saw, the contrary has sometimes been held with us.<sup>6</sup> This proposition, we are about to see, is derivable from certain distinctions of the old common law as to the differing rights of defendants in trials for felony and misdemeanor. So that, if there is in merger any thing beyond these deductions from familiar principles, it is very little. Indeed, such appears to be the whole of the doctrine of merger, with its reasons. But this presentation of the doctrine does not deny its existence; on the other hand, it explains and confirms it.

**Misdemeanor on Indictment for Felony.** — The common law is distinct, that there can be no conviction for a misdemeanor on an indictment for a felony.<sup>7</sup> If the allegation includes a misdemeanor, and the proofs sustain this part, but not the felony, there must be a general acquittal, which will be no bar to a subsequent prosecution for the misdemeanor.<sup>8</sup> The reason usually assigned is, that, —

<sup>1</sup> *Rex v. Plant*, 7 Car. & P. 575.

<sup>2</sup> *Rex v. Gordon*, 1 Leach, 4th ed. 515,  
<sup>1</sup> East P. C. 352.

<sup>3</sup> *Sweedon v. The State*, 19 Ark. 205.

<sup>4</sup> Ante, § 787.

<sup>5</sup> Stat. Crimes, § 156, 168, 174.

<sup>6</sup> Ante, § 788, 789.

<sup>7</sup> Ante, § 788; *The State v. Durham*, 72 N. C. 447; *Johnson v. The State*, 2 Dutcher, 313, 334, and the authorities cited in the next note.

<sup>8</sup> 2 Hawk. P. C. Curw. ed. p. 621; *Rex v. Westbeer*, 2 Stra. 1133, 1 Leach, 4th ed. 12; *Commonwealth v. Gable*, 7 S. & R. 423; *Reg. v. Eaton*, 8 Car. & P. 417; *Reg. v. Gisson*, 2 Car. & K. 781; *Reg. v. Goadby*, 2 Car. & K. 782, note; *Commonwealth v. Roby*, 12 Pick. 496, 505, 506; *Wright v. The State*, 5 Ind. 527; *Reg. v. Dungey*, 4 Fost. & F. 99; *Reg. v. Woodhall*, 12 Cox C. C. 240, 4 Eng. Rep. 529; *Reg. v. Nicholls*, 2 Cox

**Doctrine derivable from Procedure.**—When this rule was established,<sup>1</sup> persons indicted for misdemeanor had certain advantages at the trial, such as to make a full defence by counsel, and to have a copy of the indictment and a special jury, not permitted in felony. And it was deemed that they could not be deprived of these rights through the device of a too heavy allegation in the indictment. This plain dictate of justice was disregarded in a few of the early English cases,<sup>2</sup> wherein, as it was said afterward, “the judges appear to be transported with zeal too far.”<sup>3</sup> But,—

§ 805. **Changed Procedure — How with us.**—It is inequitable to deny one charged with felony any privilege which he ought to have in misdemeanor. Therefore the old practice has been gradually done away with in England, and it was never received in this country. If, with us, there is any discrimination, it is usually in *favor* of those indicted for the higher crimes; while, in prosecutions for the lower, any peculiar rights of defendants are merely incidental. Hence,—

**Whether Conviction for Misdemeanor.**—The courts of some of the States have permitted convictions for misdemeanor on indictments for felony;<sup>4</sup> discarding the old rule, in obedience to the maxim, *Cessante ratione legis, cessat ipsa lex*;<sup>5</sup> while in other States it has been followed.<sup>6</sup>

§ 806. **What, with us, the True Rule.**—It is a nice question whether or not our changed procedure should, as thus indicated, be held to abrogate the old rule on this subject. For, besides the difficulty of casting off a rule solely because of the removal of

C. C. 182. See *Gillespie v. The State*, 9 Ind. 380.

<sup>1</sup> See ante, § 275.

<sup>2</sup> *Rex v. Joyner*, J. Kel. 29, and cases cited in *Rex v. Westbeer*, supra.

<sup>3</sup> *Rex v. Westbeer*, as reported 2 Stra. 1188.

<sup>4</sup> *Stewart v. The State*, 5 Ohio, 241; *The State v. Kennedy*, 7 Blackf. 233; *People v. White*, 22 Wend. 167; *People v. Jackson*, 3 Hill, N. Y. 92; *Burk v. The State*, 2 Har. & J. 426; *The State v. Sutton*, 4 Gill, 494; *Cameron v. The State*, 18 Ark. 712; *The State v. Johnson*, 1 Vroom, 185; *Hanna v. People*, 19 Mich. 316; *Foster v. People*, 1 Col. Ter. 293; *Canada v. Commonwealth*, 22 Grat.

899; *Hunter v. Commonwealth*, 3 Cent. Law Jour. 129; ante, § 788. See *The State v. Bridges*, 1 Murph. 134; *Sweedeen v. The State*, 19 Ark. 205; *People v. Tyler*, 35 Cal. 553.

<sup>5</sup> Ante, § 273, 275.

<sup>6</sup> *Black v. The State*, 2 Md. 376; *Commonwealth v. Gable*, 7 S. & R. 423; *Hackett v. Commonwealth*, 3 Harris, Pa. 95; *Braddee v. Commonwealth*, 6 Watts, 530; *Commonwealth v. Roby*, 12 Pick. 496; *Commonwealth v. Newell*, 7 Mass. 245; *The State v. Valentine*, 6 Yerg. 533; *Johnson v. The State*, 2 Dutcher, 313, 324. And see *United States v. Sharp*, Pet. C. C. 131. As to Vermont, see the notes to the next section.

its original reason,<sup>1</sup> other reasons for adhering to it may exist in addition to the oftener-mentioned ones.<sup>2</sup> So thought the Vermont court, which, having in some earlier cases put aside the English practice, took it back, saying: "On an indictment for a felony, the prisoner must appear in person, and on trial must here be taken and retained in custody in discharge of his recognizance; whereas, on an indictment for a misdemeanor, he is allowed to remain on bail, and may in general appear and plead by attorney. These are privileges of which the party ought not to be deprived by changing the mode of proceeding against him, and they appear to be of sufficient importance to require an adherence to the common-law rule."<sup>3</sup> Yet this court, at a later period, turned again and embraced its former doctrine, apparently without being aware of the intermediate decision.<sup>4</sup>

§ 807. *Continued.* — And there are reasons of a different nature, entitled to weight: as, for example, one indicted for felony cannot be convicted on evidence showing him to have advised the act as an accessory before the fact, while one indicted for misdemeanor can; and the judge must be embarrassed as to the admission of the testimony, if in doubt whether the verdict, should it convict the defendant, will find him guilty of felony or misdemeanor. In England, at the present time, the before-mentioned reasons for the rule have practically ceased, defendants there having substantially the same privileges on indictments for felonies as for misdemeanors; yet the rule itself remains.<sup>5</sup> And the court of Massachusetts, sustaining the rule, rejected altogether those more common reasons, deeming it to rest on "the broader consideration, that the offences are, in legal contemplation, essentially distinct in their character, and that this is manifest from an examination of the authorities."<sup>6</sup> We may doubt, however, whether the Massachusetts reason is broad enough alone to support the rule in all circumstances where it is found in the English law.

§ 808. *Statutory Alterations of the Rule.* — Yet this rule, that on indictments for felony there can be no conviction for misde-

<sup>1</sup> Ante, § 275.

<sup>2</sup> Ante, § 274.

<sup>3</sup> The State v. Wheeler, 3 Vt. 344, 347, overruling The State v. McLeran, 1 Aikens, 311, and The State v. Coy, 2 Aikens, 181.

<sup>4</sup> The State v. Scott, 24 Vt. 127.

<sup>5</sup> Greaves Lord Campbell's Acts, 14; Reg. v. Thomas, Law Rep. 2 C. C. 141, 13 Cox C. C. 52. The statutes, in some special cases, provide otherwise. *Ib.*; Reg. v. Rudge, 13 Cox C. C. 17.

<sup>6</sup> Commonwealth v. Roby, 12 Pick. 496, 506.

meanor, has been partly or fully overturned by statutes in some of the States into which it was received from the common law.<sup>1</sup> Therefore, —

**Homicide — Rape, &c.** — Under the later law in Massachusetts, one tried on an allegation of manslaughter or of rape, which are felonies, may be found guilty of the misdemeanor of an assault and battery.<sup>2</sup> And, by force of statutes, a like practice prevails in some of the other States.<sup>3</sup>

§ 809. **Conviction of Attempt on Indictment for Full Offence.** — It is perceived, therefore, that, by the rules of the common law, though an attempt consists of the full offence partly executed,<sup>4</sup> yet, if, on an indictment for felony, the proof shows only enough of the act to constitute the misdemeanor of an attempt, there can be no conviction even though the allegation charges an attempt in form. Where the attempt and substantive offence are of one grade, — being either both felonies or both misdemeanors, — it is plain that, if the allegation sets out the attempt as well as the completed offence, the common-law rules will permit a conviction for the attempt. It is believed, however, that, in most instances, our forms of indictment for substantive offences do not charge the attempt; though, in other instances, doubtless they do. In England, the common-law doctrine is changed by 14 & 15 Vict. c. 100, § 9, already cited,<sup>5</sup> now in force, and 7 Will. 4 & 1 Vict. c. 85, § 11, repealed,<sup>6</sup> which provides, “that, on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against a person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.”<sup>7</sup> There are some American statutes following more or

<sup>1</sup> Ante, § 789.

<sup>2</sup> *Commonwealth v. Drum*, 19 Pick. 479; *Commonwealth v. Dean*, 109 Mass. 349, 352.

<sup>3</sup> *Prindville v. People*, 42 Ill. 217; *The State v. Johnson*, 1 Vroom, 185; *Carden v. The State*, 3 Head, 267. As to other American statutes and the decisions upon them, see *The State v. Flanigan*, 5 Ala. 477, 482; *Brittain v. The State*, 7 Humph. 159; *The State v. Valentine*, 6 Yerg. 533; *The State v. Bowling*, 10 Humph. 52; *Commonwealth v.*

*Newell*, 7 Mass. 245; *Commonwealth v. Roby*, 12 Pick. 496, 506; *Commonwealth v. Cooper*, 15 Mass. 187; ante, § 789.

<sup>4</sup> Ante, § 746.

<sup>5</sup> Ante, § 757.

<sup>6</sup> Known as Lord Denman's Act, Reg. v. Dungey, 4 Fost. & F. 99.

<sup>7</sup> Greaves Lord Campbell's Acts, 14. For the construction put upon these statutes by the English courts, see Reg. v. Bird, 2 Den. C. C. 94, 2 Eng. L. & Eq. 448; Reg. v. Watkins, 2 Moody, 217, Car. & M. 264; Reg. v. Eaton, 8 Car. & P. 417;



less closely these English ones.<sup>1</sup> This subject has not been much examined by our courts. The English Parliament is omnipotent. But, while our legislatures may break down all barriers founded on the distinction between felony and misdemeanor, it is not clear that, by our constitutions, they can authorize a conviction for the attempt on an indictment for the full offence, should the allegation not include a charge of the less offence.<sup>2</sup>

§ 810. **Misdemeanor alleged "feloniously."** — We have seen that, according to Hawkins, if an indictment sets out the facts of an offence and lays it as felony, yet in matter of law it is found to be misdemeanor only, a judgment for the misdemeanor may be sustained upon it,<sup>3</sup> notwithstanding there can be no conviction of misdemeanor on an indictment for felony. But, in this instance, the indictment is, in law, for misdemeanor, not felony; the word "feloniously," in the allegation, being rejected as surplusage. For it is a principle in all legal pleadings, that mere surplusage does not vitiate.<sup>4</sup> If, however, the judge at the trial should, contrary to the claim of the defendant, treat the indictment as for felony, and deny him privileges due to persons indicted for misdemeanor, this would be error like any other erroneous ruling. Or, if the defendant admitted, at the trial, that the charge set out was felony, and did not ask for any ruling on the ground of its being misdemeanor, the case would be the same as any other

Reg. v. Brimilow, 9 Car. & P. 366, 2 Moody, 122; Reg. v. Williams, 8 Car. & P. 286; Reg. v. Saunders, 8 Car. & P. 265; Reg. v. Cruse, 8 Car. & P. 541, 2 Moody, 53; Reg. v. Folkes, 2 Moody & R. 460; Reg. v. Crompton, Car. & M. 597; Reg. v. Nicholls, 9 Car. & P. 267; Reg. v. Ellis, 8 Car. & P. 654; Reg. v. Pool, 9 Car. & P. 728; Reg. v. Guttridges, 9 Car. & P. 471; Reg. v. Barnett, 2 Car. & K. 594; Reg. v. Greenwood, 2 Car. & K. 339; Reg. v. Holcroft, 2 Car. & K. 341; Reg. v. Barratt, 9 Car. & P. 387; Reg. v. Lewis, 1 Car. & K. 419; Reg. v. Reid, 2 Den. C. C. 88, 1 Eng. L. & Eq. 595; Reg. v. Birch, 2 Car. & K. 193; Reg. v. St. George, 9 Car. & P. 433; Reg. v. Phelps, 2 Moody, 240; Reg. v. Birch, 1 Den. C. C. 185; Reg. v. Gisson, 2 Car. & K. 781; 2 Taschereau Canada Crim. Law Acts, 254-263.

<sup>1</sup> And see, on this subject, Wolf v. The

State, 41 Ala. 412; Hanna v. People, 19 Mich. 316; The State v. Jarvis, 21 Iowa, 44; The State v. Wilson, 30 Conn. 500; Clifford v. The State, 10 Ga. 422; Stephen v. The State, 11 Ga. 225; The State v. Shepard, 7 Conn. 54, citing Commonwealth v. Cooper, 15 Mass. 187; which last case was subsequently disapproved of by the Massachusetts court, though for a reason not distinctly affecting the doctrine of the text. Commonwealth v. Roby, 12 Pick. 496, 507.

<sup>2</sup> See Crim. Proced. I. § 89-112.

<sup>3</sup> Ante, § 788. And see Crim. Proced. I. § 537.

<sup>4</sup> Stephen Plead. 378, 424; Larned v. Commonwealth, 12 Met. 240; Rex v. Redman, 1 Leach, 4th ed. 477; Rex v. Hall, 1 T. R. 320, 322; People v. Lohman, 2 Barb. 216, 220; Lohman v. People, 1 Comst. 379; Crim. Proced. I. § 478.

in which erroneous directions not objected to had been given ; the general doctrine being, that the party cannot take advantage of such an error. These propositions, too clear to need further elucidation,<sup>1</sup> have often lain but indistinctly in the minds of judges ; yet they are sufficiently deducible from the decisions.<sup>2</sup> Some cases, therefore, in Massachusetts,<sup>3</sup> Vermont,<sup>4</sup> and Maryland,<sup>5</sup> which seem to hold such an indictment not adequate to sustain a conviction for misdemeanor, are not elsewhere good law ; and, in the first-mentioned State, partly by the operation of statutes which do not change the principle, the early determination has been overruled.<sup>6</sup>

§ 811. *Jurisdiction.* — Want of jurisdiction in the tribunal may prevent a conviction for the less offence on an indictment for the greater. Thus, in Tennessee, during slavery, the circuit court had cognizance of murder, but not of manslaughter, committed by a slave, the latter being triable in another tribunal only ; and the consequence was, that, when a slave was charged in the circuit court with murder, the verdict could not be for manslaughter.<sup>7</sup> But in New Hampshire, a statute having given to justices of the peace exclusive jurisdiction over larcenies to the value of ten dollars and under, directing them to commit the defendants for indictment and trial in the Common Pleas Court when the value was greater ; it was held that the latter might render judgment on a verdict of guilty, valuing the property at less than ten dollars. The reason was, that the committing magistrate had conclusively settled the question of jurisdiction ; while the jury had determined the degree of the defendant's guilt.<sup>8</sup> In Vermont, it

<sup>1</sup> See ante, § 140, note.

<sup>2</sup> *Holmes's Case*, Cro. Car. 376 ; *Rex v. Scofield*, Cald. 397, 2 East P. C. 1028, 1029 ; *Rex v. Caradice*, Russ. & Ry. 205 ; *Rex v. Turner*, 1 Moody, 47 ; *The State v. Upchurch*, 9 Ire. 454 ; *Lohman v. People*, 1 Comst. 379 ; *People v. Lohman*, 2 Barb. 216 ; *The State v. Wimberly*, 3 McCord, 190 ; *Hackett v. Commonwealth*, 3 Harris, Pa. 95 ; *Commonwealth v. Squire*, 1 Met. 258 ; 2 Hawk. P. C. Curw. ed. p. 621 ; *The State v. Knouse*, 29 Iowa, 118 ; *The State v. Boyle*, 28 Iowa, 522 ; *The State v. McNally*, 32 Iowa, 580. See *The State v. Bridges*, 1 Murph. 134. And see ante, § 274, 380, note, 361, note.

<sup>3</sup> *Commonwealth v. Newell*, 7 Mass. 245 ; *Commonwealth v. Macomber*, 8 Mass. 254.

<sup>4</sup> *The State v. Wheeler*, 3 Vt. 344, 347.

<sup>5</sup> *Black v. The State*, 2 Md. 376. Followed in Delaware, *The State v. Darrah*, 1 Houst. Crim. 112.

<sup>6</sup> *Commonwealth v. Squire*, 1 Met. 258.

<sup>7</sup> *Nelson v. The State*, 10 Humph. 518. The like doctrine is also held in New York, *People v. Abbot*, 19 Wend. 192.

<sup>8</sup> *The State v. Arlin*, 7 Fost. N. H. 116. Overruled in *The State v. Dolby*, 49 N. H. 483. See *The State v. Brown*, 24 Conn. 316.

was adjudged, that, if an information in one count charges the larceny of divers articles, some valued above seven dollars and others below, and the verdict finds the respondent guilty as to one article only, of a value less than seven dollars, the court will, on motion, dismiss the case. Said the judge: "Where the property is of less value than seven dollars, the offence is within the jurisdiction of the justice of the peace; who may sentence the prisoner, on conviction, to imprisonment in the county jail. The county court have no jurisdiction over criminal offences which are cognizable before a justice."<sup>1</sup>

§ 812. **Felony proved on Indictment for Misdemeanor.** — It has already been explained that the same criminal thing which is a felony cannot also be a misdemeanor;<sup>2</sup> for the differing consequences of felony and misdemeanor cannot exist together, — as, a man cannot be hung and imprisoned at the same time. But, if to what constitutes a misdemeanor some circumstance is added, the aggregate may well be a felony. In such a case, according to Hawkins,<sup>3</sup> should the indictment be for the misdemeanor, and the aggravation which makes the act felony appear at the trial, opinions are divided on the question whether or not there can be a conviction for the misdemeanor. There is great weight in the reason which he gives for the affirmative of this proposition; namely, "because the king may proceed against the offender as he sees fit, either as a trespasser or a felon." And this is the better doctrine. In England, it appears, if on a trial for misdemeanor the wrongful act is shown to have been carried to an extent which makes it felony, the court will, in its discretion, not as of course,<sup>4</sup> order the proceedings to be suspended, until an indictment can be brought forward for the felony.<sup>5</sup> It is not believed that this practice would be proper with us, or that it is ever resorted to; it would lead to embarrassing complications under our constitutional guaranties against a second jeopardy. If the judge declines to give this direction, the prisoner cannot complain; because it is for his advantage to be prosecuted for the

<sup>1</sup> The State v. Nutting, 16 Vt. 261.

<sup>2</sup> Ante, § 787, 804; Rex v. Cross, 1 Ld. Raym. 711.

<sup>3</sup> Ante, § 788.

<sup>4</sup> Bank Prosecutions, Russ. & Ry. 378.

<sup>5</sup> See, for a full discussion of this point and of the matter generally of this

section and the next two, with citations of authorities, Reg. v. Button, 11 Q. B. 929, 12 Jur. 1017, 18 Law J. n. s. M. C. 19. 3 Cox C. C. 229. And see 1 Chit. Crim. Law, 639; 2 Hawk. P. C. Curw. ed. p. 621; Reg. v. Boulton, 12 Cox C. C. 87, 93; Reg. v. Selsby, 5 Cox C. C. 495, 497, notes.

lighter matter, rather than for the heavier.<sup>1</sup> There are some decisions in Massachusetts,<sup>2</sup> founded partly on statutes since repealed,<sup>3</sup> apparently holding, contrary to this better doctrine, that the prisoner should be found not guilty of the misdemeanor, and then indicted for the felony; but no satisfactory legal reason for this method appears; moreover, if the same evidence were not produced on the second trial, the party would altogether escape. As observed by Lord Denman, C. J.: "The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence; and entire impunity has sometimes been obtained by varying the description of the offence according to the prisoner's interest; he has been liberated on both charges, solely because he was guilty upon both."<sup>4</sup> In confirmation of the liability to conviction for the misdemeanor, the books tell us that, —

§ 813. **Misprision of Felony or Treason.** — Every treason includes a misprision of treason,<sup>5</sup> and every felony a misprision of felony,<sup>6</sup> for which misprision, though only a misdemeanor,<sup>7</sup> the person guilty of the higher crime may nevertheless be proceeded against, "if the king please."

§ 814. **Merger in Conspiracy.** — A conspiracy to commit a felony is a step toward the consummation, but it is only misdemeanor. There are American cases which seem to hold, that, if parties are on trial for such a conspiracy, and they are shown to have proceeded in it to the actual commission of the felony, the misdemeanor is merged, and they cannot be convicted,<sup>8</sup> — a rule, the authorities agree, not applicable where the object of the conspiracy is a misdemeanor.<sup>9</sup> This doctrine, the reader perceives,

<sup>1</sup> Reg. v. Button, *supra*; Reg. v. Neale, 1 Den. C. C. 36; The State v. Leavitt, 32 Maine, 183; Bank Prosecutions, Russ. & Ry. 378; Lohman v. People, 1 Comst. 379, 383; People v. Lohman, 2 Barb. 216, 220; The State v. Vadnais, 21 Minn. 382.

<sup>2</sup> Commonwealth v. Roby, 12 Pick. 496, 508; Commonwealth v. Kingsbury, 5 Mass. 106. The like under the Georgia statute. Kelsey v. The State, 62 Ga. 558.

<sup>3</sup> Commonwealth v. Squire, 1 Met. 258, 261, 262.

<sup>4</sup> Reg. v. Button, *supra*, 11 Q. B. 948.

<sup>5</sup> 1 East P. C. 140.

<sup>6</sup> 4 Bl. Com. 119.

<sup>7</sup> Ante, § 717.

<sup>8</sup> Commonwealth v. Kingsbury, 5 Mass. 106. And see the cases cited in the next note, which, on this point, contain mere dicta. Also, Commonwealth v. Delany, 1 Grant, Pa. 224; Johnson v. The State, 5 Dutcher, 453; Elkin v. People, 28 N. Y. 177. In Kentucky, it has been laid down that a conspiracy to commit a felony, consummated by committing treason, merges. Commonwealth v. Blackburn, 1 Duvall, 4.

<sup>9</sup> The State v. Murray, 15 Maine, 100; People v. Mather, 4 Wend. 229, 265; People v. Richards, 1 Mich. 216; Commonwealth v. McGowan, 2 Parsons, 341;

is contrary to just principle: it has been rejected in England;<sup>1</sup> and, though there may be States in which it is binding on the courts, it is not to be deemed general American law.<sup>2</sup>

§ 815. **Misdemeanor committed by Means of Felony.** — There is authority for saying, that, when a man undertakes to commit a misdemeanor by means of an act which is felony, the law stops with the felony, being the culminating point in the transaction, and punishes him for it, to the disregard of the minor consequence beyond. This doctrine is not so completely established by adjudication as to preclude future inquiry into it. Still it seems not unjust in principle. Therefore —

**False Pretences.** — It has been held, that, if one obtains goods by false pretences, where such obtaining is a misdemeanor, through the instrumentality of a forgery, which is a felony, he can be convicted only of the forgery.<sup>3</sup>

The State *v.* Noyes, 25 Vt. 415; The State *v.* Mayberry, 48 Maine, 218; Commonwealth *v.* O'Brien, 12 Cush. 84; ante, § 804.

<sup>1</sup> Reg. *v.* Button, 11 Q. B. 929, 12 Jur. 1017, 18 Law J. N. S. M. C. 19, 3 Cox C. C. 229; Reg. *v.* Boulton, 12 Cox C. C. 87, 93.

<sup>2</sup> Johnson *v.* The State, 5 Dutcher, 453; ante, § 791.

<sup>3</sup> Rex *v.* Evans, 5 Car. & P. 553; Reg. *v.* Anderson, 2 Moody & R. 469. As to this, however, Lord Denman has observed, "that the misdemeanor of obtaining goods on false pretences consists of a series of acts, the false pretence, and the obtaining of the goods, and the first step

in the series may also be a felony. Where that is the case, there appears no reason why the prisoner should be allowed to defeat the charge of the lesser offence by alleging his own guilt in respect of the greater offence. The same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery; the acquittal on the first charge is no bar to a second inquiry where both are charges of felony; neither ought it to be where the one charge is of felony and the other of misdemeanor." Reg. *v.* Button, supra, 11 Q. B. 946, 947, 3 Cox C. C. 229, 240. And see United States *v.* Rindskopf, 6 Bis. 259.

## BOOK VII.

## INCIDENTAL RELATIONS CONNECTED WITH CRIME.

## CHAPTER LV.

## QUASI CRIME IN REM.

§ 816. *Doctrine of this Chapter.* — When a thing which is the subject of property passes into a situation antagonistic to the law, its owner may lose his ownership in it, whether personally guilty of crime or not, because the thing has offended. The punishment, if such it may be called, falls on the thing, and does not visit the owner's person. Though he loses it, and it lapses to another or the state, the loss is not in the nature of a penalty for personal crime. To explain this doctrine is the object of the present chapter.

§ 817. *Relations of this Subject.* — While, therefore, this is not strictly matter pertaining to crime, it is so connected with the criminal law as to render its introduction here imperative. Indeed, the suffering of one through the loss of his property, to be explained in this chapter, is, though not strictly a punishment, *quasi* such, — to be properly, therefore, viewed in connection with the punishment imposed by the court, and the disabilities which follow by operation of law, on conviction for crime. Yet —

§ 818. *Subject Peculiar.* — The affinities of this subject are not alone with the criminal law. In part, they are with the civil. The popular mind more allies it to the criminal. In fact, it extends its roots into both departments, while its visible branches are its own.

§ 819. *On what Principle.* — Nearly every subject of property is some material thing. As matter, it depends for its existence and relations on the law of nature; but, as property, on the law of the land. If a man owns a bag of coin, and drops it in mid-

ocean where gravitation carries it beyond his reach, he can enjoy it no more, though it continues to be his property ; while, if he maintains his material grasp, yet so uses it that forfeiture takes from him, not the material substance, but the legal right to it, he no longer enjoys the property, which has passed from him, though he has in his hand the gold. Law is the creator of property ; and the province of a creator is to prescribe to the thing created the conditions of its being. When the conditions are violated, the property falls, — vesting in another, or in the state, or being destroyed.<sup>1</sup> The violation may be either a criminal or a civil wrong ; or it may be a thing of which the tribunals take no cognizance, further than simply to recognize the change of proprietorship in the article forfeited when the question comes before them judicially.

§ 820. **Word to express the Idea** — (“Forfeiture” — “Fine of Specific Article” — “Destruction by Abatement”). — It is practically difficult to discuss this subject, because our language has neither any single word, nor any convenient phrase, to signify the transmutation of which we are speaking, and nothing else. A word commonly employed, not as denoting every thing within this chapter, but many things, is *forfeiture*. We cannot avoid using it, yet confusion comes from its use. For the doctrine of forfeiture, as just explained, differs from various other things in the law known by the same name. It differs from a mulct, or general fine ; also, from a fine of the specific article of property, whereby, under a sentence of a court, in pursuance of a statute, such specific article, in distinction from a sum of money in gross, is transferred to the government, as will be by and by mentioned.<sup>2</sup> And it differs from those forfeitures which in the English law attend corruption of blood, on attainder for treason and felony. But within the sort of forfeiture we are considering is the loss

<sup>1</sup> In a Massachusetts case, not of forfeiture, but involving the same principle, Shaw, C. J., said : “ All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to

such reasonable limitations in their enjoyment as shall prevent them from being injurious ; and to such reasonable restraints and regulations, established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.” *Commonwealth v. Alger*, 7 Cush. 53, 85. See also observations on pages 96, 102, 103, of the report.

<sup>2</sup> Post, § 944.

which one suffers who permits a thing to become a nuisance, and it is abated without appeal to the courts, by private means.

§ 821. *Illustrations of these Forfeitures.* — The forfeitures we are now contemplating may be illustrated as follows : —

**Nuisance abated — Taxes not paid — Money bet — Confiscations.**

— If a man so uses his property that it becomes a nuisance, the nuisance is liable to be abated, to the destruction, if necessary, of the property ; <sup>1</sup> if, in some of the States, he declines or omits to pay taxes on his lands, they are forfeited, under statutes, to the State ; <sup>2</sup> one who, in some States, bets money on an election, forfeits the money ; <sup>3</sup> and, during our revolutionary struggle, confiscation acts were in several of the States passed, under which the lands of persons absenting themselves lapsed in some circumstances to the State.<sup>4</sup> Again, —

**Wages for Desertion.** — If a seaman deserts the ship, he forfeits his wages.<sup>5</sup> And —

**Revenue Laws — Enemy Property — Illicit Trade, &c.** — Forfeitures are appointed to enforce revenue and other similar laws.<sup>6</sup> There are also forfeitures of the enemy's property in times of war,

<sup>1</sup> *Lancaster Turnpike v. Rogers*, 2 Barr, 114; *Pennsylvania v. Wheeling and Belmont Bridge*, 13 How. U. S. 518; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Mills v. Hall*, 9 Wend. 315; *Penraddock's Case*, 5 Co. 100 b, Jenk. Cent. 260; *Baten's Case*, 9 Co. 53 b.

<sup>2</sup> *Blackwell on Tax Titles*, 536 et seq.; *Hodgdon v. Wight*, 36 Maine, 326; *Clarke v. Strickland*, 2 Curt. C. C. 439. See *Martin v. Snowden*, 18 Grat. 100; *Harding v. Butts*, 18 Ill. 502; *Lee v. Newkirk*, 18 Ill. 550.

<sup>3</sup> *Doyle v. Baltimore*, 12 Gill & J. 484; *Hickman v. Littlepage*, 2 Dana, 344. See *Hull v. Ruggles*, 65 Barb. 432; *People v. Kent*, 6 Cal. 89.

<sup>4</sup> *Gilbert v. Bell*, 15 Mass. 44; *Borland v. Dean*, 4 Mason, 174; *Cooper v. Telfair*, 4 Dall. 14; *Atherton v. Johnson*, 2 N. H. 31; *Thompson v. Carr*, 5 N. H. 510; *Dunham v. Drake*, Cox, 315; *Martin v. Commonwealth*, 1 Mass. 347; *Conyngham v. Commonwealth*, 3 Yeates, 471; *Hinchman v. Clark*, Cox, 340; *Chews v. Sparks*, Cox, 56; *Boyd v. Banta*, Cox, 266; *Cutts v. Commonwealth*, 2 Mass. 284; *Hylton*

*v. Brown*, 1 Wash. C. C. 298, 307; *Beach v. Woodhull*, Pet. C. C. 2; *Gratz v. Catlin*, 2 Johns. 248; *Catlin v. Gratz*, 8 Johns. 520; *Williams v. Stokes*, 3 Johns. 151; *Sleght v. Kane*, 2 Johns. Cas. 236; *Robinson v. Munson*, 1 Johns. 277; *St. Croix v. Sands*, 2 Johns. Cas. 267; *Palmer v. Horton*, 1 Johns. Cas. 27; *Pell v. Prevost*, 2 Caines, 164; *McGregor v. Comstock*, 16 Barb. 427; *Bare v. Rhine*, 2 Yeates, 286; *Dietrick v. Mateer*, 10 S. & R. 151; *Maclay v. Work*, 5 Binn. 154.

<sup>5</sup> *The Rovenia*, Ware, 309; *Spencer v. Eustis*, 21 Maine, 519; *Sherwood v. McIntosh*, Ware, 109.

<sup>6</sup> *McLane v. United States*, 6 Pet. 404; *Douglass v. Roan*, 4 Call, 353; *Bentley v. Roan*, 4 Call, 153; *Brewster v. Gelston*, 11 Johns. 390; *Wood v. United States*, 16 Pet. 342; *The Ploughboy*, 1 Gallis. 41; *Phile v. The Anna*, 1 Dall. 107; *United States v. Package of Lace*, Gilpin, 338; *Bottomley v. United States*, 1 Story, 135; *United States v. Barrels of Whiskey*, 1 Bond, 587; *United States v. The Queen*, 4 Ben. 237; *United States v. Rectified Spirits*, 8 Blatch. 480; *The*



of property employed by our own people in illicit trade, in violations of embargo laws, and the like.<sup>1</sup>

**Under Common Law — Statutory.** — The reader perceives, that some of the foregoing forfeitures spring from the unwritten law, others from statutes. A forfeiture of the sort now contemplated, therefore, may be either statutory<sup>2</sup> or under the unwritten law.

§ 822. **Judicial Sentence or not — (Effect of Sentence).** --- The forfeiture may be instant on the violation taking place which produces it,<sup>3</sup> or it may come only when pronounced by judicial sentence.<sup>4</sup> If the latter, it will, by legal implication, relate back to the time of the violation; but, in some circumstances, not in all, the intervening interests of innocent purchasers will be protected.<sup>5</sup>

Harriet, 1 Ware, 343; Boat Swallow, 1 Ware, 21; The Nymph, 1 Ware, 257; United States v. Stereoscopic Slides, 1 Sprague, 467.

<sup>1</sup> Atherton v. Johnson, 2 N. H. 31; Church v. Hubbard, 2 Cranch, 187; The Emulous, 1 Gallis. 563; The Joseph, 1 Gallis. 545; The Alexander, 1 Gallis. 582; The Rapid, 1 Gallis. 295; The Eliza, 2 Gallis. 4; The Rugen, 1 Wheat. 62; The Rapid, 8 Cranch, 155; The Lord Wellington, 2 Gallis. 103; The Sally, 8 Cranch, 382; The St. Lawrence, 8 Cranch, 484; Darby v. The Brig Eastern, 2 Dall. 34; United States v. Brig James Wells, 3 Day, 296; The William Gray, 1 Paine, 16; Amory v. McGregor, 15 Johns. 24; United States v. La Jeune Eugénie, 2 Mason, 409; Maisonnaire v. Keating, 2 Gallis. 325; Harmony v. Mitchell, 1 Blatch. 549, 13 How. U. S. 115; United States v. Little Charles, 1 Brock. 347; The Caledonian, 4 Wheat. 100; The Langdon Cheves, 4 Wheat. 103; Jecker v. Montgomery, 18 How. U. S. 110; United States v. One thousand nine hundred and sixty Bags of Coffee, 8 Cranch, 398.

<sup>2</sup> Campbell v. Evans, 45 N. Y. 356; The State v. Rum, 51 N. H. 373; The State v. Intoxicating Liquors, 44 Vt. 208; The State v. Burrows's Liquors, 37 Conn. 425; The State v. Vaughan, 1 Bay, 282; The State v. Symonds, 57 Maine, 148; Luther v. Fowler, 1 Grant, Pa. 176; Thompson

v. Carr, 5 N. H. 510. See Jackson v. Babcock, 16 N. Y. 246; Reynolds v. Schultz, 4 Rob. N. Y. 282; Wilkinson v. Cook, 44 Missis. 367.

<sup>3</sup> McLane v. United States, 6 Pet. 404; Amory v. McGregor, 15 Johns. 24; United States v. One thousand nine hundred and sixty Bags of Coffee, 8 Cranch, 398; United States v. Brigantine Mars, 8 Cranch, 417; Reg. v. Whitehead, 9 Car. & P. 429; Ash v. Ashton, 3 Watts & S. 510; Doyle v. Baltimore, 12 Gill & J. 484.

<sup>4</sup> Fire Department v. Kip, 10 Wend. 266; The Thomas Gibbons, 8 Cranch, 421; The Mars, 1 Gallis. 192; The Caledonian, 4 Wheat. 100; Rex v. Van Muyen, Russ. & Ry. 118; Parker v. United States, 2 Wash. C. C. 861; Hobson v. Perry, 1 Hill, S. C. 277; United States v. Grundy, 3 Cranch, 337; Hodgson v. Millward, 3 Grant, Pa. 406; Hunter v. Routledge, 6 Jones, N. C. 216; United States v. Brig Neurea, 19 How. U. S. 92; United States v. Rectified Spirits, 8 Blatch. 480.

<sup>5</sup> Bukley v. Orms, Brayt. 124; The Mars, 1 Gallis. 192; Clark v. Protection Insurance Company, 1 Story, 109; The Ploughboy, 1 Gallis. 41; United States v. Stevenson, 3 Ben. 119; United States v. Barrels of Whiskey, 1 Abb. U. S. 93; Dean v. Chapin, 22 Mich. 275. In Henderson's Distilled Spirits, 14 Wal. 44, a case in which the claimant was an inno-

§ 823. **Further of the Principle.** — In these cases of forfeiture, the property is supposed so to act, through its possessor, as, losing its resting-place on the law, to fall. Now, —

**Intent — Attempt to alien — Erecting Nuisance.** — A mere intent in a man's mind cannot be deemed an act of his property. Therefore neither an intent,<sup>1</sup> nor ordinarily an attempt,<sup>2</sup> will work a forfeiture. For which reason, among others, a condition in a devise that it shall be void if the devisee *attempts to aliene* the estate is a nullity;<sup>3</sup> and, “if one see his neighbor erecting a thing which will be a nuisance, he cannot abate it till it become an actual nuisance.”<sup>4</sup> Yet this principle should be received cautiously, and as illumined by doctrines about to be stated.

§ 824. **Forfeiture as Punishment.** — In another chapter we shall see,<sup>5</sup> that forfeiture is sometimes a punishment for crime. It is then, as already observed, a different thing from the forfeiture discussed in this chapter.<sup>6</sup> It may fall as well upon a criminal attempt as a substantive offence. But —

**Non-concurrence of Intent.** — Even the forfeitures of this chapter are, in some circumstances, not in others, arrested if

cent purchaser, the doctrine was laid down, that, where the statute makes a forfeiture absolute, the decree of condemnation relates back to the time when the wrongful act was committed, and takes effect then. Applying this rule to the particular case, Clifford, J., said: “Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practised by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture. But the decisive answer to all that is the one already given, that the forfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he cannot by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if traced to

their source, have their origin in the early history of the common law.” p. 61. Yet, for the statute to have this effect, as against purchasers in good faith, the intention of its makers must be plain, that the forfeiture shall be absolute and instantaneous on the commission of the offence. *United States v. Barrels of Spirits*, 1 Dillon, 49, 2 Abb. U. S. 305. And if, for example, the government has by the statute an election to proceed against either the goods or the person, the rights of one who innocently purchases them before the election is made, will be respected. *United States v. The Reindeer*, 2 Cliff. 57, 68.

<sup>1</sup> *Case of Le Tigre*, 3 Wash. C. C. 567, 572.

<sup>2</sup> *McQueen Hus. & Wife*, 271.

<sup>3</sup> *Pierce v. Win*, 1 Vent. 321; *Foy v. Hynde*, Cro. Jac. 697. And see *Mildmay's Case*, 6 Co., 40, 42 b; *Stephens v. James*, 4 Sim. 499.

<sup>4</sup> *Rex v. Wharton*, 12 Mod. 510, by Holt, C. J.

<sup>5</sup> Post, § 944.

<sup>6</sup> Ante, § 820.

the owner's intent did not concur with the property's act. Thus, —

**Overwhelming Necessity — Mistake — Owner's Agent — (Revenue Laws, &c.).** — The violation of revenue laws (not of the criminal department, being merely for the collection of duties<sup>1</sup>) is excused, and the forfeiture avoided, by overwhelming necessity,<sup>2</sup> and by accident and mistake;<sup>3</sup> and the same doctrine is applied to the breach of embargo acts,<sup>4</sup> and to many other things.<sup>5</sup> But in these cases it is of no avail to the owner of the property, that he is free from blame, unless those to whom he had voluntarily intrusted it are so likewise.<sup>6</sup>

§ 825. **Owner's Motive generally Immaterial.** — In these cases, however, the motive of the owner, or whether he committed a crime or not, is generally unimportant. If the forfeiture is purely of the sort treated of in this chapter, it falls whenever the property is found within the required circumstances, be the owner's motives or purposes what they may.<sup>7</sup> But still, the practitioner should remember, if the forfeiture is created by a statute, the statutory terms must not be disregarded, and they may be such as to produce a result quite different from what is thus indicated.<sup>8</sup> To illustrate, —

§ 826. **Owner and Master — (Piratical Aggressions).** — When the master of a vessel undertakes piratical aggressions upon the high seas, contrary to the act of Congress, the owner of the vessel forfeits it, though himself innocent in the transaction.<sup>9</sup> So —

<sup>1</sup> Stat. Crimes, § 195.

<sup>2</sup> *Stratton v. Hague*, 4 Call, 564; *The Gertrude*, 3 Story, 68; ante, § 351.

<sup>3</sup> *United States v. Nine Packages of Linen*, 1 Paine, 129; *Fairclough v. Gatewood*, 4 Call, 158; *United States v. Fourteen Packages*, Gilpin, 235, 244. But see *United States v. Package of Lace*, Gilpin, 338, 342.

<sup>4</sup> *Brig James Wells v. United States*, 7 Cranch, 22; *The New York*, 3 Wheat. 69; *The William Gray*, 1 Paine, 16; *United States v. Brig James Wells*, 3 Day, 296; *United States v. Guillem*, 11 How. U. S. 47.

<sup>5</sup> *The Marianna Flora*, 11 Wheat. 1; *Peisch v. Ware*, 4 Cranch, 347; *Martin v. Commonwealth*, 1 Mass. 347. And see *Sturgess v. Maitland*, Anthon, 153; *The Palmyra*, 12 Wheat. 1.

<sup>6</sup> *Phile v. The Anna*, 1 Dall. 197; *The Bello Corrunes*, 6 Wheat. 152. But see *The State v. Intoxicating Liquors*, 63 Maine, 121. And see *The Porpoise*, 2 Curt. C. C. 307.

<sup>7</sup> And see *The Palmyra*, 12 Wheat. 1, and particularly the observations of Story, J., p. 14, 15.

<sup>8</sup> And see *Commonwealth v. Intoxicating Liquors*, 115 Mass. 142; *United States v. Cook*, 1 Sprague, 213; *The State v. Burrows's Liquors*, 37 Conn. 425; *Attorney-General v. Municipal Court*, 103 Mass. 456; *The State v. Rum*, 51 N. H. 373; *United States v. Barrels of Whiskey*, 1 Bond, 587; *United States v. The Queen*, 4 Ben. 237; *United States v. Distilled Spirits*, 10 Blatch. 428.

<sup>9</sup> *United States v. The Malek Adhel*, 2 How. U. S. 210. In this case, Story,

**Neutral's Interest.** — A neutral's share in a belligerent ship is subject to condemnation.<sup>1</sup> Likewise —

**Embargo Laws.** — If a vessel violates an embargo act, without the owner's concurrence, she is forfeited, the same as if he concurred; for she excavates from beneath her the place of rest on the law, equally whether she acts through her master and crew, or through her owner.<sup>2</sup>

§ 827. **Deodands.** — Another illustration may be drawn from the common-law doctrine of *deodands*, — a branch of the English system not generally, if at all, received in this country.<sup>3</sup> A deodand, in the English law, is any thing — as a cart, a horse, a wheel, or other like object — which occasions the death of a human being; and all the owner's property in “the unhappy instrument,” as Hawkins terms it, is “forfeited to the king, in order to be disposed of in pious uses by the king's almoner.”<sup>4</sup> Now, the law leaves it quite immaterial whether the death were accidental or intended; or whether the person whose property is forfeited participated in the act or not.<sup>5</sup>

§ 828. **Abatable Nuisances.** — One further illustration is in the

J., delivering the opinion of the Supreme Court of the United States, said: “It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equipments on board were the usual equipments for such a voyage. . . . The act [of Congress] makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. . . . It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the ne-

cessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.”

<sup>1</sup> The *Primus*, 29 Eng. L. & Eq. 589.

<sup>2</sup> *United States v. Little Charles*, 1 Brock. 347, 354.

<sup>3</sup> See post, § 968 and note, 970.

<sup>4</sup> 1 Hawk. P. C. Curw. ed. p. 74, § 3, 6.

<sup>5</sup> *Ib.*; 3 Inst. 57; Foster, 287, 288; 1 Hale P. C. 419 et seq. And see *Hampstead's Case*, 1 Salk. 220; *Rex v. Brown*, T. Raym. 208; *Chandois's Case*, Cro. Jac. 483; *Reg. v. Wheeler*, 6 Mod. 187. Anonymous, T. Raym. 97.

law of abatable nuisances. Whenever a subject of property comes, whether through the fault of its owner or not, into a situation to be a nuisance, it is not strictly forfeited; but the nuisance may be abated, to the destruction, if necessary, of the property.<sup>1</sup> If the nuisance is a private one, persons whose interests are prejudiced by it may, without resorting to legal proceedings, go upon the ground and abate it;<sup>2</sup> if a public, it may be abated by any individual of the public, that is, by anybody.<sup>3</sup> Yet, as we have seen,<sup>4</sup> it must be in actual existence, not merely prospective. So the person abating must do no needless damage:<sup>5</sup> as, if a house is used for purposes publicly injurious, he may pull it down, when the injury cannot otherwise be arrested;<sup>6</sup> but, when it can, he must not proceed so far. He is not authorized, for example, to destroy a building occupied as a house of ill-fame.<sup>7</sup> In other words, he may simply abate the nuisance, no more.<sup>8</sup>

§ 829. *Continued* — (Crime or not). — In the case of the private nuisance, no crime is committed; in that of the public one, there is a crime or not, according as the intent of the producer of it concurs criminally therein or not. Thus, —

**In Way — River.** — An indictment ordinarily lies against one who obstructs a public way;<sup>9</sup> but, if by misfortune or accident the owner of a vessel sinks it in a navigable river, he is not indictable;<sup>10</sup> though the nuisance may, like any other obstruction of a public way, be abated.<sup>11</sup> Yet even where a nuisance is cre-

<sup>1</sup> Ante, § 821.

<sup>2</sup> *Gates v. Blincoe*, 2 Dana, 158; *Moffett v. Brewer*, 1 Greene, Iowa, 348; *Lancaster Turnpike v. Rogers*, 2 Barr, 114; *Great Falls Co. v. Worster*, 15 N. H. 412; *Rex v. Rosewell*, 2 Salk. 459.

<sup>3</sup> *Renwick v. Morris*, 7 Hill, N. Y. 575; *Arundel v. McCulloch*, 10 Mass. 70; *Wetmore v. Tracy*, 14 Wend. 250; *Hall's Case*, 1 Mod. 76; *Low v. Knowlton*, 26 Maine, 128; *Manhattan Manuf. & Co. v. Van Keuren*, 8 C. E. Green, 255; *Reg. v. Mathias*, 2 Fost. & F. 570; *Reg. v. Patton*, 13 L. Canada, 311; *Adams v. Beach*, 6 Hill, N. Y. 271; ante, § 490. There are some late American cases in which the proposition is in part or wholly denied. See, and for further discussions, post, § 1080, 1081, and notes.

<sup>4</sup> Ante, § 823.

<sup>5</sup> *Arundel v. McCulloch*, 10 Mass. 70; *The State v. Moffett*, 1 Greene, Iowa, 247; *Moffett v. Brewer*, 1 Greene, Iowa, 348; *James v. Hayward*, W. Jones, 221, 223; *Reg. v. Mathias*, supra.

<sup>6</sup> *Meeker v. Van Rensselaer*, 15 Wend. 397.

<sup>7</sup> *Ely v. Niagara*, 36 N. Y. 297. And see *Miller v. Burch*, 32 Texas, 208.

<sup>8</sup> *Welch v. Stowell*, 2 Doug. Mich. 332; *Barclay v. Commonwealth*, 1 Casey, 503.

<sup>9</sup> *The State v. Knotts*, 2 Speers, 692; *Freeman v. The State*, 6 Port. 372; *Kelley v. Commonwealth*, 11 S. & R. 345.

<sup>10</sup> *Rex v. Watts*, 2 Esp. 675; *Cummings v. Spruance*, 4 Harring. Del. 315.

<sup>11</sup> *Dimmett v. Eskridge*, 6 Munf. 308; *Hopkins v. Crombie*, 4 N. H. 520; *Rung v. Shoneberger*, 2 Watts, 23.

ated by the commission of a crime, its abatement without judicial proceedings is not punishment, which can follow only the conviction of the offender. On such conviction, the court usually perhaps,<sup>1</sup> not always,<sup>2</sup> orders the abatement of the nuisance; yet even this is not properly a part of the punishment. Again, —

**Pardon.** — A pardon of the offence, whereby all punishment is taken away, does not free the nuisance from being abated.<sup>3</sup>

§ 830. **Other Forfeitures.** — Many other illustrations of the foregoing doctrines might be given, but these will suffice.<sup>4</sup>

§ 831. **Legislative Forfeitures — (Constitutional).** — The creation of forfeitures unknown to the common law is a legitimate exercise of the legislative power; but this, like any other, may be restrained by the constitution of the State. The State constitutions differ, the adjudications on the subject are not numerous, and we should traverse a wide field and gather little fruit, if we were to carry our investigations far in this direction. In general, our constitutions have few, if any, direct restrictions under this head; such as exist, if any, resulting from provisions introduced with a primary regard to other objects.<sup>5</sup> Thus there are, in most of the constitutions, guaranties for the protection of persons charged with crime; but the reader has observed, that the forfeitures of this chapter are not, even where a crime is committed, a part of the punishment.

§ 832. **Hogs at Large — (By-laws — Constitutional).** — The general powers of a municipal corporation to make by-laws do not extend to the creation of forfeitures.<sup>6</sup> Still a charter may be in

<sup>1</sup> Anonymous, Comb. 10.

<sup>2</sup> *Rex v. Incledon*, 13 East, 164; *Rex v. West Riding of Yorkshire*, 7 T. R. 467; *The State v. Haines*, 30 Maine, 65; *Rex v. Pappineau*, 1 Stra. 686; *The State v. Noyes*, 10 Fost. N. H. 279.

<sup>3</sup> *Rex v. Wilcox*, 2 Salk. 458. And see *Case of Pardons*, 12 Co. 29.

<sup>4</sup> The reader who is curious to follow this subject further into detail may profitably consult the cases below; namely, — *Barnicoat v. Six Quarter Casks of Gunpowder*, Thacher Crim. Cas. 596; *Trueman v. Casks of Gunpowder*, Thacher Crim. Cas. 14; *American Print Works v. Lawrence*, 3 Zab. 9; *Hale v. Lawrence*, 3 Zab. 590; *Smith v. Maryland*, 18 How. U. S. 71; *Griffin v. Potter*,

14 Wend. 209; *Stump v. Findlay*, 2 Rawle, 168; *Harrisburg Bank v. Commonwealth*, 2 Casey, 451; *French v. Rollins*, 21 Maine, 372.

<sup>5</sup> The reader may consult *Hickman v. Littlepage*, 2 Dana, 344; *Violett v. Violett*, 2 Dana, 323; *Shepherd v. McIntire*, 5 Dana, 574; *Cooper v. Telfair*, 4 Dall. 14; *Atherton v. Johnson*, 2 N. H. 31; *The Apollon*, 9 Wheat. 862; *Commonwealth v. Dana*, 2 Met. 329; *The State v. Allen*, 2 McCord, 55; *Wooldridge v. Lucas*, 7 B. Monr. 49; *The Palmyra*, 12 Wheat. 1; *Boles v. Lynde*, 1 Root, 195; *Whitfield v. Longest*, 6 Ire. 268; *Miller v. The State*, 3 Ohio State, 475.

<sup>6</sup> Stat. Crimes, § 22.

such express terms as to carry the power. But, with no such terms in the charter, an ordinance of the city of Vicksburg directed the city marshal to seize and sell all hogs found running at large in the city, and to pay over half the proceeds to the use of the city hospital, and to retain the other half for his services. And, in accordance with universal doctrine, this ordinance was held to be void. But the court, by Handy, J., added: "If such a power had been expressly conferred by the act of the legislature incorporating the city, it would have been obnoxious to the provisions of the constitution, and void; and much less can it be justified under any general powers conferred upon the corporation by their charter." The ordinance was deemed to be in violation of the provision which declares, that no person "can be deprived of his life, liberty, or property, but by due course of law," and of the provision that "the right of trial by jury shall remain inviolate."<sup>1</sup> Now, this, which is thus laid down *obiter*, is, it is believed, not in accordance with the general and better doctrine. It is competent, on general principles, for the law-making power to declare what shall be a public nuisance, and to provide for the forfeiture of the thing which shall become such. The forfeiture may be as well without judicial proceedings as with, and the case is entirely outside such constitutional provisions as those referred to by the learned judges.<sup>2</sup> Thus, —

**Dogs at Large — (Hogs, again).** — Under a statute duly framed for the purpose, a person who finds a dog at large on his premises, without its owner or keeper, may rightfully kill it, no matter what temptation enticed it from home;<sup>3</sup> and a doctrine like this, contrary to the Mississippi doctrine, appears to be held elsewhere regarding hogs at large.<sup>4</sup>

§ 833. **These Forfeitures and those for Crime further distinguished.** — Our differing statutes, the differing views of judges, and the diverse provisions of the constitutions of our States create complications rendering it impossible to distinguish, by any single rule, the circumstances and statutory words under which a for-

<sup>1</sup> *Donovan v. Vicksburg*, 29 Missis. 247, 250.

<sup>2</sup> Yet, **Stray Animals.** — Something like this Mississippi doctrine is held in New York on the subject of Estrays. *Campbell v. Evans*, 45 N. Y. 356, 54 Barb. 566; *Squares v. Campbell*, 41 How. Pr. 193. As to Pennsylvania, see *Patterson*

*v. McVay*, 7 Watts, 482; *Henry v. Richardson*, 7 Watts, 557.

<sup>3</sup> *Bradford v. McKibben*, 4 Bush, 545; *Blair v. Forehand*, 100 Mass. 136. And see *Brown v. Hoburger*, 52 Barb. 15; post, § 1080 and note.

<sup>4</sup> *Gosselink v. Campbell*, 4 Iowa, 296; *McKee v. McKee*, 8 B. Monr. 433.

feiture should be deemed a punishment for crime,<sup>1</sup> from those in which it should not. But the reader will ordinarily not find it difficult to apply the foregoing principles to new cases as they arise. There have been some nice questions under —

**Modern Liquor Laws.** — In Massachusetts, a statute which directed the forfeiture of intoxicating liquors kept with the intent to sell them contrary to its provisions was adjudged void, because the proceedings it established to enforce the forfeiture were obnoxious to constitutional guaranties for the protection of persons accused of crime.<sup>2</sup> Under a Connecticut statute, the proceeding to enforce a forfeiture of liquor is held to be purely *in rem*, and to charge no personal offence against the owner or keeper.<sup>3</sup> It is plain, therefore, that the forfeiture of liquor, provided for by a statute, is a punishment or not according to the nature and terms of the provision.

§ 834. **General Views.** — In the Massachusetts case, the forfeiture of the property was by the statute itself made to depend upon an intent in the mind of its owner; that is, it was to be forfeited when kept for sale contrary to law. And, disguise the real fact as we may, under whatever form of words, if the intent (located in the owner's breast, not attached to the thing to be forfeited) is the pivot on which the forfeiture turns, then the question is one of criminal law, and the forfeiture is a penalty for crime, instead of being the kind of forfeiture discussed in this chapter. If the statute had provided for the destruction or other forfeiture of the liquor on its being in particular circumstances, or in a particular locality, or in approximation to some particular thing, the question would have been different. And perhaps the distinction thus indicated may show us when a forfeiture ordained in a statute is of the one kind and when of the other kind. Yet, if the intent of the person possessing the thing to be forfeited is a mere secondary element, its introduction into the case will not alone make the forfeiture a penalty for crime. But this entire question is a nice one, on principle, and little illumined by authority.

<sup>1</sup> Ante, § 820, 824.

<sup>2</sup> Fisher v. McGirr, 1 Gray, 1, 22, 26, 27, 36, 37. On the general subject of statutes similar to that of Massachusetts, see The State v. Gurney, 33 Maine, 527; Barnett v. The State, 36 Maine, 198;

The State v. Gurney, 37 Maine, 156; Darst v. People, 51 Ill. 286; The State v. Rum, 51 N. H. 373; Commonwealth v. Intoxicating Liquors, 115 Mass. 142.

<sup>3</sup> The State v. Burrows's Liquors, 37 Conn. 425.



§ 835. *Continued.* — The views thus suggested by the Massachusetts case were not considered by the court. And, looking at the question purely in the light of principle, we have the following: Whenever the law, statutory or common, creates a forfeiture of property by reason of particular circumstances attending it, or of its being dangerous to the community, or of any form or position which it assumes, — this forfeiture is not to be deemed a punishment inflicted on its owner in the criminal-law sense. It is not, therefore, within constitutional guaranties protecting persons accused of crime. Thence it follows, that, if the law, in its clemency, permits the owner still to retain his property and avoid the forfeiture on showing himself innocent of any wrong in the transaction, there is no more a punishment than before. But if the provision is, that a person shall forfeit property A for what property B does, or for what the owner does in a matter not connected with the property, or for a bare intent which does not enter into the situation and conduct of the property, the forfeiture is a punishment which can be inflicted only on conviction of the owner, for his act or intent, viewed as a crime.<sup>1</sup> Difficulties will arise in applying these principles, but the principles themselves seem to be fundamental in our jurisprudence.

<sup>1</sup> In *United States v. Three Tons of Coal*, 6 Bis. 379, Dyer, J., after approving of this passage, adds: "The true test, I think, lies here. When the judgment of forfeiture necessarily carries with it and as part of it a conviction and judgment against the person for the crime, the case is of criminal character. But when the forfeiture does not necessarily involve personal conviction and judgment for the offence, and such conviction and judgment must be obtained, if at all, in another and independent proceeding, there the remedy by way of forfeiture is of civil and not criminal nature." p. 391-393. In this case it was held, that a proceeding against a distillery for forfeiture under the revenue laws is not criminal within the Constitu-

tion of the United States. I presume the learned judge does not mean, that the case is civil whenever there is no *separate* judgment for a *penalty in addition to the forfeiture*; for that would contradict the proposition he had approved. A specific forfeiture may be a punishment, and the only punishment, for a particular offence. Ante, § 820, 824; post, § 944. But the idea appears to be, that it is civil or criminal according as the forfeiture is in the nature of punishment for a personal crime or not. And see *Distilled Spirits*, 2 Ben. 486; *United States v. Barrels of Distilled Oil*, 6 Blatch. 174; *United States v. Distillery*, 11 Blatch. 255; *United States v. The Queen*, 11 Blatch. 416; *Commonwealth v. Intoxicating Liquors*, 107 Mass. 396.

## CHAPTER LVI.

DEFENCE OF PERSON AND PROPERTY.<sup>1</sup>

- § 836, 837. Introduction.  
 838, 839. General Views.  
 840, 841. Perfect and Imperfect Defence distinguished.  
 842-859. The Perfect Defence.  
 860-863. The Imperfect Defence.  
 864-874. Defence of one's Person.  
 875, 876. Defence of one's Property.  
 877. Assisting others in Defence.

§ 836. **Purpose and Scope of this Chapter.**—The law of self-defence, and of the defence by private persons of one another and of their property, comes into frequent discussion in criminal cases. Especially in the title Homicide, it, of itself, constitutes a considerable head. But it is not limited to cases of homicide, therefore it is better discussed by itself.

§ 837. **How the Chapter divided.**—We shall consider, I. Some General Views; II. Distinction between Perfect and Imperfect Defence; III. The Perfect Defence; IV. The Imperfect Defence; V. Summary showing the Right to defend one's Person; VI. Summary showing the Right to defend one's Property; VII. The Right to assist others in Defence of Person and Property.

I. *Some General Views.*

§ 838. **Subject Difficult, and why.**—The question of the rights of private persons to defend themselves, their property, and one another against aggressors, appears obscure in the books; because, though it has often been before the courts and legal authors, they have failed to draw certain distinctions of the utmost importance. Let us, while discussing the general subject,

<sup>1</sup> There is a volume of "Select American Cases on Self Defence," by Horrigan & Thompson, embodying many notes. I recommend its consultation in connection with this chapter.

look for these also ; and, in doing this, descend more into detail, and divide, as already proposed, the matter into minuter parts, than those who have gone before have done.

§ 839. **Preliminary Considerations.** — It is plain, in natural reason, that one may carry the defence of himself further than that of his property ; because personal rights rank higher than those of property. It is plain, also, that, when the defence of one's person or property involves the taking of life, the right to make it may not, in all cases, be perfect. The law may, and, in natural reason, should, in various circumstances, forbid the individual to protect even his undoubted rights in so extreme a way, when the courts are ready to give him redress. And even where the defence may be effectual without the taking of life, still it may be such a disturbance of the peace that the law will forbid it, except under judicial mandate. Other distinctions, founded on natural reason, will occur to the reader ; and it is important he should bear all in mind while we proceed with the discussion.

## II. *Distinction between Perfect and Imperfect Defence.*

§ 840. **What the Distinction.** — There are two kinds of permissible defence of person or property. The one extends, when necessary, to the taking of the aggressor's life ; and this we shall call the perfect defence. The other does not permit him who employs it to go so far ; but he may resist trespasses on his person or property to an extent not exactly the same in all circumstances, yet not involving the life of the trespasser ; and this we shall call the imperfect defence.

§ 841. **Reason for the Distinction.** — The reason for the distinction appears, in a good measure, already.<sup>1</sup> There are circumstances in which, if men were to make no resistance, a wrong would be done beyond the power of the law to redress. Then, if this wrong is of a certain standard magnitude, it ought to be, and it is, lawful for him who is threatened with it to resist to all lengths, without measuring consequences. But, where the menaced injury is slight, especially if of a sort which a proceeding in court can correct, the defence by the individual should not be carried so far, though still he may make some defence.

<sup>1</sup> Ante, § 839.

### III. *The Perfect Defence.*

§ 842. **Limited by Necessity.** — The right to defend one's person or property proceeds from necessity. And, however complete this right may be, or however far the law permits it to be carried, it stops where necessity ends. The party making the defence may use no instrument and no power beyond what will simply prove effectual.<sup>1</sup> Thus, —

§ 843. **Shooting Person committing Felony.** — Though it is lawful for one to oppose another who is committing felony, even to the taking of his life,<sup>2</sup> yet, if there is no obstacle to his arrest, the shooting of him in the felonious act, instead of having him arrested, is a felonious homicide.<sup>3</sup> And, —

**Needless Killing in Self-defence.** — While it is lawful to kill a man in self-defence, still his mere assault with the fist will not justify the instant taking of his life by a stab; and to thus resort to a defence wholly unnecessary is murder.<sup>4</sup> It is not lawful to kill another who even meditates the taking of one's life, till some overt act is done in pursuance of the meditation; in other words, till the danger becomes immediate.<sup>5</sup> The steps necessary may be taken, and no more. Thus, again, —

§ 844. **Expecting Assault.** — A man who expects to be attacked

<sup>1</sup> I have not seen this doctrine laid down in words, but it embodies a principle on which many of the cases proceed; as, *People v. Doe*, 1 Mich. 451; *People v. McLeod*, 1 Hill, N. Y. 377; *Carroll v. The State*, 23 Ala. 28; *Rex v. Thomas*, 1 Russ. Crimes, 3d Eng. ed. 614; *Grainger v. The State*, 5 Yerg. 459; *Shorter v. People*, 2 Comst. 193; *Dill v. The State*, 25 Ala. 15; *The State v. Wells, Cox*, 424; *The State v. Smith*, 3 Dev. & Bat. 117; *Commonwealth v. Drew*, 4 Mass. 391; *Monroe v. The State*, 5 Ga. 85; *Oliver v. The State*, 17 Ala. 587; *Mitchell v. The State*, 22 Ga. 211; *Noles v. The State*, 26 Ala. 31; *People v. Barry*, 31 Cal. 357; *The State v. Burke*, 30 Iowa, 331; *Commonwealth v. Mann*, 116 Mass. 58; *Ruloff v. People*, 45 N. Y. 213; *The State v. Shippey*, 10 Minn. 223; *Bohanon v. Commonwealth*, 8 Bush, 481; *The State v. Benham*, 23 Iowa, 154; *Hinch v. The State*, 25 Ga. 699; *Burden v. People*,

26 Mich. 162; *Harrison v. Harrison*, 43 Vt. 417.

<sup>2</sup> Post, § 849, 853–855, 867, 874.

<sup>3</sup> *Rex v. Scully*, 1 Car. & P. 319. See *Halloway's Case*, W. Jones, 198, Cro. Car. 131.

<sup>4</sup> *Stewart v. The State*, 1 Ohio State, 66, 71. And see *The State v. Yarbrough*, 1 Hawks, 78; *The State v. Tackett*, 1 Hawks, 210; *Mooney v. The State*, 33 Ala. 419; post, § 850. When one is assaulted, it depends on the nature and violence of the assault whether it may be lawfully repelled by stabbing the assailant, *Floyd v. The State*, 36 Ga. 91; *The State v. Neeley*, 20 Iowa, 108; *The State v. Kennedy*, 20 Iowa, 569.

<sup>5</sup> *Dyson v. The State*, 26 Missis. 362; 2 East P. C. 272; *The State v. O'Connor*, 31 Misso. 389; *Lander v. The State*, 12 Texas, 462; *Hinton v. The State*, 24 Texas, 454; *People v. Scoggins*, 87 Cal. 676; post, § 872.

should first employ the means in his power to avert the necessity of self-defence; and, until he has done this, his right of self-defence does not arise.<sup>1</sup> Nor can a person avail himself of a necessity which he has knowingly and wilfully brought upon himself.<sup>2</sup> Yet one assaulted by another who has threatened to kill him is not bound to run in the particular instance, thus increasing his danger by encouraging the assailant to repeat the attempt when he will be less prepared to resist.<sup>3</sup>

§ 845. **Preferring one's own Life to Another's.**—The cases in which a man is clearly justified in taking another's life to save his own are where the other has voluntarily placed himself in the wrong. And probably, as we have seen,<sup>4</sup> it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it would seem, circumstances in which one is bound even to die for another. What are these circumstances is a question which cannot often arise in a judicial tribunal; but—

**Mariner and Passenger.**—The opinion has been expressed, that a mariner at sea should sacrifice himself to a passenger, when his services are not specially needed for the preservation of life. "He is bound," said the court, "to set a greater value on the life of others than on his own; and, while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think, that, if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him."<sup>5</sup>

§ 846. **Duty to avoid taking Life.**—This doctrine, that one is not to destroy the life of an innocent person to save his own, is mentioned here to distinguish it from the rules pertaining to self-defence. From it, and from what is said in preceding paragraphs, may be deduced the further proposition, that every man is under

<sup>1</sup> *People v. Sullivan*, 3 Seld. 396; *The State v. Martin*, 30 Wis. 216; *Edwards v. The State*, 47 Missis. 581; *Gonzales v. The State*, 31 Texas, 495; *The State v. Shippey*, 10 Minn. 223; *Atkins v. The State*, 16 Ark. 568. But there are circumstances in which this is not so. *Bohannon v. Commonwealth*, 8 Bush, 481.

<sup>2</sup> *The State v. Neeley*, 20 Iowa, 108; *Adams v. People*, 47 Ill. 376; *The State*

*v. Bryson*, Winston, No. 2, 86; *The State v. Starr*, 38 Misso. 270.

<sup>3</sup> *Philips v. Commonwealth*, 2 Duvall, 328; *Bohannon v. Commonwealth*, supra. And see *Tweedy v. The State*, 5 Iowa, 433; post, § 851.

<sup>4</sup> Ante, § 348 and the authorities there referred to; 4 Bl. Com. 186.

<sup>5</sup> Baldwin, J., in *United States v. Holmes*, 1 Wal. Jr. 1, 25, Whart. Hom. 237.

a duty to do all he safely can to avoid the taking of life, even though the precise letter of the adjudged cases seems to justify the taking. This proposition, though not distinctly announced in the cases, appears to have been in the minds of judges who have decided some of them.

§ 847. **Care in Self-defence — (Giving Way).** — And thus we are conducted to another proposition; namely, that a man who undertakes a defence of himself against an aggressor, instead of giving way, when by this means he can prevent a collision, does it at extreme peril. Not that he may not resist an attack, or that he must always endanger his own safety by playing the coward; but, if two paths are open for him, the one leading from a conflict and the other to it, and he chooses the latter, he must, to escape the penalties of the law, keep within its exact lines. Another preliminary consideration is —

§ 848. **How Old Authorities regarded — (Special Verdicts).** — In early times, special verdicts were commonly given in causes of homicide, not general ones as now; for, said Lord Hale, “the prisoner cannot plead any thing by way of justification, as that he did it in his own defence, or *per infortunium*, but must plead not guilty; and upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment.”<sup>1</sup> Consequently the judicial utterances on self-defence, found in the old books, are not to be regarded altogether as general legal doctrine; but rather as, in a degree, expressions of views proper to influence the minds of jurors contemplating such particular facts as are embodied in the special verdicts.<sup>2</sup>

§ 849. **Course of Discussion.** — With these general views in our minds, let us proceed more directly to consider, through the remainder of this sub-title, —

*Under what circumstances the Perfect Defence — that is, the defence which may extend to the taking of the aggressor's life — is permissible: —*

**Life the Supreme Right.** — The law holds the life of a man in the highest regard. And only in extreme instances of wrong-doing, and impelled by a supreme necessity, can another innocently take it away. Therefore, —

**Resisting Crime — (Misdemeanor — Felony).** — When, in general,

<sup>1</sup> 1 Hale P. C. 478.

<sup>2</sup> Vol. II. § 678.

a person is in the commission of any mischief whether civil or criminal, no other person opposing him, however lawfully, is entitled to proceed in such opposition to the taking of his life. But to this rule there are exceptions, of which the most prominent one relates to felony. Anciently the punishment of all felony was death;<sup>1</sup> from which reason, or from some other not appearing, it became established doctrine both in England and in our States, that one may oppose another who is attempting to perpetrate any felony, to the extinguishment, if need be, of the felon's existence.<sup>2</sup> Indeed, a man even commits an indictable misdemeanor who neglects to oppose a felony; or, it may be, stops in his opposition short of taking the felon's life, where that extreme measure is the only one which can be made effectual.<sup>3</sup> Again, —

**Suppressing Riots and Affrays, &c.** — It is the duty of officers, and, at least, the right of private persons, to suppress riots and affrays, together with some other misdemeanors of the like nature.<sup>4</sup> And when the disorder can be put down only by the taking of life, this may lawfully be done.<sup>5</sup>

**Resisting Murderous Assault.** — These views may be illustrated by the familiar doctrine, that one assaulted with murderous intent may, to avert the felonious result, take the aggressor's life;<sup>6</sup> and, though his justification rests also on the right of self-defence, it reposes equally on the authority with which the law invests every man to resist the commission of a felony.<sup>7</sup> But, —

§ 850. **Assault not Murderous.** — Where an assault is a simple one, not made with the intent to kill, or do other great bodily

<sup>1</sup> Ante, § 615, 616.

<sup>2</sup> *Oliver v. The State*, 17 Ala. 587; *Monroe v. The State*, 5 Ga. 85; *Moore v. Hussey*, Hob. 93; *Semayne's Case*, 5 Co. 91; *The State v. Harris*, 1 Jones, N. C. 190; *Cooper's Case*, Cro. Car. 544; *United States v. Wiltberger*, 3 Wash. C. C. 515; *The State v. Rutherford*, 1 Hawks, 457; *The State v. Roane*, 2 Dev. 58; *Dill v. The State*, 25 Ala. 15; 1 Hale P. C. 481, 547; *McPherson v. The State*, 22 Ga. 478; *Noles v. The State*, 26 Ala. 31; *Mitchell v. The State*, 22 Ga. 211; *Staten v. The State*, 30 Missis. 619; *Keener v. The State*, 18 Ga. 194; *McClelland v. Kay*, 14 B. Monr. 103; *Rapp*

*v. Commonwealth*, 14 B. Monr. 614; *People v. Payne*, 8 Cal. 341; *The State v. Brandon*, 8 Jones, N. C. 463; ante, § 843; post, § 853-855, 867, 874; Vol. II. § 648-656, 706.

<sup>3</sup> Ante, § 717, 719; *Crim. Proced. I.* § 164, 165.

<sup>4</sup> *Crim. Proced. I.* § 166, 167, 169-171, 183.

<sup>5</sup> Vol. II. § 655. And see *Patten v. People*, 18 Mich. 314.

<sup>6</sup> *The State v. Harris*, 1 Jones, N. C. 190; 3 Inst. 55, 56; ante, § 842.

<sup>7</sup> See *Noles v. The State*, 26 Ala. 31; *Staten v. The State*, 30 Missis. 619; *Aaron v. The State*, 31 Ga. 167.

harm, and the person assailed is not deceived as to its character, — in other words, where the intent of the assailant is not to commit a felony but a misdemeanor,<sup>1</sup> — the right of what we call perfect defence does not exist. The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him;<sup>2</sup> while yet he may repel force by force, and, within limits differing with the facts of cases, give back blow for blow.<sup>3</sup>

**Retreating "to the Wall."** — These cases of mere assault, and cases of mutual quarrel, where the attacking party has not the purpose of murder in his heart, are those to which is applied the doctrine of the books,<sup>4</sup> that one cannot justify the killing of another, though apparently in self-defence, unless he retreated "to the wall," or other interposing obstacle, before resorting to this extreme right. But, —

**Not necessary where Murder meant — Or Deadly Weapon.** — Where an attack is made with murderous intent, the person attacked is under no obligation to fly; he may stand his ground, and, if need be, kill his adversary.<sup>5</sup> And it is the same where the attack is with a deadly weapon;<sup>6</sup> for, in this case, the person

<sup>1</sup> This proposition is practically accurate when viewed in connection with the doctrine that the person assailed is justified in acting from *appearances*. Ante, § 305 and note. But the reader should compare all the doctrines of the chapter with one another. There are many circumstances in which the full defence is permissible, while yet the assailant could not be convicted of assault with intent to commit a felony.

<sup>2</sup> *People v. Harper*, 1 Edm. Sel. Cas. 180; *Stoffer v. The State*, 15 Ohio State, 47; *Commonwealth v. Drum*, 8 Smith, Pa. 9; *United States v. Wiltberger*, 3 Wash. C. C. 515; *Reg. v. Bull*, 9 Car. & P. 22; *Reg. v. Hewlett*, 1 Fost. & F. 91; *Greschia v. People*, 53 Ill. 295.

<sup>3</sup> Vol. II. § 41, 698, 699, 702; *Commonwealth v. Bush*, 112 Mass. 280; *The State v. Conally*, 3 Oregon, 69; *Evans v. The State*, 33 Ga. 4; *Commonwealth v. Mann*, 116 Mass. 58; *The State v. Benham*, 28 Iowa, 154; *Harrison v. Harrison*, 48 Vt. 417; *The State v. Martin*, 30 Wis. 216.

<sup>4</sup> 1 Hale P. C. 479-481; 4 Bl. Com. 185; 3 Inst. 55, 56; *Shorter v. People*, 2

Comst. 193; post, § 869-871. See *Stewart v. The State*, 1 Ohio State, 66, 71; *Creek v. The State*, 24 Ind. 151; *Farrow v. The State*, 48 Ga. 30; *Anonymous*, J. Kel. 58.

<sup>5</sup> *Foster*, 273, where several observations occur, worthy of consideration; 3 Inst. 56; 1 East P. C. 271; *The State v. Mullen*, 14 La. An. 570; *Pfomer v. People*, 4 Parker C. C. 558; *Aaron v. The State*, 31 Ga. 167; *Commonwealth v. Carey*, 2 Brews. 404; *Lingo v. The State*, 29 Ga. 470. In a California case, "on the trial of the case," said Cope, J., "it was shown that the deceased had threatened to take the life of the defendant, and that these threats were communicated to the latter previous to the killing. It did not appear that the threats were followed by any overt act; and, under the circumstances, the mere apprehension of danger was insufficient to justify the homicide." *People v. Lombard*, 17 Cal. 316, 320. See ante, § 843.

<sup>6</sup> *The State v. Thompson*, 9 Iowa, 188, 192; *Tweedy v. The State*, 5 Iowa, 433. And see *The State v. Potter*, 13 Kan. 414; *Kingen v. The State*, 45 Ind. 518.



attacked may well assume that the other intends murder, whether he does in fact or not.

§ 851. **Deductions from foregoing Distinctions.**—The foregoing distinctions show how the pure right of self-defence complicates itself with other rights and duties. And, in looking into a particular case, we must bear all in our minds. Thus,—

**Law of Misprision.**—When a felony is attempted, the duty comes immediately to him who witnesses the attempt, to resist it; insomuch that, as we have seen,<sup>1</sup> if he merely declines this duty, he is guilty of an indictable misdemeanor, called misprision of felony. Now, if the person whom another attacks with intent to murder him flies, instead of resisting, he commits substantially this offence of misprision of felony; even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life. While, on the other hand, if he flies from one meaning merely to inflict a battery, he is in no way amenable either to the letter or spirit of a broken law. And—

§ 852. **Rights to the Two Defences, again — (Duty permissive).**—We see here what appears to be the principal distinction between the rights of perfect and imperfect defence. The perfect defence may be made whenever there is a duty to resist the aggressor; the imperfect is permissible, in one degree or another, when there is no duty to defend, yet the law permits it, if one pleases. And we shall by and by more fully see,<sup>2</sup> that, in the latter, there is a great difference in cases; which we may liken to ascending steps, laid all the way from the lowest point of privilege to remove forcibly a force employed against one's rights, up, by regular gradation, to the very edge of the perfect defence of which we are now treating.

§ 853. **Further of taking Life to prevent Felony.**—The books have some distinctions as to the right to take life to prevent a felony.<sup>3</sup> Thus,—

**Felony by Force or not.**—There are passages in which it seems to be implied, that this right does not exist where the felony is not of a nature to be committed by force.<sup>4</sup> Now, the cases which

<sup>1</sup> Ante, § 716 et seq., 849.

<sup>2</sup> Post, § 860 et seq.

<sup>3</sup> Ante, § 849, 850.

<sup>4</sup> 4 Bl. Com. 180; *Monroe v. The State*, 5 Ga. 85; *Aaron v. The State*, 31 Ga. 167. In a Connecticut case it was observed: "The class of crimes in pre-

vention of which a man may, if necessa-

have arisen are of felony by force; because in others there is either no opportunity to interfere, or no necessity for a forcible interference. But, on principle, there can be no such distinction in the law itself, and probably none is found in actual adjudication.<sup>1</sup> Mr. East, however, states the doctrine in a way seldom or never practically misleading, thus: "A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavors, *by violence or surprise*, to commit a known felony; such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases, he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and, if he kill him in so doing, it is called justifiable self-defence."<sup>2</sup> Still this statement is objectionable as containing an unhappy mingling of doctrines; while, yet, the facts of actual life will seldom or never show a case in which the felony can be prevented only by killing the felon,<sup>3</sup> unless he was attempting or employing actual force, or his movements were awakening surprise in the person present to resist.

§ 854. Spring-guns — (Further of Killing to prevent Crime). —

ry, exercise his natural right to repel force by force to the taking of the life of the aggressor, are *felonies* which are committed by *violence and surprise*; such as murder, robbery, burglary, arson, breaking a house in the daytime *with intent to rob*, sodomy, and rape. Blackstone says: 'Such homicide as is committed for the *prevention* of any forcible and atrocious crime is justifiable by the law of nature; and also by the law of England, as it stood as early as the time of Bracton;' and he specifies, as of that character, those which we have enumerated. No others were specified by Hale or Hawkins, who wrote before him on the Pleas of the Crown, or have been specified by any writer since." The judge, therefore, goes on to say, that, according to the rules of the common law, a man cannot take life in order to prevent a larceny by one breaking and entering his shop; yet, as the Connecticut statute has made such a criminal act burglary, the life may be taken to prevent this burglary the same as burglary at the common law. (See Stat. Crimes, § 139). The State v.

Moore, 31 Conn. 479. The reader who carefully examines the foregoing sections of my text will see what appear to me to be the *reasons* on which the old law on this subject rested. I am speaking of the inherent reasons of the law, in distinction from what may have been said about them by any particular author or judge. (See ante, § 274.) And I think the reasons thus given harmonize with the adjudications, and explain and enforce them, while excluding the supposed distinction between the different kinds of felony. It does not, however, follow, that the right to take life will extend to the prevention of every species of modern statutory felony, where the punishment is not death, but only imprisonment. In many cases of this sort the question may well be deemed open to doubt upon principle, as well as upon authority. See also post, § 855. And see Pond v. People, 8 Mich. 150.

<sup>1</sup> See the authorities cited ante, § 849.

<sup>2</sup> 1 East P. C. 271. And see the State v. Thompson, 9 Iowa, 188, 192.

<sup>3</sup> Ante, § 842.

In Kentucky, the court in a civil action held, that one having property in a warehouse well secured under locks may erect, as an additional protection at night, a spring-gun, made to explode on entering the house. Therefore, when a slave broke and entered it in the night, to steal, exploding the gun and wounding himself mortally, the warehouse owner was held not to be answerable to the owner of the slave for his value. And Nicholas, J., said: "It would seem, that the right of killing to prevent the perpetration of crime depends more upon the character of the crime, and the time and manner of its attempted perpetration, than upon the degree of punishment attached to it by law, or upon the fact of its being designated in the penal code as a felony or not. A name can neither add to nor detract from the moral qualities of a crime; and, in the eye of reason and justice, the intrinsic nature of the offence, together with the time and manner of its attempted commission, must ever test the legality of the means resorted to for its prevention."<sup>1</sup>

§ 855. *Continued.* — These observations (not speaking now of the question adjudged) leave out of view the central truth, that legal doctrine is shaped to promote certainty of judicial decision, as well as justice in the particular instances. And among the distinctions established to reconcile the demands of justice and certainty is the division of crime into felony and misdemeanor, with the differing consequences which flow from each.<sup>2</sup> As to the point decided, this case seems fairly within the general rule which permits one to interpose for the prevention of a felony. Yet, in Alabama, the right is limited to the defence of the habitation.<sup>3</sup> Where conceded, its practical carrying out may be dangerous, and it should be carefully guarded.<sup>4</sup>

<sup>1</sup> Gray v. Combs, 7 J. J. Mar. 478, 483.  
See McClelland v. Kay, 14 B. Monr. 103.

<sup>2</sup> Ante, § 609.

<sup>3</sup> Simpson v. The State, 59 Ala. 1.

<sup>4</sup> And see Bird v. Holbrook, 4 Bing. 628. *How in Connecticut.* — In Connecticut it is held, that spring-guns may be set to protect a shop against burglars; but, if they endanger persons travelling on the highway, the setting of them will be indictable as a nuisance. The State v. Moore, 31 Conn. 479; ante, § 853, note; post, § 856. *How in England, under Statute, &c.* — It was provided by

7 & 8 Geo. 4, c. 18, § 1 (now superseded by 24 & 25 Vict. c. 100, § 31, containing substantially the same provisions), that, "whereas it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm, &c., therefore, &c., if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily

§ 856. **Spring-guns as Nuisance.** — While the Connecticut court sustains the right thus to set spring-guns as a protection to person and property,<sup>1</sup> it holds that they may be so placed as to become an indictable public nuisance. They are such when located near a highway, if they render travelling thereon dangerous. But where, on a prosecution for nuisance, the jury, by a special verdict, found that the defendant put spring-guns in his shop for its protection against burglars; that they were loaded with large shot, and so placed as to discharge their contents obliquely toward the highway, the travelled path of which was about a rod and a half from the shop; that the shop was lathed and plastered on the inside, and double-boarded on the outside, but it was possible scattering shot might pass through the boards at places where by reason of cracks there was not a double thickness of boards; and that the travelling public were annoyed by apprehensions of harm from the guns; it was still held that such real and substantial danger did not appear as would warrant a conviction.<sup>2</sup>

§ 857. **In General, Perfect Defence of Property.** — The setting of spring-guns, and the taking of life by other means, when done in resistance of felony, operate indirectly as perfect defence of property within a limited range. But otherwise such defence of mere property is not permissible. The general doctrine is, that, while a man may use "all reasonable and necessary force, to defend his

harm upon a trespasser or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor." And, where one entered another's garden at night, without permission, to search for a stray fowl, and, while looking into some bushes, came in contact with a wire which caused something to explode with a loud noise, knocking him down, and slightly injuring his face and eyes, it was held, that the other was not liable for this injury either at the common law, or, in the absence of evidence of its having been caused by a spring-gun or other engine "calculated to inflict grievous bodily harm," under the above statute. *Wootton v. Dawkins*, 2 C. B. n. s. 412. A dog-spear, set in the woods to protect game from dogs, is not within this statute; and, without it,

one cannot recover for injury to his dog by a dog-spear, if, knowing of its existence, he walks through the wood, and the dog, attracted by game, runs upon it and is wounded. And the court intimated, that it would make no difference though the owner of the dog was ignorant of the existence of the dog-spear. *Jordin v. Crump*, 8 M. & W. 782. On the right to claim damages for injuries received by a man and his dog, from spring-guns and similar things, at the common law and by force of this statute, opinions not quite uniform have been expressed by different English judges. See the above case of *Jordin v. Crump*; also, *Deane v. Clayton*, 7 Taunt. 489; *Ilott v. Wilkes*, 3 B. & Ald. 804; and some others there referred to.

<sup>1</sup> Ante, § 855, note.

<sup>2</sup> *The State v. Moore*, 81 Conn. 479.

real or personal estate, of which he is in the actual possession, against another who comes to dispossess him without right,"<sup>1</sup> he cannot innocently carry this defence to the extent of killing the aggressor. If no other way is open, he must yield, and get himself righted by resort to the law.<sup>2</sup> But—

§ 858. **Defence of Castle.**—The general doctrine, as to the defence of property, is not applicable to the defence of what is termed the castle. In the early times, our forefathers were compelled to protect themselves in their habitations, by converting them into holds of defence; and so the dwelling-house was called a castle. And thence has grown up the familiar doctrine, that, while a man keeps the doors of his house closed, no other has the right to break in, under any circumstances; except in particular cases where it becomes lawful for the purpose of making an arrest of the occupant, or the like,—cases which it is not within our present line of discussion to consider. From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out, even to the taking of life.<sup>3</sup> As observed by Campbell, J., in a Michigan case,

<sup>1</sup> Ante, § 536.

<sup>2</sup> United States v. Wiltberger, 3 Wash. C. C. 515; Oliver v. The State, 17 Ala. 587; Commonwealth v. Green, 1 Ashm. 289, 297; Carroll v. The State, 23 Ala. 28; The State v. Morgan, 3 Ire. 186; McDaniel v. The State, 8 Sm. & M. 401; The State v. Zellers, 2 Halst. 220; Harrison v. The State, 24 Ala. 67; Commonwealth v. Drew, 4 Mass. 391; Monroe v. The State, 5 Ga. 85; Howell v. The State, 5 Ga. 48; Rex v. Ford, J. Kel. 51; The State v. Smith, 3 Dev. & Bat. 117; The State v. Lazarus, 1 Mill, 33; Moore v. Hussey, Hob. 93; Semayne's Case, 5 Co. 91; Reg. v. Sullivan, Car. & M. 209; United States v. Williams, 2 Cranch C. C. 438; The State v. Noles, 26 Ala. 31; McAuley v. The State, 3 Greene, Iowa, 435; The State v. McDonald, 4 Jones, N. C. 19; People v. Horton, 4 Mich. 67; Priester v. Augley, 5 Rich. 44; The State v. Buchanan, 17 Vt. 573; People v. Hubbard, 24 Wend. 369; Commonwealth v. Kennard, 8 Pick. 133; The State v. McDonald, 4 Jones, N. C. 19; Haynes v. The State, 17 Ga. 465; The State v. Brandon, 8 Jones, N. C. 463; Kunkle v. The State,

32 Ind. 220. See People v. Payne, 8 Cal. 341; People v. Batchelder, 27 Cal. 69; The State v. Burwell, 63 N. C. 661; Reg. v. Archer, 1 Fost. & F. 351; Murphy v. People, 37 Ill. 447; The State v. Vance, 17 Iowa, 138. See post, § 876.

<sup>3</sup> 1 Hale P. C. 458, where this learned author says: "A bailiff, having a warrant to arrest Cook upon a *capias ad satisfaciendum*, came to Cook's house and gave him notice, Cook menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, Cook shoots him, and kills him; it was ruled, 1. That it is not murder because he cannot break the house, otherwise it had been if it had been upon an *habere facias possessionem*. 2. But it was manslaughter, because he knew him to be a bailiff. But, 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defence of his house." s. c. Cook's Case, Cro. Car. 537. And see, as to the doctrine of the text, 1 Chit. Crim. Law, 56; Moore v. Hussey, Hob. 93, 96; Semayne's Case, 5 Co. 91, where it is said, "Every one

“a man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life.”<sup>1</sup> And a man’s business office has been held, in Missouri, to be his dwelling-house within this rule.<sup>2</sup> Still, —

§ 859. **Waiving Protection of Castle.** — One may waive the protection of his castle by permitting another to enter; then, if the latter does enter without a breaking,<sup>3</sup> the parties stand toward each other on different ground.<sup>4</sup> Thus, —

**Putting out of House.** — If a man enters another’s dwelling-house peaceably, on an implied license, he cannot be ejected except on request to leave, followed by no more than the necessary and proper force, even though misbehaving himself therein.<sup>5</sup> Yet if the entry itself is with violence or is opposed, no request to depart need precede the act of turning out; since the trespasser knows, as well without express words as with, that his absence is desired.<sup>6</sup> Hence a needless battery, resulting in death, employed in ejecting an intruder from the dwelling-house, will constitute felonious homicide.<sup>7</sup> And though one has forbidden another his house, yet, should the latter come peaceably, and not instantly leave on being ordered away, the former, killing him, will be guilty of murder.<sup>8</sup> Still one attacked in his home need not retreat,<sup>9</sup> and he may use all necessary force to eject the intruder.<sup>10</sup>

may assemble his friends and neighbors to defend his house against violence;” *Commonwealth v. Drew*, 4 Mass. 391; 4 Bl. Com. 223; *Reg. v. Sullivan*, Car. & M. 209; *The State v. Zellers*, 2 Halst. 220; *Hudgins v. The State*, 2 Kelly, 173; *Carroll v. The State*, 23 Ala. 28; *Haynes v. The State*, 17 Ga. 465; *Temple v. People*, 4 Lans. 119; *Corey v. People*, 45 Barb. 262; *The State v. Patterson*, 45 Vt. 308; *The State v. Medlin*, Winst. No. II. 99; *Ford’s Case*, J. Kel. 51; *Weaver v. Bush*, 8 T. R. 78; *The State v. Taylor*, 82 N. C. 554; 1 Hawk. P. C. Curw. ed. p. 98, § 36; *Crim. Proced. I.* § 195. Such also is plainly the ancient doctrine. Thus Britton, treating of Appeals of Homicide, says: The defendant “may say, that, although he committed the act, yet he did not do it by felony pre-pense, but by necessity in defending himself, or his wife, or his house, or his family, or his lord, or his lady, from death.” *Nichols’s Translation of Brit.*, vol. i. p. 113.

<sup>1</sup> *Pond v. People*, 8 Mich. 150, 177. See *De Forest v. The State*, 21 Ind. 23.

<sup>2</sup> *Morgan v. Durfee*, 69 Misso. 469.

<sup>3</sup> *Stat. Crimes*, § 290, 312.

<sup>4</sup> *Crim. Proced. I.* § 195, 199, 200.

<sup>5</sup> *Post*, § 862, 873; *Gregory v. Hill*, 8 T. R. 299; *Shaw v. Chairtie*, 3 Car. & K. 21; *Green v. Bartram*, 4 Car. & P. 308; *Reg. v. Roxburgh*, 12 Cox C. C. 8. And see *Ballard v. Bond*, 1 Jur. 7.

<sup>6</sup> *Tullay v. Reed*, 1 Car. & P. 6; *Polkinhorn v. Wright*, 8 Q. B. 197, 206; *Green v. Goddard*, 2 Salk. 641.

<sup>7</sup> *The State v. Lazarus*, 1 Mill. 33; *McCoy v. The State*, 3 Eng. 451. And see *Reg. v. Sullivan*, Car. & M. 209; *Rex v. Longden*, Russ. & Ry. 228.

<sup>8</sup> *The State v. Smith*, 3 Dev. & Bat. 117. See *People v. Horton*, 4 Mich. 67.

<sup>9</sup> *The State v. Harman*, 78 N. C. 515; *post* § 869.

<sup>10</sup> *The State v. Dugan*, 1 Houst. Crim. 563. And cases cited to last section.

IV. *The Imperfect Defence.*

§ 860. **Extends to both Person and Property.** — Though the perfect defence cannot, as just seen, be resorted to for the protection of property, except where it consists of the castle, or a felony is being committed upon it; yet, on the other hand, the imperfect defence is permitted as well of the property as the person.

§ 861. **As to Property.** — A man may lawfully defend his property in possession by any degree of force, short of the taking of life, necessary to make the defence effectual;<sup>1</sup> unless it amounts to a riot, a forcible detainer, or some other like crime. Yet he cannot proceed therein beyond what necessity requires.<sup>2</sup> For illustration, —

**By Assault and Battery — Accidental Homicide.** — An assault and battery may be justified as inflicted in defence of one's property.<sup>3</sup> And if, in the employment of necessary force, the party resisted is accidentally killed, the doctrine seems to be on authority,<sup>4</sup> and clearly is in principle, that the homicide is not punishable. Yet, consistent with this proposition, is another, that one in the defence of his property should not resort to means reasonably calculated to endanger life.<sup>5</sup> For, —

§ 862. **By Dangerous Weapon — Improper Battery — (Homicide).** — If a dangerous weapon is used when other means would suffice, resulting in death, however unintended;<sup>6</sup> or, *a fortiori*, if the trespasser is intentionally killed;<sup>7</sup> the party so resisting becomes guilty of a felonious homicide. Nor should one turn another out

<sup>1</sup> Ante, § 857; *The State v. Johnson*, 12 Ala. 840. Still Mr. East observes: "A man cannot justify maiming another in defence of his possessions, but only in defence of his person. This restriction, however, cannot be intended to extend to cases where a man defends himself against a known felony, threatened to be committed with violence, against even his property." 1 East P. C. 402.

<sup>2</sup> Ante, § 842; *The State v. Clements*, 32 Maine, 279; *The State v. Lazarus*, 1 Mill, 38.

<sup>3</sup> *Harrington v. People*, 6 Barb. 607; *The State v. Briggs*, 3 Ire. 357. And see

*The State v. Hooker*, 17 Vt. 658; *Faris v. The State*, 3 Ohio State, 159.

<sup>4</sup> The principle of the statement in the text is possibly sustained in *The State v. Merrill*, 2 Dev. 269.

<sup>5</sup> *Kunkle v. The State*, 32 Ind. 220. And see *Territory v. Drennan*, 1 Montana, 41.

<sup>6</sup> *Commonwealth v. Drew*, 4 Mass. 391; *McDaniel v. The State*, 8 Sm. & M. 401; *The State v. Zellers*, 2 Halst. 220. And see *Reg. v. Sullivan*, Car. & M. 209.

<sup>7</sup> *Harrison v. The State*, 24 Ala. 67; *McDaniel v. The State*, 8 Sm. & M. 401; *The State v. Smith*, 3 Dev. & Bat. 117.

of his house with a kick,<sup>1</sup> or beat or tie to a horse a trespasser who yields;<sup>2</sup> and he who does these things, producing death, commits felonious homicide.

§ 863. **Defence of the Person.** — Since one may resort to the perfect defence of his person, it follows that he may to the imperfect. But the doctrine will be more exactly stated under the next sub-title.

### *V. Summary showing the Right to defend one's Person.*

§ 864. **How the Discussion distributed.** — Much of what would properly appear under this sub-title will be found under the last two, which should be read in connection with this.

§ 865. **When killing in Self-defence permissible.** — The rule is commonly stated in the American cases thus: if the individual assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable.<sup>3</sup> And this proposition, it has been held, cannot be qualified by adding to it the words, "which [bodily harm] might probably endanger his life;" for persons attacked may destroy the life of an assailant, though no danger, near or remote, threatens their own lives, but only their safety in a less degree.<sup>4</sup> "The law gives a person the same right to use

<sup>1</sup> Wild's Case, 2 Lewin, 214. And see McCoy v. The State, 3 Eng. 451.

<sup>2</sup> Holloway's Case, Palmer, 545; s. c. nom. Holloway's Case, Cro. Car. 131, W. Jones, 198; 1 Hale P. C. 473; Foster, 291.

<sup>3</sup> Young v. The State, 11 Humph. 200; People v. Shorter, 4 Barb. 460; Shorter v. People, 2 Comst. 193; Stewart v. The State, 1 Ohio State, 66, 71; Copeland v. The State, 7 Humph. 479; The State v. Wells, Cox, 424; Holmes v. The State, 23 Ala. 17; Carroll v. The State, 23 Ala. 28; Dill v. The State, 25 Ala. 15; Rapp v. Commonwealth, 14 B. Monr. 614; Campbell v. People, 16 Ill. 17; Meridith v. Commonwealth, 18 B. Monr. 49; Green v. The State, 28 Missis. 687; Pond v. People, 8 Mich. 150; People v. Cole, 4 Parker C. C. 35; The State v. Swift, 14 La. An. 827; Rippey v. The State, 2 Head,

217; Payne v. Commonwealth, 1 Met. Ky. 370; The State v. Mullen, 14 La. An. 570; Kingen v. The State, 45 Ind. 518; People v. Lamb, 54 Barb. 342; The State v. Abarr, 39 Iowa, 185; Commonwealth v. Crawford, 8 Philad. 490; Berry v. Commonwealth, 10 Bush, 15. And see Monroe v. The State, 5 Ga. 85; Pennsylvania v. Robertson, Addison, 246; Fahnestock v. The State, 28 Ind. 281, 257; The State v. King, 22 La. An. 454; Thompson v. The State, 24 Ga. 297; Isaacs v. The State, 25 Texas, 174; Pound v. The State, 43 Ga. 88; Head v. The State, 44 Missis. 731; Evans v. The State, 44 Missis. 762; The State v. Bertrand, 3 Oregon, 61; The State v. Conally, 8 Oregon, 69; Stoneman v. Commonwealth, 25 Grat. 887; ante, § 305.

<sup>4</sup> Young v. The State, 11 Humph. 200. And see The State v. Sloan, 47 Misso.



such force as may be reasonably necessary, under the circumstances by which he is surrounded, to protect himself from *great bodily harm*, as it does to prevent his life being taken. He may excusably use this necessary force to save himself from any felonious assault,"—though he should thereby kill the aggressor.<sup>1</sup> Let us look at some points of this doctrine more minutely.

§ 866. **Defence of Limb — Chastity — (Resistance of Felony).** — Grotius — not a common-law authority, but worthy of high respect on such a subject<sup>2</sup> — observes: "Since the loss of a limb, especially of a principal one, is very grievous, and nearly equal to the loss of life; and since, moreover, it can hardly be known whether it do not bring in its train loss of life; if it cannot otherwise be avoided, I think the author of such danger may be slain. Whether the same be lawful in defence of chastity, can scarcely be doubted, since not only common estimation, but the divine law, makes chastity of the same value as life."<sup>3</sup> But the right of self-defence even to the taking of life sufficiently results, in these cases, from the doctrine, already discussed, of resistance to the commission of a felony; though, doubtless, it equally results from the considerations thus mentioned by Grotius.

§ 867. **Repelling Battery.** — According to the books, a man cannot, as we have seen,<sup>4</sup> justify the killing of another who comes merely to beat him; though he may repel the assault by a beating till the aggressor desists.<sup>5</sup> Now, —

**Danger of Great Bodily Harm.** — The distinction is not a broad one, or quite discernible in principle, between this beating, especially if extreme, and the great bodily harm to prevent which, it has just been stated,<sup>6</sup> the assailant's life may be taken. And, in reason, the form of expression does not appear accurate when we say, in the language of most of the cases, that one may take the life of another to avoid great bodily harm from him. Perhaps the expression may be justified on the ground that it is less likely

604; *People v. Campbell*, 30 Cal. 312; *Reg. v. Hewlett*, 1 Fost. & F. 91; *The State v. Benham*, 23 Iowa, 154; *The State v. Burke*, 30 Iowa, 331.

<sup>1</sup> *The State v. Burke*, 30 Iowa, 331.

<sup>2</sup> See *Bishop First Book*, § 138, 572, *Grotius*, note.

<sup>3</sup> Grotius *de Jure Belli et Pacis*, ii. 1, § 6 & 7, Whewell's ed. Vol. I. p. 211.

<sup>4</sup> Ante, § 843, 850.

<sup>5</sup> 1 East P. C. 272; *United States v. Wiltberger*, 3 Wash. C. C. 515; *Nailor's Case*, cited Foster, 278. And see *Reg. v. Driscoll*, Car. & M. 214.

<sup>6</sup> Ante, § 865.

to mislead a jury than one scientifically more accurate. But, on principle, and more definitely, the doctrine is thus, —

**Resisting Attempted Felony — (Mayhem — Sodomy — Rape — Ultimate Danger to Life, &c.).** — The attempt to commit any felony, such as a mayhem, the crime against nature, or a rape,<sup>1</sup> upon the person, — or, in the language of a learned court as quoted in a previous section,<sup>2</sup> any “*felonious assault*,” — comes under the head of perfect defence; and this attempt may be resisted to the death, without any flying or avoiding of the combat.<sup>3</sup> Moreover, the danger, to constitute a danger to the life, need not be of immediate death, but of such an injury as will shorten the period of the earthly existence. And these considerations, it is submitted, should properly be deemed a sufficient extension of the right to take the life of him who does not endanger the life of the person he assails. But this statement of the doctrine, let it be repeated, does not differ greatly in effect from the common form; as, for example, the difference is not practically broad between danger of great bodily harm and danger of a felonious maim or mayhem.

§ 868. **Repelling Attempts against Liberty.** — The attempt to take away one’s liberty is not such an aggression as may be resisted to the death. Thus, —

**In Unlawful Arrest — Kidnapping.** — If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him. He has no protection from his office, or from the fact that the other is an offender. But the doctrine already stated,<sup>4</sup> that nothing short of an endeavor to destroy life will justify the taking of life, prevails in this case; consequently, if the one to be arrested kills the officer or private individual in resisting, he commits thereby the lower degree of felonious homicide called manslaughter.<sup>5</sup> Still, in principle, life and liberty stand on substan-

<sup>1</sup> 1 Gab. Crim. Law, 495; 4 Bl. Com. 181; Foster, 274; 1 Hale P. C. 485.

<sup>2</sup> Ante, § 865.

<sup>3</sup> Ante, § 849, 850.

<sup>4</sup> Ante, § 863–868.

<sup>5</sup> Rex v. Deleany, Jebb, 88; Reg. v. Tooley, 11 Mod. 242; Roberts v. The State, 14 Misso. 138; Rex v. Gordon, 1 East P. C. 315, 352; Rex v. Patience, 7 Car. & P. 775; Rex v. Thompson, 1 Moody, 80; Rex v. Gillow, 1 Moody, 85,

1 Lewin, 57; Reg. v. Phelps, Car. & M. 180; Rex v. Withers, 1 East P. C. 295, 360; Commonwealth v. Drew, 4 Mass. 391; The State v. Craton, 6 Ire. 164; Rex v. Curran, 3 Car. & P. 397; Rex v. Addis, 6 Car. & P. 388; Rex v. Davis, 7 Car. & P. 785; Rex v. Howarth, 1 Moody, 207; Rafferty v. People, 72 Ill. 37; Goodman v. The State, 4 Texas Ap. 349. And see Rex v. Dixon, 1 East P. C. 313; The State v. Ramsey, 5 Jones, N.C. 195; Vol. II. § 699.

tially one foundation ; life being valueless without liberty. And the reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life, may be because liberty can be secured by a resort to the laws. And if a case should arise, in which the attempt was to convey a person by force beyond the reach of the laws, and there confine him perpetually, doubtless the courts would hold him justified legally, as in the judgment of every man he would be morally, in resisting to death. And there would be foundation for extending this proposition to any attempt to convey the individual out of the country.<sup>1</sup>

§ 869. **Conflict not to be sought.** — Though, if one is attacked by a man who intends to kill him, he may stand his ground and kill the assailant as already explained, still it would seem not permissible for him, knowing the other's designs, to seek the conflict.<sup>2</sup> Thus we have seen,<sup>3</sup> that one who is threatened must wait for some overt act before resorting to his right of self-defence.<sup>4</sup> And after a danger has passed, one is not justified in following up the adversary to take his life.<sup>5</sup> The principle of the law plainly is, that a conflict for blood should, if possible, be avoided. And from this principle proceeds the doctrine, already mentioned,<sup>6</sup> that, —

**Retreating to the Wall.** — If there is a mere fight, or an assault not murderously intended, and it progresses to a conflict for blood, neither party can innocently avail himself of the right of perfect defence by killing the other, until he has endeavored to extricate himself by "retreating to the wall," as the old phrase is. In the words of Lord Hale: "Regularly it is necessary, that the person that kills another in his own defence fly as far as he may to avoid the violence of the assault, before he turn upon his assailant; for, though in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet, in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honor, because the

<sup>1</sup> And see *Williams v. The State*, 44 Ala. 41.

<sup>2</sup> And see *Commonwealth v. Drum*, 8 Smith, Pa. 9.

<sup>3</sup> Ante, § 843; post, § 872.

<sup>4</sup> *Dawson v. The State*, 33 Texas, 491; *Johnson v. The State*, 27 Texas, 758;

*Williams v. The State*, 3 Heisk. 376; *Evans v. The State*, 44 Missis. 762; *The State v. Horne*, 9 Kansas, 119.

<sup>5</sup> *The State v. Conally*, 3 Oregon, 69; *Evans v. The State*, 33 Ga. 4.

<sup>6</sup> Ante, § 850.

king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.”<sup>1</sup> But he goes on to show, that this doctrine cannot apply where flight is impossible; and indeed he explains, as do all the old writers on this branch of our law, that the right to take the assailant’s life is only to be exercised when no other means of escape are open. The proposition is admirably laid down in a New York case, that, when a man expects to be attacked, the right of self-defence does not arise until he has done every thing to avoid the necessity of using it;<sup>2</sup> and this proposition seems clearly to apply in all circumstances of the nature of those now under consideration.<sup>3</sup> Moreover, a person attacked in his own dwelling-house need not fly from it, but he may use all the violence necessary for his protection.<sup>4</sup> After a man has retreated, and no further way of escape is open, then, of course, he may turn and kill the aggressor.<sup>5</sup> But one must not have brought on himself the necessity which he sets up in his own defence.<sup>6</sup>

§ 870. Continued — (Mutual Combat). — The cases in which this doctrine of retreating to the wall is commonly invoked, are those of mutual combat. Both parties being in the wrong, neither can right himself except by “retreating to the wall.” When one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place.<sup>7</sup> Lord Hale says: “If A assaults B first, and upon that assault B reassaults A, and that so fiercely that A cannot retreat to the wall or other *non ultra* without danger of his life; nay, though A fall upon the ground upon the assault of B, and then kills B; this shall not be interpreted to be *se defendendo*, but to be murder, or simple homicide, according to the circumstances of the case; for otherwise we should have all cases

<sup>1</sup> 1 Hale P. C. 481.

<sup>2</sup> People v. Sullivan, 3 Seld. 396. And see United States v. Mingo, 2 Curt. C. C. 1.

<sup>3</sup> See Oliver v. The State, 17 Ala. 587; Reg. v. Smith, 8 Car. & P. 160; Creek v. The State, 24 Ind. 151.

<sup>4</sup> The State v. Martin, 30 Wis. 216. And see People v. Walsh, 43 Cal. 447.

<sup>5</sup> Stoffer v. The State, 15 Ohio State, 47.

<sup>6</sup> 1 Hawk. P. C. Curw. ed. p. 82, § 22; Vaiden v. Commonwealth, 12 Grat. 717; Haynes v. The State, 17 Ga. 465; post, § 870 and note.

<sup>7</sup> Foster, 227; The State v. Hill, 4 Dev. & Bat. 491; Stoffer v. The State, 15 Ohio State, 47. And see The State v. Howell, 9 Ire. 485.

of murders or manslaughters by way of interpretation turned into *se defendendo*.”<sup>1</sup> But a better reason for this just conclusion is, that, by continuing in the combat, the party brought upon himself the necessity of killing his fellow-man.<sup>2</sup>

§ 871. Continued — (Repentance — Withdrawal). — This space for repentance is always open. And where a combatant in good faith withdraws as far as he can, really intending to abandon the conflict, and not merely to gain fresh strength or some new advantage for an attack, but the other will pursue him, then, if taking life becomes inevitable to save life, he is justified.<sup>3</sup> But a mere colorable withdrawal avails nothing.<sup>4</sup> In like manner, where, upon a quarrel, one of the parties retreated fifty yards, desiring to avoid the conflict, but the other pursued him with uplifted arm; and, being first struck by the retreating one with the fist, stabbed and killed him; the killing was held to be murder.<sup>5</sup>

<sup>1</sup> 1 Hale P. C. 482.

<sup>2</sup> Hawkins maintains, contrary in part to the doctrine of the text, that the one who gives the first blow cannot be permitted to kill the other, however necessary the killing for his own preservation, even after having put into exercise the virtue of retreating to the wall; because here also the necessity was brought upon himself. Yet he admits that there are good opinions the other way. 1 Hawk. P. C. Curw. ed. p. 87, § 17. And see *Rex v. Kessal*, 1 Car. & P. 437. Though this opinion of Hawkins, which shuts the gate of repentance, is not generally received, yet another proposition of his accords exactly with our text. It is, that, when a person who makes a murderous assault is himself driven to the wall, instead of retreating there to avoid further conflict, and there kills the other in his own defence, he is guilty of murder. 1 Hawk. P. C. Curw. ed. p. 87, § 18, p. 97, § 26; Anonymous, J. Kel. 58; *The State v. Hill*, 4 Dev. & Bat. 491.

<sup>3</sup> *Stoffer v. The State*, 15 Ohio State, 47; *The State v. Hill*, 4 Dev. & Bat. 491; *The State v. Ingold*, 4 Jones, N. C. 216; Lord Hale says: “Suppose that A by malice makes a sudden assault upon B, who strikes again, and pursuing hard upon A, A retreats to the wall, and, in saving his own life, kills B, — some have held this to be murder, and not *se defendendo*,

because A gave the first assault. But Mr. Dalton thinketh it to be *se defendendo*, though A made the first assault, either with or without malice, and then retreated. It seems to me, that, if A did retreat to the wall, upon a real intent to save his life, and then merely in his own defence killed B, it is *se defendendo*, and with this agrees *Stamf. P. C. lib. 1, c. 7, f. 15 u*. But if, on the other side, A, knowing his advantage of strength or skill or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defence, but really intended the killing of B, then it is murder or manslaughter as the circumstance of the case requires.” 1 Hale P. C. 479, 480.

<sup>4</sup> *Foster*, 227; *Hodges v. The State*, 15 Ga. 117.

<sup>5</sup> *The State v. Howell*, 9 Ire. 485. “It is true,” said Nash, J., “that the deceased struck the first blow, but this does not mitigate the offence of the prisoner. In every stage of the transaction he was the assailant. When he approached the deceased, his arm was raised in the attitude to strike, and with a deadly weapon. The law did not require the deceased to wait till the prisoner had executed his threat, but justified him in anticipating the premeditated assault.” See post, § 872. Where, on a trial for murder, the defendant was shown to have com-

§ 872. **Overt Steps** — (**Threats — Apprehended Harm**). — What has already been said should be borne in mind, that mere threats will not justify a killing, which is permissible only when some overt step has been taken toward carrying them into execution.<sup>1</sup> But a threatened blow need not be actually given,<sup>2</sup> — a branch of the doctrine that an assault may sometimes be met by a battery.<sup>3</sup> And as words alone will not justify even an assault,<sup>4</sup> so no mere apprehension of what another will do, however strong the fears excited, will justify one in taking his life.<sup>5</sup> Again, —

§ 873. **Improper Force**. — If improper force is used for defence, even where force is permissible, he who employs it must answer as for a felonious homicide should death accidentally follow.<sup>6</sup> And, —

**Blow for Provoking Language**. — If a man returns provoking language by a blow from an instrument calculated to produce death, which follows, he is guilty of murder.<sup>7</sup> Also, —

**Killing Ghost**. — It has been held to be no excuse for killing a person, that he was out at night dressed in white as a ghost; and this would be so, even if he could not otherwise be taken; since

menced the affray, and he asked the court to instruct the jury, "that, if the defendant had reason to believe, and did believe, that he was in great danger of losing his life, and under that belief killed the deceased, he was justified," this instruction was refused, and the refusal was held to be right. *People v. Stonecipher*, 6 Cal. 405.

<sup>1</sup> Ante, § 843, 869; *Wall v. The State*, 18 Texas, 682; *People v. Butler*, 8 Cal. 435. And see *The State v. Barfield*, 7 Ire. 299.

<sup>2</sup> *The State v. Baker*, 1 Jones, N. C. 267.

<sup>3</sup> Vol. II. § 41.

<sup>4</sup> *Commonwealth v. Green*, 1 Ashm. 289, 297; Vol. II. § 40.

<sup>5</sup> *Dyson v. The State*, 26 Missis. 362; *Harrison v. The State*, 24 Ala. 67; *Dupree v. The State*, 33 Ala. 380; *The State v. Shippey*, 10 Minn. 223. See *Monroe v. The State*, 5 Ga. 85; *Pritchett v. The State*, 22 Ala. 39; *Evers v. People*, 6 Thomp. & C. 156, 8 Hun, 716; *United States v. Carr*, 1 Woods, 480. In

Georgia there was the following case: A presented a gun at B, and subsequently took it down. B then said, that, if he raised it again, he would throw a brickbat at him. He did again raise it, the brickbat was thrown, and B was shot. And it was held, that, in consideration of the threat or banter of B, such killing may have been no more than voluntary manslaughter; and it was error in the court below to charge, that, "if the first presenting of the gun was with malicious intent, notwithstanding what followed, the killing was murder." *McGuffie v. The State*, 17 Ga. 497. And see *Keener v. The State*, 18 Ga. 194; *Atkins v. The State*, 16 Ark. 568; *Cotton v. The State*, 81 Missis. 504; *Lyon v. The State*, 22 Ga. 399; *Balkum v. The State*, 40 Ala. 671; *Aaron v. The State*, 81 Ga. 167; *The State v. Owen*, Phillips, 425; *The State v. Benham*, 23 Iowa, 154; *The State v. Ferguson*, 9 Nev. 106.

<sup>6</sup> Ante, § 859, 862.

<sup>7</sup> *The State v. Merrill*, 2 Dev. 269.

“the person who appeared as a ghost was only guilty of a misdemeanor.”<sup>1</sup>

**Relative Strength.**—In questions of self-defence, the relative strength of the parties may be taken into the account.<sup>2</sup>

§ 874. **Mistake of Facts.**—We have already seen,<sup>3</sup> how the doctrine is where one, mistaking the facts, undertakes self-defence, when really no occasion for it exists. And,—

**Reasonable Man.**—Constituting a part of this question, is a consideration of the reasonableness of an excited fear. Some of the cases appear to maintain that, to justify a self-defence, there must be a reasonable cause for fear,<sup>4</sup> or the circumstances must be such as to excite the fears of a reasonable man.<sup>5</sup> A doctrine like this was formerly held, by some courts, in the law of false pretences; namely, that a pretence, to be indictable, must be calculated to mislead men of ordinary capacity and prudence; so that a weak man, defrauded by a pretence which a stronger mind would have resisted, had no protection. But that doctrine is now exploded.<sup>6</sup> On the present one, the courts are perhaps divided.<sup>7</sup> In reason, and in accordance with all the analogies in the criminal law, if a man was careless, and therefore deemed a defence to be necessary when none was in fact, he would commit a crime in making it to the injury of an innocent person; because, as we have seen,<sup>8</sup> carelessness is criminal. But it is not criminal to be born underwitted, or with less intellect than some other person possesses; therefore, if one of little understanding, acting carefully, arrives at the conclusion that a defence of himself is necessary, the law should protect him in making it, precisely as if he possessed a stronger mind which was misled by graver appearances. If an insane man is misled by an insane delusion, he is protected.<sup>9</sup> By all the courts, then, the rule of reason is applied to the strongest intellects, and thence downward to the average, and to the intellects so feeble and deranged as to be regarded insane.

<sup>1</sup> *Rex v. Smith*, 1 Russ. Crimes, 3d Eng. ed. 546.

<sup>2</sup> *Hinch v. The State*, 25 Ga. 699; *The State v. Benham*, 23 Iowa, 154.

<sup>3</sup> *Ante*, § 305 and note.

<sup>4</sup> *Creek v. The State*, 24 Ind. 151, 154; *The State v. Collins*, 32 Iowa, 36. And see *The State v. Abarr*, 39 Iowa, 185.

<sup>5</sup> *Golden v. The State*, 25 Ga. 527, 533; *People v. Williams*, 32 Cal. 280.

<sup>6</sup> Vol. II. § 433, 434.

<sup>7</sup> See the authorities collected *ante*, § 305, note.

<sup>8</sup> *Ante*, § 313 et seq.

<sup>9</sup> *Ante*, § 392-394.

With what show of righteousness or of law, therefore, can a judge refuse to apply it to the rest?

# VI. *Summary showing the Right to defend one's Property.*

§ 875. **Already explained.**—The doctrine on this subject is already, perhaps, sufficiently explained.<sup>1</sup>

**In Brief.**—One, in defence of his property, must not commit a forcible detainer, a riot, or any like crime. He must not kill the aggressor; but, if the question comes to this, he must find his redress in the courts. If the wrongful act is proceeding to a felony on the property, he may then kill the doer to prevent the felony, if there is no other way, otherwise this extreme measure is not lawful. And the defence may be such, and such only, as necessity requires; of course, within the limit which forbids the taking of life.<sup>2</sup> Therefore—

§ 876. **In Homicide.**—A man commits a felonious homicide who inflicts death in opposing an unlawful endeavor to carry away his property.<sup>3</sup> There is here the right to resist, but not to the taking of life.<sup>4</sup>

# VII. *The Right to assist others in Defence of Person and Property.*

§ 877. **General Doctrine.**—The doctrine here is, that whatever one may do for himself he may do for another. The common case, indeed, is where a father, son, brother, husband, servant, or the like, protects by the stronger arm the feeble.<sup>5</sup> But a guest

<sup>1</sup> Ante, § 858-861.

<sup>2</sup> See, not as directly announcing the proposition of our text, *Wild's Case*, 2 Lewin, 214; *Harrison v. The State*, 24 Ala. 67; *Rex v. Bourne*, 5 Car. & P. 120; *Halloway's Case*, W. Jones, 198, Cro. Car. 131; *The State v. Zellers*, 2 Halst. 220; *The State v. Baker*, 1 Jones, N. C. 267; *Commonwealth v. Power*, 7 Met. 596; *Reg. v. Sullivan*, Car. & M. 209; *The State v. Johnson*, 12 Ala. 840; *The State v. Clements*, 32 Maine, 279; *The State v. Lazarus*, 1 Mill, 33; *McCoy v. The State*, 3 Eng. 451; *Copeland v. The State*, 7 Humph. 479; *Shorter v. People*, 2 Comst. 193; 1 East P. C. 402.

<sup>3</sup> Ante, § 857, 861; See *People v. Honshell*, 10 Cal. 83.

<sup>4</sup> *People v. Hubbard*, 24 Wend. 369; *The State v. Johnson*, 12 Ala. 840; *Curtis v. Hubbard*, 1 Hill, N. Y. 336; ante, § 857. But see *The State v. Buchanan*, 17 Vt. 573.

<sup>5</sup> *United States v. Wiltberger*, 3 Wash. C. C. 515; *Rex v. Bourne*, 5 Car. & P. 120; *Pond v. People*, 8 Mich. 150. And see *Staten v. The State*, 30 Missis. 619; *Sharp v. The State*, 19 Ohio, 379; *Patten v. People*, 18 Mich. 814; *Parker v. The State*, 81 Texas, 132; *Dupree v. The State*, 33 Ala. 380; *Reg. v. Harrington*, 10 Cox C. C. 870; *Stoneman v. Common-*



in a house may defend the house ;<sup>1</sup> or the neighbors of the occupant may assemble for its defence ;<sup>2</sup> and, on the whole, though distinctions have been taken and doubts expressed, the better view plainly is, that one may do for another whatever the other may do for himself.<sup>3</sup> But there may be cases in which combinations for defence will be unlawful on other grounds ; as amounting to breaches of the peace, or the like.

wealth, 25 Grat. 887 ; *Bristow v. Commonwealth*, 15 Grat. 684 ; *The State v. Johnson*, 75 N. C. 174 ; *Waybright v. The State*, 56 Ind. 122 ; *Commonwealth v. Malone*, 114 Mass. 295.

<sup>1</sup> *Curtis v. Hubbard*, 4 Hill, N. Y. 437 ; *Cooper's Case*, Cro. Car. 544.

<sup>2</sup> *Semayne's Case*, 5 Co. 91 ; ante, § 858, note.

<sup>3</sup> 1 East P. C. 289, 292, 293 ; *Rex v. Adey*, 1 Leach, 4th ed. 206, 1 East P. C. 329 ; *Commonwealth v. Drew*, 4 Mass. 391 ; *Reg. v. Tooley*, 11 Mod. 242. *Succession of Irwin*, 12 La. An. 676 ; *The State v. Westfall*, 49 Iowa, 328. See *The State v. Shirley*, 64 N. C. 610.

## CHAPTER LVII.

## THE DOMESTIC RELATIONS.

- § 878, 879. Introduction.  
 880-884 *b*. Parent and Child.  
     885. Guardian and Ward.  
     886. Teacher and Pupil.  
 887-889. Master and Domestic Servant.  
 890-891 *a*. Husband and Wife.

§ 878. **Scope of this Chapter.** — The domestic relations are more or less treated of in other connections. There will be here some recapitulation ; but the leading purpose is to bring together such views and authorities as have no appropriate place elsewhere.

§ 879. **How the Chapter divided.** — We shall consider, I. Parent and Child ; II. Guardian and Ward ; III. Teacher and Pupil ; IV. Master and Domestic Servant ; V. Husband and Wife. And —

**Doctrine common to All — (Exceptions).** — A doctrine common to all is, that they furnish no protection for crime ; but a violator of the criminal law in the relation is punishable the same as out of it. We have seen, that the rules of marital coercion furnish a partial exception.<sup>1</sup> And, again, the legal rights which any relation confers are respected in the law of crime the same as in the civil department.

I. *Parent and Child.*

§ 880. **In General of the Relation.** — Our law, especially in modern times, gives no countenance to the idea which once prevailed in some systems of jurisprudence, that the parent is a sort of owner of the child, who exists chiefly for his good. On the contrary, it looks always to the sunrise ; regarding the child as the man of the future, while the parent is passing away in the west.

<sup>1</sup> Ante, § 356 et seq.

And it accords parental control and custody on the theory of the child's good, rather than the parent's.<sup>1</sup> So that, —

**Authority and Chastisement.** — To enable parents to rear their children for happiness and usefulness, "the law," says Kent, while compelling maintenance, "has given them a right to such authority, and, in support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust."<sup>2</sup> The little one is placed, helpless and untaught, in the parental hands. The helplessness is alike physical, mental, and moral. Parental discipline, rightly understood, is to assist the strivings and aspirations of the child's better nature. And the child, needing this assistance, is therefore entitled to it. The question of what help of this sort shall be given is better left to the parent than to any other person; because parental affection prompts more strongly than any other to the exercise of a merciful judgment. But as parents are sometimes unmerciful, the law itself casts over the child such protection as it can,<sup>3</sup> and visits them with punishment for any flagrant abuse of their trust. Consequently, —

§ 881. **Extent of Chastisement.** — The doctrine, as commonly expressed in general terms, is, that the parent may inflict *moderate* chastisement,<sup>4</sup> or such as is reasonable under the circumstances.<sup>5</sup> And, —

**Assault and Battery — Felonious Homicide.** — If he goes beyond this, he is indictable for assault and battery;<sup>6</sup> or, if the child dies, for a felonious homicide.<sup>7</sup> But —

§ 882. **Good Faith in Parent — (Parental Judgment).** — The law has provided no means whereby a parent, meditating chastisement, can first obtain a judicial opinion as to its necessity, the proper instruments, and its due extent. In reason, therefore, if he acts in good faith, prompted by true parental love, without passion, and inflicts no permanent injury on the child, he should

<sup>1</sup> 2 Bishop Mar. & Div. § 528 c, 528 e, 529, 532, 546, 549.

<sup>2</sup> 2 Kent Com. 203.

<sup>3</sup> *Faulk v. Faulk*, 23 Texas, 653; *Neal v. The State*, 54 Ga. 281; *Commonwealth v. Coffey*, 121 Mass. 66.

<sup>4</sup> 2 Kent Com. 204; 1 Russ. Crimes, 3d Eng. ed. 645.

<sup>5</sup> 1 Hawk. P. C. 6th ed. c. 60, § 23, Bac. Abr. Assault and Battery C.

<sup>6</sup> Vol. II. § 38, 72; 3 Greenl. Ev. § 63; *The State v. Bitman*, 13 Iowa, 485.

<sup>7</sup> Vol. II. § 656, 663, 683-685, 690; *Grey's Case*, J. Kel. 64; *Rex v. Cheeseman*, 7 Car. & P. 455; *Anonymous*, 1 East P. C. 261; *Rex v. Hazel*, 1 Leach, 4th ed. 368, 1 East P. C. 236; *Rex v. Conner*, 7 Car. & P. 438.

not be punished merely because a jury, reviewing the case, do not deem that it was wise to proceed so far. And something like this appears to have been held in North Carolina.<sup>1</sup> "A very large margin," said McCay, J., in the Georgia court, "must be left to the judgment of the parent."<sup>2</sup> So, in a civil cause between master mariner and seaman, Ware, J., observed: "When it is apparent that punishment has been merited, I have never been in the habit of attempting to adjust very accurately the balance between the magnitude of the fault and the quantum of the punishment. Unless unusual or unlawful instruments have been used, or there have appeared clear and unequivocal marks of passion on the part of the captain, or the punishment has been manifestly excessive and disproportionate to the fault, I have not thought myself justified in giving damages."<sup>3</sup> But the whipping of a child with an obviously improper instrument—as, for example, a saw twenty-two inches long and three-fourths of an inch wide—is in no ordinary case justifiable.<sup>4</sup> Where the question is simply whether or not the punishment was excessive, its decision is for the jury, not the court.<sup>5</sup> And, in one case, which was that of a teacher standing *in loco parentis*, it seems to have been deemed that the consideration of good faith or of the absence of passion was not of primary importance; but the jury was simply to determine whether, under all the facts, the punishment was reasonable and proper.<sup>6</sup>

<sup>1</sup> The State v. Alford, 68 N. C. 322.

<sup>2</sup> Neal v. The State, 54 Ga. 281, 282.

<sup>3</sup> Butler v. McLellan, 1 Ware, 219, 230. The like in Commonwealth v. Seed, 5 Pa. Law J. Rep. 78.

<sup>4</sup> Neal v. The State, *supra*. See Commonwealth v. Coffey, 121 Mass. 66; Stanfield v. The State, 43 Texas, 167.

<sup>5</sup> Johnson v. The State, 2 Humph. 283; Commonwealth v. Randall, 4 Gray, 36; Stanfield v. The State, *supra*.

<sup>6</sup> Commonwealth v. Randall, *supra*. **Improper Correction in Homicide.**—In North Carolina, it appearing in a murder case that the prisoner, who stood *in loco parentis* to the deceased, a boy eighteen years of age, punished him for lying, by keeping him naked on his back, with his feet tied up, from morning to dinner every day for a week, and repeatedly whipped him each day while in that posi-

tion, the first day severely, the instruments used being a heavy leather strap, a knotted cord four double, and an iron ramrod, it was held not to be error for the court to refuse to instruct the jury, that, in the absence of express malice, the crime would be only manslaughter. The acts detailed manifest "a heart totally regardless of social duty and fatally bent on mischief." The State v. Harris, 63 N. C. 1. See Vol. II. § 663, 683-685. **Excessive Imprisonment, &c.**—Where, on an indictment for false imprisonment, the defendant was shown to have kept his blind and helpless boy in a cold and damp cellar, without fire, during several days in midwinter, under the excuse that the boy was covered with vermin, and had to be anointed with kerosene, he was held not to be justified, and so the allegation was sustained. Fletcher v.

§ 883. **Criminal Neglect.** — Another branch of this general doctrine is, that, if a parent under legal obligation<sup>1</sup> to maintain his child refuses or neglects to furnish it with needful food or clothing,<sup>2</sup> and by reason of this it either dies or suffers a less physical injury, — or, in like manner and with like results, exposes it to the physical elements, or imprisons or abandons it, — the law visits the act or neglect as a crime, constituting either an assault and battery or a felonious homicide.<sup>3</sup> In these cases, unlike those of chastisement inflicted for faults, there is no right in the parent to proceed in a moderate way; and no inquiry presents itself, whether the fault of the child justified the act. The doctrines on this subject are developed in various other places in these volumes and in “Criminal Procedure.” But, to illustrate, —

§ 884. **Abandonment an Assault.** — In one case it was ruled, that an indictment for abandoning a child should aver an assault.<sup>4</sup> But this would seem not to be required under all circumstances.<sup>5</sup>

**Ability.** — If the charge is of a lack of sustenance, ability to maintain the child must be shown.<sup>6</sup> And, —

**Injury.** — In some of these cases, the child must have suffered an injury.<sup>7</sup> Again, —

**To charge Parish.** — An indictment alleged that the prisoner left a child, a month old, of which she had the care, in the highway

People, 52 Ill. 395. **Controlling Conscience of Child.** — See, as to forcing child out of church, &c., *Commonwealth v. Sigman*, 2 Pa. Law Jour. Rep. 36.

<sup>1</sup> Vol. II. § 659 et seq.; 2 Bishop Mar. & Div. § 528, 528 a, 556–558; *Stovall v. Johnson*, 17 Ala. 14; *Hines v. Mullins*, 25 Ga. 696; *Tompkins v. Tompkins*, 3 C. E. Green, 303; *Myers v. Myers*, 2 McCord Eq. 214.

<sup>2</sup> *Reg. v. Troy*, 1 Crawf. & Dix C. C. 556; *Reg. v. Waters*, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. n. s. M. C. 53; *Reg. v. Phillpot*, Dears. 179, 20 Eng. L. & Eq. 591; *Rex v. Saunders*, 7 Car. & P. 277.

<sup>3</sup> *Gibson's Case*, 2 Broun, 366; *Beal's Case*, 1 Leon. 327; *Reg. v. Pelham*, 8 Q. B. 959, 15 Law J. n. s. M. C. 105, 10 Jur. 659; *Rex v. Ridley*, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653; *Rex v. Squire*, 1 Russ. Crimes, 3d Eng. ed. 490;

*Reg. v. Renshaw*, 2 Cox C. C. 285, 11 Jur. 615, 20 Eng. L. & Eq. 593; *Reg. v. Morris*, 2 Crawf. & Dix C. C. 91; *Reg. v. Hogan*, 2 Den. C. C. 277, 15 Jur. 805, 20 Law J. n. s. M. C. 219, 5 Eng. L. & Eq. 553; *Reg. v. Mulroy*, 3 Crawf. & Dix C. C. 318; *Reg. v. Chandler*, Dears. 453, 24 Law J. n. s. M. C. 109, 1 Jur. n. s. 429, 29 Eng. L. & Eq. 551.

<sup>4</sup> *Reg. v. Mulroy*, 3 Crawf. & Dix C. C. 318.

<sup>5</sup> Vol. II. § 29; *Crim. Proce.* II. § 538, 538 a.

<sup>6</sup> *Reg. v. Pelham*, 8 Q. B. 959; *Reg. v. Hogan*, 2 Den. C. C. 277, 5 Eng. L. & Eq. 553; *Reg. v. Ryland*, Law Rep. 1 C. C. 99, 10 Cox C. C. 569; *Reg. v. Rugg*, 12 Cox C. C. 16.

<sup>7</sup> Vol. II. § 29; *Reg. v. Pelham*, *supra*; *Reg. v. Phillpot*, Dears. 179, 20 Eng. L. & Eq. 591; s. c. nom. *Reg. v. Philpott*, 6 Cox C. C. 140.

in a certain parish, with the intent to burden the parish with its maintenance. And the allegation was held to be insufficient, because it did not negative the settlement of the child in the parish, or aver any injury done to the child.<sup>1</sup>

**Statutes** — (“Abandonment”). — There are statutes making it indictable to “abandon or expose” a child,<sup>2</sup> and the like.<sup>3</sup>

§ 884 *a.* **Command of Parent.** — The command of the parent does not justify the child in committing a criminal act.<sup>4</sup> So also —

**Protecting Child.** — The parent has no right to protect his child in a crime.<sup>5</sup>

§ 884 *b.* **Enticing away Child.** — The doctrine is familiar in civil jurisprudence, that one who entices away a child from his father’s service is liable in an action for damages.<sup>6</sup> Yet, in the absence of a statutory provision, he is not indictable therefor.<sup>7</sup>

## II. *Guardian and Ward.*

§ 885. **Guardian not in Custody.** — Not every guardian has the custody of the person of the ward. And no legal reason appears why one who has not should possess the right to chastise. But —

**Having Custody.** — Some have the custody,<sup>8</sup> — a sort of question upon which the statutes of our States differ. Such a guardian stands *in loco parentis* to the child,<sup>9</sup> and he may exercise the paternal power of chastisement.<sup>10</sup> He may even change the child’s domicile;<sup>11</sup> as to which, however, the courts will hold him under some restraint.<sup>12</sup>

<sup>1</sup> Reg. v. Cooper, 1 Den. C. C. 459, 3 Cox C. C. 559, 2 Car. & K. 878.

<sup>2</sup> Reg. v. White, Law Rep. 1 C. C. 311, 12 Cox C. C. 83; Shannon v. People, 5 Mich. 71.

<sup>3</sup> Cowley v. People, 21 Hun, 415.

<sup>4</sup> Ante, § 355; The State v. Herdina, 25 Minn. 161, 162; McDaniel v. The State, 5 Texas Ap. 475.

<sup>5</sup> The State v. Herdina, *supra*.

<sup>6</sup> Butterfield v. Ashley, 6 Cush. 249; Sargent v. Mathewson, 38 N. H. 54; Evans v. Walton, Law Rep. 2 C. P. 615; Bundy v. Dodson, 28 Ind. 295; Jones v. Tevis, 4 Litt. 25.

<sup>7</sup> The State v. Rice, 76 N. C. 194.

<sup>8</sup> Rex v. Isley, 5 A. & E. 441; Bounell v. Berryhill, 2 Ind. 613; Coltman v. Hall, 31 Maine, 196; Tenbrook v. McCole, 7 Halst. 97; In re Van Houten, 2 Green, Ch. 221; Woodworth v. Spring, 4 Allen, 321; Ward v. Roper, 7 Humph. 111.

<sup>9</sup> In re Andrews, Law Rep. 8 Q. B. 153.

<sup>10</sup> Stanfield v. The State, 43 Texas, 167. See also Fulton de Pace, 7 b; Rex v. Cheeseman, 7 Car. & P. 455; Armstrong v. Walkup, 12 Grat. 608.

<sup>11</sup> Townsend v. Kendall, 4 Minn. 412; Ex parte Bartlett, 4 Bradf. 221.

<sup>12</sup> Ex parte Martin, 2 Hill, Ch. 71; Trammell v. Trammell, 20 Texas, 406.

III. *Teacher and Pupil.*

§ 886. **Chastisement.** — The books commonly assume, that the teacher has the same right to chastise the pupil as the parent the child.<sup>1</sup> He certainly has no greater right, even though acting under express permission from the parent; for the latter cannot delegate a power which he does not himself possess.<sup>2</sup> Nor, it is plain, can the teacher of a mere day scholar, living with the parent, usurp the parental function of chastising for faults committed at home. But, within the proper jurisdiction of the teacher, the latter may exact a compliance with all reasonable commands; and, in return for any specific offence, not in the way of general castigation,<sup>3</sup> visit disobedience with kind and reasonable corporal punishment.<sup>4</sup> It should not be excessive and cruel, it should be proportioned to the gravity of the offence, and always within the bounds of moderation.<sup>5</sup> But plainly the teacher's calm and honest judgment as to what is required should have weight, as in the case of the parent.<sup>6</sup> And, where no improper weapon has been employed,<sup>7</sup> the presumption, until the contrary appears in the proofs, will be that what was done was done rightly.<sup>8</sup> On the whole, and for several reasons which will occur to the reader, the extent of the teacher's power will vary in some degree with what in the relation is special to the particular instance, and it will seldom quite equal the parental right. Yet on this question we have little direct authority.<sup>9</sup>

**Pupil of Age.** — When one who has attained majority voluntarily attends a school, he places himself by implication under its discipline. And it has been adjudged that the power of reasonable chastisement extends, therefore, to the teacher in such a case.<sup>10</sup>

<sup>1</sup> 1 Hawk. P. C. 6th ed. c. 60, § 23; Bac. Abr. Assault and Battery, C; Pulton de Pace, 6 b.

<sup>2</sup> Reg. v. Hopley, 2 Fost. & F. 202.

<sup>3</sup> The State v. Mizner, 50 Iowa, 145.

<sup>4</sup> Danenhoffer v. The State, 69 Ind. 295.

<sup>5</sup> Anderson v. The State, 3 Head, 455.

<sup>6</sup> Ante, § 882; Commonwealth v. Seed, 5 Pa. Law J. Rep. 78.

<sup>7</sup> Ante, § 882.

<sup>8</sup> The State v. Mizner, supra.

<sup>9</sup> See Commonwealth v. Randall, 4 Gray, 36; Anderson v. The State, 3 Head, 455.

<sup>10</sup> The State v. Mizner, 45 Iowa, 248.

IV. *Master and Domestic Servant.*

§ 887. **Different kinds of Servants.**—Servants are of different sorts, sustaining different relations to the master or employer. Some are simply agents,<sup>1</sup> as will be explained in the next chapter. And there are differences in domestic service.

**Chastisement.**—The older English books lay down the doctrine in general terms, that the master has the right of chastisement.<sup>2</sup> Nor do they always distinguish very nicely between the different kinds of servant.<sup>3</sup> Plainly, with us, and probably in England, the true rule gives the right only to the masters of apprentices and other minors to whom they stand *in loco parentis*. In these cases, the right does exist; yet most fully, though perhaps not exclusively, where the minor is domesticated in the household.<sup>4</sup> The relation of master and apprentice is for the instruction of the child, and there may be an analogy between it and teacher and pupil. But one who has simply hired a minor from the father is not, therefore, put *in loco parentis*, with the right of chastisement, where no parental consent thereto has been given.<sup>5</sup> And—

**Immoderately beating Apprentice.**—A master who beats his apprentice immoderately is indictable for the battery.<sup>6</sup>

§ 888. **Neglect, &c.**—The doctrines stated under Parent and

<sup>1</sup> Vol. II. § 332–338; Stat. Crimes, § 271.

<sup>2</sup> 1 Hawk. P. C. 6th ed. c. 60, § 23; Bac. Abr. tit. Assault and Battery, C; Rex v. Wiggs, 1 Leach, 4th ed. 378, 379, note.

<sup>3</sup> Rex v. Wiggs, *supra*.

<sup>4</sup> 2 Kent Com. 261; Pulton de Pace, 6b; Burn Just. tit. Servants, xxvi.; Reg. v. Miles, 6 Jur. 243. In Burn's Justice by Chitty, Vol. I. p. 182, 28th ed. it is said: "The master has more authority over an apprentice than over a common servant, for he may legally correct his apprentice for negligence or other misbehavior, provided it be done with moderation; whereas, if the master or his wife beat any other servant, it is a good cause for departure and action. But, in case of gross misconduct, it is better for the master to apply to a justice of the

peace or the sessions, to discharge or punish the apprentice, than to take the law into his own hands. The master cannot delegate this authority to another." So Chancellor Kent says: "The master may correct his apprentice, with moderation, for negligence or misbehavior." 2 Kent Com. 264. And see Rex v. Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Gates v. Lounsbury, 20 Johns. 427; People v. Phillips, 1 Wheeler Crim. Cas. 155; Matthews v. Terry, 10 Conn. 455, 458; Commonwealth v. Baird, 1 Ashm. 267; Commonwealth v. Conrow, 2 Barr. 402; In re Ambrose, Phillips, N. C. 91.

<sup>5</sup> Cooper v. The State, 8 Baxter, 324; Davis v. The State, 6 Texas Ap. 133; Matthews v. Terry, 10 Conn. 455. And see Commonwealth v. Baird, 1 Ashm. 267.

<sup>6</sup> Rex v. Keller, 2 Show. 289.



Child,<sup>1</sup> concerning the liability of those who refuse to provide for the infant, apply to cases of master and infant servant, and master and apprentice, wherever there is the legal obligation to provide.<sup>2</sup> And the like may be said of the other doctrines laid down in the same connection.<sup>3</sup> In some circumstances, to create a liability, the infant must be of tender years.<sup>4</sup>

§ 889. **Criminal Responsibility of Master for Servant's Acts.** — The master is not punishable criminally for the offences of his servants, unless committed by his command or with his assent, in which cases he is.<sup>5</sup> But this doctrine, which is not special to domestic servants,<sup>6</sup> is, with its limitations, more particularly explained in other connections.<sup>7</sup>

## V. *Husband and Wife.*

§ 890. **Elsewhere.** — Under a previous title,<sup>8</sup> the effect of coverture, as a presumed coercion, excusing the wife for criminal acts committed in the husband's presence, was considered. And many other questions relating to husband and wife are discussed in other connections in this volume and the second. Still there remains something for this chapter.

§ 891. **Imprisonment and Chastisement.** — Whether and when the husband may chastise or imprison the wife are explained in the author's "Marriage and Divorce."<sup>9</sup> The result is, that a former supposed right of chastisement is entirely abandoned, and the authority to imprison is very limited, if indeed it exists with us to any extent; while yet, in special circumstances,<sup>10</sup> the husband may exercise over the wife a physical restraint not precisely defined.<sup>11</sup> Hence, —

<sup>1</sup> Ante, § 883.

<sup>2</sup> *Rex v. Friend*, Russ. & Ry. 20; *Reg. v. Gould*, 1 Salk. 381; *Rex v. Ridley*, 2 Camp. 650; *Reg. v. Smith*, 8 Car. & P. 153; *Reg. v. Edwards*, 8 Car. & P. 611. See *Rex v. Clerke*, 2 Show. 193.

<sup>3</sup> See also *Rex v. Meredith*, Russ. & Ry. 46; *Rex v. Booth*, Russ. & Ry. 47, note; *Rex v. Warren*, Russ. & Ry. 47, note; *Hays v. Bryant*, 1 H. Bl. 253; *Rex v. Wiggs*, 1 Leach, 4th ed. 378, note; *Rex v. Smith*, 2 Car. & P. 449; *Orton v. The State*, 4 Greene, Iowa, 140.

<sup>4</sup> *Reg. v. S.* 5 Cox C. C. 279.

<sup>5</sup> *Sloan v. The State*, 8 Ind. 312; *Forrester v. The State*, 63 Ga. 349.

<sup>6</sup> *The State v. Smith*, 10 R. I. 258; *Roberts v. Preston*, 9 C. B. n. s. 208.

<sup>7</sup> Ante, § 316-319. Post, § 892.

<sup>8</sup> Ante, § 356 et seq.

<sup>9</sup> 1 Bishop Mar. & Div. § 754-756.

<sup>10</sup> Post, § 891 a.

<sup>11</sup> And see *The State v. Oliver*, 70 N. C. 60; *Fulgham v. The State*, 46 Ala. 143; *Commonwealth v. McAfee*, 108 Mass. 458; *The State v. Craton*, 6 Ire. 164; *Adams v. Adams*, 100 Mass. 365; *Taylor v. Taylor*, 76 N. C. 433; and numerous other cases cited in Mar. & Div.

**Assault and Battery.** — He is liable to indictment for assault and battery committed on her.<sup>1</sup> If he acted under provocation from her, it may be shown in mitigation of his punishment.<sup>2</sup>

§ 891 *a*. **Husband's Responsibility for Wife's Offences** — (**Liquor Selling**). — A husband is not to the same extent answerable for his wife's crimes<sup>3</sup> as he is civilly responsible for her torts.<sup>4</sup> For what she does in his absence and without his knowledge or consent he is not, in general, criminally liable.<sup>5</sup> But the rule that one's mere presence does not make him guilty of a crime committed by another without the concurrence of his will<sup>6</sup> does not apply to a husband in respect of his wife's criminal conduct. Though he is not even permitted to whip her,<sup>7</sup> he is required to put forth his marital power to restrain her from violating the laws. And if, for example, she with his knowledge and in his presence makes a sale of intoxicating liquor contrary to a statute, and he does not interfere, he may be punished for the sale.<sup>8</sup> More than this, a husband must regulate his own household; and, if the wife, contrary to his wishes and remonstrance, persists in selling liquor in the house in violation of law, he is even liable criminally for sales made by her in his absence. Nor is it different though she owns the premises as her separate estate, and the sales are for her sole benefit.<sup>9</sup>

<sup>1</sup> *Bradley v. The State*, Walk. Missis. 156; *The State v. Buckley*, 2 Harring. Del. 552; *The State v. Mabrey*, 64 N. C. 592. See also *Reg. v. Rundle*, Dears. 482, 24 Law J. N. s. M. C. 129, 1 Jur. N. s. 430, 29 Eng. L. & Eq. 555.

<sup>2</sup> *Robbins v. The State*, 20 Ala. 36.

<sup>3</sup> Stat. Crimes, § 1025.

<sup>4</sup> 2 Bishop Mar. Women, § 254.

<sup>5</sup> *The State v. Baker*, 71 Misso. 475.

<sup>6</sup> Ante, § 633.

<sup>7</sup> Ante, § 891.

<sup>8</sup> *Hensly v. The State*, 52 Ala. 10.

<sup>9</sup> *The State v. McDaniel*, 1 Houst. Crim. 506; *Commonwealth v. Barry*, 115 Mass. 146; *Commonwealth v. Carroll*, 124 Mass. 30. And see *Commonwealth v. Kennedy*, 119 Mass. 211; *Commonwealth v. Pratt*, 126 Mass. 462; *The State v. Colby*, 55 N. H. 72; *The State v. Roberts*, 55 N. H. 483.

## CHAPTER LVIII.

## RELATIONS OTHER THAN DOMESTIC.

§ 892. *Elsewhere.* — Like the domestic relations, those within the present title are treated of in connection with other topics in these volumes. Yet something may be useful here.

*Principal and Agent, including Master and Servant other than domestic:* —

**Agent personally answerable.** — Whatever one, knowing the facts,<sup>1</sup> does as the agent or servant of another he is criminally answerable for, precisely as though he had proceeded self-moved and for his own personal benefit.<sup>2</sup> And an agent merely present with the principal and lending the concurrence of his will, or assisting him, knowing the facts, is responsible for the latter's criminal act.<sup>3</sup> Again, —

**Acting through Agent.** — The rule, familiar in civil jurisprudence, that what one does through an agent is to be treated as his own act, prevails equally, though under slightly different modifications, in the criminal law.<sup>4</sup> The employer of him who commits a felony is not a principal felon, but he is an accessory before the fact.<sup>5</sup> In other crimes he and the agent are equally principal offenders.<sup>6</sup> Yet a mere authority to one to act as agent or servant in civil affairs does not include the power to commit a crime in behalf of the principal or master; or, as less precisely expressed, the latter is not responsible for the for-

<sup>1</sup> Ante, § 310; Taylor v. The State, 5 Texas Ap. 529.

<sup>2</sup> Ante, § 355, 658; The State v. Martin, 31 La. An. 849; The State v. Jackson, 2 Harring. Del. 542; Cutsinger v. Commonwealth, 7 Bush, 392; Murphy v. The State, 6 Texas Ap. 420, 421; The State v. Mercer, 32 Iowa, 405. And see Gibson v. Kauffield, 13 Smith, Pa. 168; Nall v. The State, 34 Ala. 262; Roberts v. The State, 7 Coldw. 359; Tardiff v. The

State, 23 Texas, 169; The State v. Stucker, 33 Iowa, 395.

<sup>3</sup> Anderson v. The State, 8 Texas Ap. 542, 544; Taylor v. The State, supra; Han- non v. The State, 5 Texas Ap. 549, 550; United States v. Rossvally, 3 Ben. 157.

<sup>4</sup> Ante, § 218-221, 316, 317, 631; Clay v. People, 86 Ill. 147; Hobbs v. Young, 3 Mod. 313, 316, Holt, 66.

<sup>5</sup> Ante, § 651, 673; The State v. Wyckoff, 2 Vroom, 65.

<sup>6</sup> Ante, § 632, 685-687.

mer's unauthorized breaches of the criminal law.<sup>1</sup> On the other hand, any authorization of the offence, whether direct or by implication, makes the principal or master a criminal therein.<sup>2</sup> If the business itself in which the master is employed involves a violation of the law, the general authority implied to the servant or clerk who conducts it will suffice to render the former liable criminally for the doings of the latter.<sup>3</sup>

§ 893. *Freedmen*. —

**Acts done in Slavery.** — Slavery having passed away, those who were slaves are, in some localities, called freedmen. While it existed, there were generally special codes of laws regulating slaves; and offences committed by them, and even sometimes by free negroes, were prosecuted and punished differently from the like offences by free white people. A question which has ceased to be of practical importance was, by which law, or whether by either, a negro should be punished for what he did while a slave; and, on this question, judicial opinions were divided.<sup>4</sup>

**After Emancipation.** — Of course, on the abolition of slavery, negroes became punishable under the laws applicable to freemen, for criminal acts committed subsequently to emancipation.<sup>5</sup>

§ 894. **Recognizance by Master.** — Where a master entered into a recognizance for his slave's appearance in court; then, before the appearance-day, the slave was emancipated; then he delivered him to the sheriff, but federal soldiers rescued him; the liability on the bail-bond was held to be, on both of these grounds, discharged.<sup>6</sup>

<sup>1</sup> Ante, § 219, 317; *The State v. Mahoney*, 23 Minn. 181; *Lathrope v. The State*, 51 Ind. 192; *Goods v. The State*, 3 Greene, Iowa, 566; *The State v. James*, 63 Misso. 570; *Thompson v. The State*, 45 Ind. 495; *Anderson v. The State*, 39 Ind. 553; *Hanson v. The State*, 43 Ind. 550; *O'Leary v. The State*, 44 Ind. 91; *Felton v. United States*, 96 U. S. 699.

<sup>2</sup> *McCutcheon v. People*, 69 Ill. 601; *Forrester v. The State*, 63 Ga. 349.

<sup>3</sup> *The State v. Wentworth*, 65 Maine, 234; *Molihan v. The State*, 30 Ind. 266; *Anderson v. The State*, 22 Ohio State, 305. See *The State v. Berhman*, Riley, 92, 3 Hill, S. C. 90; *Reg. v. Holbrook*, 3 Q. B. D. 60, 4 Q. B. D. 42; *Barnett v. The State*, 54 Ala. 579; *Stevens v. People*, 67 Ill. 587; *Mullinix v. People*, 76 Ill. 211; *Miller v. New York*, 5 Thomp. & C. 219, 3 Hun, 35;

*Second National Bank v. Curren*, 36 Iowa, 555; *Gathings v. The State*, 44 Missis. 343.

<sup>4</sup> *Gibson v. The State*, 35 Ga. 224; *Burt v. The State*, 39 Ala. 617; *Nelson v. The State*, 39 Ala. 667; *George v. The State*, 39 Ala. 675; *Peters v. The State*, 39 Ala. 681; *Aaron v. The State*, 39 Ala. 684; *Keith v. The State*, 5 Coldw. 35; *Wharton v. The State*, 5 Coldw. 1; *Brown v. The State*, 35 Ga. 232; *The State v. Brodnax*, Phillips, 41.

<sup>5</sup> *Tempe v. The State*, 40 Ala. 350; *Eliza v. The State*, 39 Ala. 698; *Witherby v. The State*, 39 Ala. 702; *Ferdinand v. The State*, 39 Ala. 706. And see *Burns v. The State*, 48 Ala. 195; *Boyd v. The State*, 7 Coldw. 69.

<sup>6</sup> *Lewis v. The State*, 41 Missis. 686.

**Children as illegitimate.** — Whether children born of slave parents are to be deemed illegitimate after emancipation is a question discussed in “Marriage and Divorce.”<sup>1</sup> It was held by the majority of a divided court, that, where a slave father has a slave child by a slave mother, and they are made free by a constitutional amendment, the father cannot be compelled to support the child as a bastard.<sup>2</sup>

**Rights of Freedmen.** — Under constitutional and statutory provisions securing to freedmen equality with free whites, various questions have arisen, not to be discussed in this connection.<sup>3</sup>

§ 895. *Legal Practitioners* : —

**Capable of Crime.** — A lawyer is not exempt from the criminal laws.<sup>4</sup> He may even commit treason while acting in his profession.<sup>5</sup> If he advises the friends of a felon to persuade the witnesses not to appear against him, and it is done, this is a misdemeanor in him and them; or, as Lord Coke expresses it, “a great contempt and misprision, for which they might be fined and imprisoned.”<sup>6</sup> And “if a client and his attorney enter into a conspiracy to resist an officer in performing his duty, both are equally guilty.”<sup>7</sup> So, in Virginia, a statute makes punishable “an attempt to employ as true” a forged writing knowing it to be forged; and it is held that, if one as counsel brings a suit on such a writing, with knowledge of the forgery, and with intent to defraud, he commits the offence.<sup>8</sup> Moreover it is familiar doctrine that an attorney may be guilty of a contempt of court.<sup>9</sup> And, though communications between counsel and client are generally privileged, yet, if a man goes to a lawyer for advice

<sup>1</sup> 1 Bishop Mar. & Div. § 163 b.

<sup>2</sup> Lewis v. Commonwealth, 3 Bush, 539. And see White v. Ross, 40 Ga. 339.

<sup>3</sup> The following are among the cases which may be consulted under this head: United States v. Rhodes, 1 Abb. U. S. 28; United States v. Cruikshank, 1 Woods, 308; Ellis v. The State, 42 Ala. 525; Murrell v. The State, 44 Ala. 367; Burns v. The State, 48 Ala. 195; Gaines v. The State, 39 Texas, 606; Donnell v. The State, 48 Missis. 661; Lonas v. The State, 3 Heisk. 287; The State v. Gibson, 36 Ind. 389. Other cases are cited under the several minuter titles, particularly in Stat. Crimes.

<sup>4</sup> Walker v. Commonwealth, 8 Bush, 86.

<sup>5</sup> Coke's Case, J. Kel. 12, 23.

<sup>6</sup> Robert's Case, 3 Inst. 139; 1 Hale P. C. 621.

<sup>7</sup> Caldwell, J., in United States v. Smith, 1 Dil. 212.

<sup>8</sup> Chaboon v. Commonwealth, 20 Grat. 738.

<sup>9</sup> Vol. II. § 253, 255 and note, 270; Ex parte Smith, 28 Ind. 47; Anonymous, 1 Stra. 384; Daw v. Eley, Law Rep. 7 Eq. 49; People v. Palmer, 61 Ill. 255. In re Rea, 14 Cox C. C. 139; Slater v. Merritt, 75 N. Y. 268; Ingle v. The State, 8 Blackf. 574; Wells v. Commonwealth, 21 Grat. 500.

how to commit a crime, — as, for example, how to forge a contract, — the communication is not privileged, and the adviser may be required to disclose it as a witness.<sup>1</sup> So, —

**Disbarring.** — An attorney is an officer of the court, and he may be suspended from his functions or disbarred for misconduct toward the court or the client.<sup>2</sup> He is otherwise also liable to the summary process of the court in respect of his duties.<sup>3</sup>

§ 896. *Physician and Patient* : —

**Elsewhere.** — The doctrines governing this relation are sufficiently discussed in other parts of these volumes.<sup>4</sup>

<sup>1</sup> *People v. Blakeley*, 4 Parker C. C. 176.

<sup>2</sup> Vol. II. § 255, note, 270; In re Woolley, 11 Bush, 95; *The State v. Tunstall*, 51 Texas, 81; *Ex parte Trippe*, 66 Ind. 531; *Kane v. Haywood*, 66 N. C. 1; In re Browne, 2 Col. Ter. 553; *Kepler v. Klingensmith*, 50 Ind. 434; In re Baluss, 28 Mich. 507; In re ———, 1 Hun, 321;

*Ex parte Walls*, 64 Ind. 461; *Walker v. Commonwealth*, 8 Bush, 86.

<sup>3</sup> *Ex parte Edwards*, 7 Q. B. D. 155; In re Browne, *supra*. See *The State v. McLane*, 43 Texas, 404; *Hawkins v. Smith*, 56 Ga. 571.

<sup>4</sup> Ante, § 217, 314 and note, 558; Vol. II. § 36, 664, 685, 693.

# CHAPTER LIX.

## PARDON.<sup>1</sup>

§ 897. **Scope of this Chapter.** — The subject of pardon divides itself into two parts, — the one relating to the law, and the other to the procedure. The former belongs to the present volumes; the latter to “Criminal Procedure.”

**Distinguished from English.** — In England, this subject presents itself under various complications of doctrine; but, in this country, it is comparatively simple.

§ 898. **How defined.** — A pardon is a remission of guilt.<sup>2</sup>

<sup>1</sup> For the procedure as respects the plea of pardon, see *Crim. Proced. I.* § 832 et seq.

<sup>2</sup> 1. The principal question relating to this definition is, whether the words should be “remission of guilt” or “remission of the punishment of guilt.” The books do not abound in definitions of pardon. Lord Coke says: “A pardon is a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. All that is forfeited to the king by any attainder, &c., he may restore by his charter; but if, by the attainder, the blood be corrupted, that must be restored by authority of Parliament. We call it in Latin *pardonatio*, and derive it *a per et dono*: *per* is a preposition, and in the Saxon tongue is *for* or *vor*; as to forgive is thoroughly to remit, and forethink is to repent, and forbear is to bear with patience, as it is said, *leve est ferre, perferre grave*.” 3 *Inst.* 233.

2. In the *Law Dictionary* of Jacob, afterward known by the name of Tomlins, its principal late editor, we have the following, referring, for authority, to *Staundf. Pl. Cor.* 47: “Pardon. The re-

mitting or forgiving of an offence committed against the king.” *Tit. Pardon.*

3. In the Supreme Court of the United States, Marshall, C. J., defined as follows: “A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.” *United States v. Wilson*, 7 *Pet.* 150, 160. And Field, J., speaks of pardon as “releasing the offence, obliterating it in legal contemplation.” *Osborn v. United States*, 91 *U. S.* 474, 478.

4. In this confusion and lack of defining, we should look to the law as adjudged to see what is the true definition. Bishop *First Book*, § 261-264, 266. Looking thus, we find, that, for example, after one is pardoned, he cannot be accused of the offence by words verbally spoken, without subjecting the speaker to an action of slander, the same as though the offence had not been committed. Thus, says Starkie: “In *Cuddington v. Wilkins*, *Hob.* 81, which was an action for publishing these words of the plaintiff, ‘He is a thief,’ the defendant pleaded, that the plaintiff had been guilty of stealing six

**Amnesty.**—The word “amnesty” does not in legal language differ greatly in meaning from “pardon.” But it is not often, if ever, applied to a pardon granted to a single individual for an ordinary crime; it signifies a general pardon to rebels for their treason and other high political offences, or the forgiveness which one sovereign grants to the subjects of another, who have offended by some breach of the law of nations.<sup>1</sup> “An amnesty,” says Vattel, “is a perfect oblivion of the past.”<sup>2</sup> Whether or not there may be a partial amnesty, there are pardons which come short of such “total oblivion.”

§ 899. **In whom Power of Pardon.**—In England, the Crown has the power of pardon,<sup>3</sup> and practically most pardons proceed from this source. The power has been regulated from time to time by statutes, some of which are of early dates. And sometimes pardons, general and special, have been granted by acts of

sheep. The plaintiff replied, that, after the felony, and before the publication of the words, he had been pardoned by a general pardon. Upon a demurrer, this replication was holden to be good, inasmuch as the guilt, as well as the punishment, is taken away by a pardon.” 1 Stark. Slander, 237, 238. Turning to this case, in Hobart, one of the most authoritative of the old reporters, we read: “The whole court were of opinion, that, though he [the plaintiff] were a thief once, yet, when the pardon came, it took away not only *pœnam* but *reatum*, for felony is *contra coronam et dignitatem regis*. Now, when the king had discharged it and pardoned him of it, he had cleared the person of the crime and infamy. . . . And it was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain, after he be cured or manumitted, but that he hath been a thief or villain he might say.” p. 81 b, 82. And see post, § 917. Hawkins states the effect of a pardon in the same way. “I take it to be settled at this day,” he observes, “that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy of all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after

the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction [a point settled and practised upon in all our courts at the present time, post, § 917]; because the pardon makes him, as it were, a new man.” 2 Hawk. P. C. Curw. ed. p. 547, § 48.

5. It is impossible, therefore, to doubt, that, in the law, a pardon is a remission, not merely of the punishment of guilt, but of the guilt itself. Of course, as the human law does not control the divine, no one supposes, that, before the tribunal of God, a pardon from an earthly sovereign is pleadable. Therefore, in a moral sense, a man may be guilty after the executive of the country has pardoned him; but, in a law book, we treat of law, not of ethics.

<sup>1</sup> Vattel Law of Nations, b. 3, c. 18, and b. 4, c. 2; *Knote v. United States*, 10 Ct. Cl. 397.

<sup>2</sup> Vattel Law of Nations, b. 4, c. 2, § 20; *The State v. Blalock*, Phillips, 242.

<sup>3</sup> *Rex v. Parsons*, 1 Show. 283; *Rex v. Greenvelt*, 12 Mod. 119; s. c. nom. *Greenvelt's Case*, 1 Ld. Raym. 218, 214; *Shugborough v. Biggins*, 5 Co. 50 a; s. c. nom. *Shackborough v. Biggins*, Cro. Eliz. 632, 682; *Searle v. Williams*, Hob. 288, 293; *Smith v. Bowen*, 11 Mod. 254.



Parliament.<sup>1</sup> With us, the constitutions of the United States and of the several States provide for pardons; or, should there be a State or two in which this is not so, the defect is supplied by legislation.<sup>2</sup> By the Constitution of the United States, the President is vested with the "power to grant reprieves and pardons for offences against the United States, except in cases of impeachment."<sup>3</sup> In most of the States, the power is reposed in the governor, who is to exercise it with the advice of his council, or other officers designated for the purpose, or alone, as the provision may be.<sup>4</sup> Sometimes special powers of remitting fines and forfeitures are conferred on the courts.<sup>5</sup>

§ 900. **Pardon as Legislative Act.** — According, therefore, to the system of laws whence ours are derived, pardon may proceed from either the executive or the legislative department, the power not being exclusive in either.<sup>6</sup> In our country, it is the general style of our written constitutions to confer *specific* executive powers on the Governor or President, and *general* legislative authority on the legislature. The result would seem to be, that ordinarily the governor of a State, for example, can exercise the pardoning power expressly given him, and no other; while the legislature may exercise all pardoning power not expressly withheld. So the question stands in principle. In authority, it has been held, under a constitution forbidding any one department of the government to exercise powers properly belonging to another, that pardons, being grantable by the governor, cannot be given by the legislature.<sup>7</sup> Ordinarily, as the function is both

<sup>1</sup> 3 Inst. 233 et seq.

<sup>2</sup> And see Story Const. § 1496. **Whether Statute required.** — When the constitution of a State vests in the governor the power of pardon, he may exercise it, though no legislation exists on the subject. *Baldwin v. Scoggin*, 15 Ark. 427. **No Power in Legislature.** — In Alabama, the legislature cannot pardon, the power being exclusively in the governor. *Haley v. Clark*, 26 Ala. 439.

<sup>3</sup> Const. U. S. art. 2, § 2, cl. 1.

<sup>4</sup> See the constitutions and the statutes of the several States; also, *Commonwealth v. Caton*, 4 Call. 5; *Ex parte Birch*, 3 Gilman, 134, 145; *The State v. Fuller*, 1 McCord, 178; *The State v. Fleming*, 7 Humph. 152; *Ex parte Hunt*, 5

Eng. 284; *The State v. Twitty*, 4 Hawks, 193; *Ex parte Hickey*, 4 Sm. & M. 751; *Shoop v. Commonwealth*, 3 Barr, 126; *The State v. Simpson*, 1 Bailey, 378; *The State v. Brewer*, 7 Blackf. 45; *Charleston v. Corleis*, 2 Bailey, 186; *Commonwealth v. Lockwood*, 109 Mass. 323; *Ex parte Scott*, 19 Ohio State, 581; *Dominick v. Bowdoin*, 44 Ga. 357; *Grubb v. Bullock*, 44 Ga. 379; *Wilkerson v. Allan*, 23 Grat. 10; *Blair v. Commonwealth*, 25 Grat. 850; *The State v. Nichols*, 26 Ark. 74; *The State v. Dunning*, 9 Ind. 20.

<sup>5</sup> *Strafford v. Jackson*, 14 N. H. 16.

<sup>6</sup> *The State v. Nichols*, 26 Ark. 74.

<sup>7</sup> *The State v. Sloss*, 25 Misso. 291. To a like effect is *The State v. Nichols*, supra. Cooley says: "Whether the leg-

executive and legislative in the country whence we derive our unwritten laws, the vesting of the power in the governor would appear not to make it exclusive in him. And, in one way or another, pardons, and especially the broader amnesty, are widely granted by the legislatures of our States.<sup>1</sup>

§ 901. *Continued.* — There is another view of this question, as to pardon before final judgment. The power to make laws carries with it the power to repeal them. If a statute is repealed, no proceeding against an offender under it can be instituted, or, if instituted, carried further. So that, unless final judgment has been rendered, the repeal of a statute has the practical effect of a legislative pardon;<sup>2</sup> and, in reason, the greater power includes the less. It plainly includes the right to pass a general act of amnesty. And this, in principle, includes the authority to pass a special act of pardon. But some of our State constitutions require that all laws shall be general; and it would probably violate such a provision for the legislature to undertake to pardon a single person.

§ 902. *Common-law Authorities.* — We have seen,<sup>3</sup> that the common law of crimes prevails generally in our States. Therefore the English authorities on pardon are pertinent there.<sup>4</sup> And though the national tribunals cannot take jurisdiction of any crime without the aid of a statute;<sup>5</sup> yet, as observed constantly in practice, when a jurisdiction has been acquired, they look into the common law for their rules of decision. On the question of pardon, the course of the courts was early explained by Marshall, C. J., thus: "As this power had been exercised from time imme-

islature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of *Haley v. Clark*, 26 Ala. 439, and *People v. Bircham*, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation." *Cooley Const. Lim.* 2d ed. 115, note.

<sup>1</sup> *Bird v. Breedlove*, 24 Ga. 623; *The State v. Blalock*, Phillips, 242; *Haddix v. Wilson*, 3 Bush, 523; *Michael v. The*

*State*, 40 Ala. 361; *The State v. Keith*, 68 N. C. 140. And see *Greathouse's Case*, 2 Abb. U. S. 382; *Michael v. The State*, 40 Ala. 361; *The State v. Dunning*, 9 Ind. 20.

<sup>2</sup> *Stat. Crimes*, § 175-185. But it is not quite so in full. After a pardon has been granted and accepted, it cannot be withdrawn; while, after a statute is repealed, a new statute may authorize prosecution for an offence committed under it before the repeal. *Ib.* § 180.

<sup>3</sup> *Ante*, § 35-38, 189.

<sup>4</sup> *People v. Bowen*, 43 Cal. 439.

<sup>5</sup> *Ante*, § 194, 190.

morial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.”<sup>1</sup>

§ 903. **Not before Offence committed.** — There can be no pardon of an offence until committed; for earlier immunity granted would be a license, procurable only from the legislature.<sup>2</sup> But, —

**Before or after “Conviction.”** — By the general doctrine, when guilt is incurred, it can be remitted either before judicial proceedings are undertaken, or during their pendency, or after their termination, or after the punishment has been partly or fully endured.<sup>3</sup> Yet, by express words in the constitutions of considerable numbers of our States, the pardoning power is forbidden to act before “conviction.”<sup>4</sup> A conviction, in ordinary legal language, consists of a plea or verdict of guilty, and it is immaterial whether or not final judgment has been rendered thereon.<sup>5</sup> Therefore, though a constitution has this clause, there may be a pardon under it after verdict and before sentence.<sup>6</sup>

<sup>1</sup> *United States v. Wilson*, 7 Pet. 150, 160; *s. p.* *Ex parte Wells*, 18 How. U. S. 307, 310, 311, where Wayne, J., observed: “We must give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution.” And see *Stat. Crimes*, § 97; *People v. Bowen*, *supra*.

<sup>2</sup> *Thomas v. Sorrell*, Vaugh. 330, 333; *Case of Pardons*, 12 Co. 29; *Rex v. Wilcox*, 2 Salk. 458; *Rex v. Williams*, Comb. 18; *Shipley v. Craister*, 2 Vent. 131; 2 Hawk. P. C. Curw. ed. p. 540, § 28. And see *Ib.* and § 29, for some possible exceptions in England; but they can probably have no application in this country. See post, § 904 and note.

<sup>3</sup> *Rex v. Reilly*, 1 Leach, 4th ed. 454; *Rex v. Crosby*, 1 Ld. Raym. 39; *Anonymous*, 1 Vent. 349; *Rex v. Castlemain*, T. Raym. 379; post, § 904; *Commonwealth v. Bush*, 2 Duvall, 264. It was therefore held in Missouri, that the pardoning power given by the constitution to the governor of the State extends to the granting of pardons as well before as after conviction. And *Scott, J.*, after re-

ferring to the English authorities, added: “It seems to be equally well settled in the United States, that, unless the power of pardoning is restricted, it may be exercised as well before as after conviction.” *The State v. Woolery*, 29 Misso 300, 301. The words of the Georgia constitution being, that the governor “shall have power to grant reprieves and pardons, to commute penalties, and to remit any part of a sentence for offences against the State except in cases of impeachment,” it is held that the pardon may be as well before conviction as after. *Domick v. Bowdoin*, 44 Ga. 357; *Grubb v. Bullock*, 44 Ga. 379.

<sup>4</sup> *Ex parte Birch*, 3 Gilman, 134, 145.

<sup>5</sup> *Stat. Crimes*, § 348.

<sup>6</sup> *Commonwealth v. Mash*, 7 Met. 472; *The State v. Fuller*, 1 McCord, 178; *Duncan v. Commonwealth*, 4 S. & R. 449; *Blair v. Commonwealth*, 25 Grat. 850; *Commonwealth v. Lockwood*, 109 Mass. 323; *The State v. Alexander*, 76 N. C. 231. And see *The State v. Nichols*, 26 Ark. 74; *The State v. Dyches*, 28 Texas, 535.

§ 904. **Pardons and Amnesty by President.** — The Constitution of the United States does not forbid the pardoning power to act before conviction. Therefore the President may pardon an offence as soon as it has been committed; but not, as just said, before its commission. To attempt this would be an encroachment upon powers exclusively legislative; in other words, it would be an endeavor to annul the law of the land.<sup>1</sup>

§ 905. **Procured by Fraud — (Suppression of Facts).** — A pardon procured by a fraud on the pardoning power is void.<sup>2</sup> It is so even, according to the English books, whenever the king has not been truly and fully apprised of the nature of the case, and the state of the proceedings.<sup>3</sup> Gabbett observes: "It may be laid down as a general rule, that any suppression of truth or sugges-

<sup>1</sup> See ante, § 64. **The Amnesty Proclamations.** — An instance of oversight, rather than of any real purpose to violate constitutional duty, was pointed out by me to President Lincoln, in a letter published in the newspapers, dated Feb. 22, 1865, as follows: "The Constitution provides, art. 2, § 2, that the President 'shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.' Before there can be a pardon, there must be an offence. You cannot to-day pardon what you think a man may do to-morrow. And if you promise to-day, to pardon a crime which a man may commit to-morrow, you thereby in effect violate the Constitution. You abuse the godlike power of mercy, which the Constitution has put into your hands. Yet on the 8th of December, 1863, you issued a proclamation which, taken in connection with what accompanied it, and with other circumstances and events, is understood, perhaps unjustly, by the whole country, North and South, to be of this unlawful kind. Is it your intent that those only who have done nothing since December 8, 1863, to help the rebellion, can have the benefit of your amnesty proclamation? You said, in your Message a year afterward, that the rebels could still have the benefit of it; and you did not limit the statement to include only those who had done nothing to help the rebellion since it was issued." The error was in attempting to

apply such a proclamation to offences afterward to be committed; and omitting, in the instrument itself, to state explicitly that it could not be so applied. Questions upon the effect of the amnesty statutes and proclamations, promulgated during and at the close of our late civil war, are fast passing away; but those who have occasion to look into them will find help from the following cases: *Armstrong v. United States*, 13 Wal. 154; *Pargoud v. United States*, 13 Wal. 156; *Carlisle v. United States*, 16 Wal. 147; *Lapeyre v. United States*, 17 Wal. 191; *The Confiscation Cases*, 20 Wal. 92; *Greathouse's Case*, 2 Abb. U. S. 382; *United States v. Hughes*, 1 Bond, 574; *Bragg v. Lorio*, 1 Woods, 209; *United States v. Six Lots of Ground*, 1 Woods, 234; *Brown v. United States*, McCahon, 229; *Haym v. United States*, 7 Ct. Cl. 443; *Hamilton v. United States*, 7 Ct. Cl. 444; *Waring v. United States*, 7 Ct. Cl. 501; *Knote v. United States*, 10 Ct. Cl. 397; *Michael v. The State*, 40 Ala. 361; *Haddix v. Wilson*, 3 Bush, 523; *Ex parte Law*, 35 Ga. 285; *United States v. Athens Armory*, 35 Ga. 344; *The State v. Keith*, 63 N. C. 140; *The State v. Shelton*, 65 N. C. 294; *The State v. Haney*, 67 N. C. 467; *Ex parte Hunter*, 2 W. Va. 122; *Hedges v. Price*, 2 W. Va. 192.

<sup>2</sup> *Commonwealth v. Hallowsay*, 8 Wright, Pa. 210, 219.

<sup>3</sup> 2 Gab. Crim. Law, 585; 2 Hawk. P. C. Curw. ed. p. 533, § 8, 9. See also *The State v. McIntire*, 1 Jones, N. C. 1.

tion of falsehood, in a charter of pardon, will vitiate it; and, upon this principle, if it state the party to be attainted when in fact no attainder had ever taken place, it will be altogether invalid.”<sup>1</sup> So likewise it is void, if the party is attainted, and it does not mention the attainder; the presumption from the omission being, that the king was not truly informed;<sup>2</sup> while, on the other hand, if the charter of pardon, drawn in general terms, contains an exception of any particular class of felony, the exception applies equally whether there has been an attainder of it or not.<sup>3</sup>

§ 906. *Continued.*—The like doctrine as to fraud prevails with us.<sup>4</sup> If, on comparing the instrument of pardon with the record in the cause, the court sees that the executive may have been imposed upon by false statements, or an omission of relevant facts, it will hold the pardon to be void.<sup>5</sup> Even though the pardoned person did not himself participate in the deception, yet the pardon is equally void if others procured it by false papers and representations. “He can claim nothing as a favor that is founded on the fraud of his friends, so as to prevent the frustration of the fraud.”<sup>6</sup> But,—

<sup>1</sup> 2 Gab. Crim. Law, 586; 3 Inst. 238.

<sup>2</sup> 2 Hawk. P. C. Curw. ed. p. 584; *Rex v. Maddocks*, 1 Sid. 430; *Anonymous*, J. Kel. 28.

<sup>3</sup> 2 Hawk. P. C. Curw. ed. p. 535, § 13.

<sup>4</sup> *Commonwealth v. Kelly*, 9 Philad. 586.

<sup>5</sup> *The State v. Leak*, 5 Ind. 359. In this case, persons had become sureties in a recognizance, to the amount of \$2,000, for the appearance of A, charged with murder. The principal and sureties were defaulted; and, after judgment rendered on the forfeited recognizance, the governor remitted \$1,500 to the sureties, by an instrument which did not state the crime for which A was to appear and answer, or the amount of the judgment thus rendered. And it was held, that the remission was void, because it must be presumed the governor was not informed of the true state of the facts. As to the necessity of supplying the information to the pardoning power, see *Bird v. Breedlove*, 24 Ga. 623.

<sup>6</sup> *Commonwealth v. Hallaway*, 8

*Wright*, Pa. 210, 219, 220, by Lowrie, C. J. The court considered, that Stat. 27 Edw. 3, stat. 1, c. 2, is common law in Pennsylvania; or, if not, “we think,” said the judge, “the principles of the common law demand this conclusion, and they have a rather wider extent than the provisions of this statute.” The statute is as follows: “Because our lord the king hath often granted charters of pardon of felonies upon feigned and untrue suggestions of divers people, whereof much evil hath chanced in times past; and for to eschew such evil, &c., in every charter of pardon of felony, which shall be granted at any man’s suggestion, the said suggestion, and the name of him that maketh the suggestion, shall be comprised in the same charter; and if after the same suggestion be found untrue, the charter shall be disallowed and holden for none. And the justices before whom such charter shall be alleged shall inquire of the same suggestion, and that as well of charters granted before this time as of charters which shall be granted in time to come;

**Erroneous Date of Conviction.** — In the absence of fraud, a pardon will be good, though it states the date of the conviction incorrectly, if it was intended to cover, and does cover, the particular offence.<sup>1</sup>

§ 907. **Delivery and Acceptance.** — A pardon, to be valid, must be delivered, and, like a deed of land, accepted by the grantee. Where there is no acceptance, it is void.<sup>2</sup> In Pennsylvania, by usage, a delivery to the warden of the prison is *prima facie* a delivery to the prisoner; but, in a particular instance, the intention may be shown to be otherwise, when it will not have this effect.<sup>3</sup> And perhaps there are other localities in which a mere delivery to the prison-keeper will be adequate; though it is not quite clear on what principle this can be so. A mere delivery to the marshal or sheriff is not a delivery to the prisoner.<sup>4</sup>

**Not revocable.** — After delivery, a pardon cannot be revoked.<sup>5</sup> But it can be, after passing out of the hands of the executive, at any time before delivery.<sup>6</sup>

**As to General Legislative Pardon.** — The doctrine of delivery and acceptance does not apply to a legislative act of amnesty and pardon. The courts take notice of such an act like any other general statute. Nor, being a law, and not a deed, does it require acceptance.<sup>7</sup> And, —

**General Pardon by Proclamation.** — The like rule applies to a general executive pardon or amnesty. There is no instrument meant for delivery; and, though one might doubtless decline to avail himself of his rights under such a proclamation, the courts take judicial notice of it, and it goes into effect on being executed

and, if they find them untrue, then they shall disallow the charters so alleged, and shall moreover do as the law demandeth." If this statute is common law with us, still perhaps one or two of its provisions should be interpreted in the light of principles relating to directory statutes mentioned elsewhere. Stat. Crimes, § 255.

<sup>1</sup> Commonwealth v. Ohio and Pa. Railroad, 1 Grant, Pa. 329. Yet if a pardon misrecites the offence, it will be inoperative. United States v. Stetter, 1 Whart. Crim. Law, 5th ed. § 786, note.

<sup>2</sup> United States v. Wilson, 7 Pet. 150. Marshall, C. J. in this case observed:

"It may be supposed, that no being condemned to death would reject a pardon; but the rule must be the same in capital cases and in misdemeanors. A pardon may be conditional; and the condition may be more objectionable than the punishment inflicted by the judgment." p. 161. s. p. In re Callicot, 8 Blatch. 80, 98.

<sup>3</sup> Commonwealth v. Halloway, 8 Wright, Pa. 210.

<sup>4</sup> In re De Puy, 3 Ben. 307.

<sup>5</sup> The State v. Nichols, 26 Ark. 74. And see United States v. Hughes, 1 Bond, 574.

<sup>6</sup> In re De Puy, *supra*.

<sup>7</sup> The State v. Blalock, Phillips, 242.

in due form of law. It remains only for the person relying on it to comply with its conditions, if any.<sup>1</sup>

§ 908. **By what Rules construed.**—A pardon is to be construed by the rules applying to grants. If, therefore, its meaning is in doubt, it is to be taken most strongly against the grantor,<sup>2</sup> yet not beyond the fair import of its words.<sup>3</sup> In like manner, while amnesty, by statute or proclamation, is not a deed or within its reasons, it is justly said to be an act of grace, to be interpreted liberally in favor of those for whose benefit it is intended.<sup>4</sup> But its meaning, like that of other writings, must be gathered from its language, to the exclusion of extrinsic information concerning the intent of the pardoning power.<sup>5</sup> And it is not to be understood as attempting the repeal of a statute in violation of the constitution,<sup>6</sup> but solely as contemplating effects within the constitutional power of pardon.<sup>7</sup> Still, —

**Effect distinguished.** — A pardon, like any other instrument, may have an effect quite beyond its words, — to be explained further on.<sup>8</sup> And, —

**What a Pardon — (Order to discharge Prisoner).** — There is no one exclusive form of language essential to this instrument. Therefore a writing, by the President, under the seal of the United States, directing the immediate discharge of a person sentenced to imprisonment for robbing the mail, was held to be a pardon.<sup>9</sup> But —

**Promise of Pardon.** — A mere promise of pardon is not a pardon, though it may properly lead the court to continue the case until the thing promised can be obtained.<sup>10</sup>

§ 909. **To what the Power extends.** — The power of pardon extends, in England, to all indictable offences, to ecclesiastical

<sup>1</sup> *Lapeyre v. United States*, 17 Wal. 191; *Armstrong v. United States*, 13 Wal. 154; *Pargoud v. United States*, 13 Wal. 156; *Greathouse's Case*, 2 Abb. U. S. 382; *United States v. Hughes*, 1 Bond, 574; *Hamilton v. United States*, 7 Ct. Cl. 444.

<sup>2</sup> *Wyrral's Case*, 5 Co. 49 *b*; *Ex parte Hunt*, 5 Eng. 284.

<sup>3</sup> 2 Hawk. P. C. Curw. ed. p. 535, 539, 540, § 12, 24, 25. See *Rawleigh's Case*, 2 Rol. 50.

<sup>4</sup> *The State v. Shelton*, 65 N. C. 294.

<sup>5</sup> *Greathouse's Case*, 2 Abb. U. S. 382.

<sup>6</sup> *The Confiscation Cases*, 20 Wal. 92.

<sup>7</sup> Stat. Crimes, § 90. And see further as to the interpretation of pardons, *Rex v. Johnson*, 3 Mod. 241; *Philips's Case*, 1 Sid. 170; *Oswald v. Everard*, 1 Ld. Raym. 637; *Pool v. Trumbal*, 3 Mod. 56; *Wyrral's Case*, 5 Co. 49 *b*; *Phitton's Case*, 6 Co. 79 *b*; *Littleton v. Dudley*, 5 Co. 47 *a*; *Franklin's Case*, 5 Co. 46 *b*.

<sup>8</sup> Post, § 916 et seq.

<sup>9</sup> *Jones v. Harris*, 1 Strob. 160.

<sup>10</sup> *Rex v. Garside*, 4 Nev. & M. 33, 2 A. & E. 266. See *The State v. Baptiste*, 26 La. An. 134; *Crim. Proced. I.* § 847.

ones,<sup>1</sup> and to wrongs pursuable by penal action;<sup>2</sup> except that, when a right to a penalty or to costs has vested in a private person, the pardon of the offender cannot take it away.<sup>3</sup> The constitutions of some of our States expressly extend the pardoning power to the remission of fines and forfeitures, while those of other States, and that of the United States, do not; but the whole is included, the same as in England, under the general power.<sup>4</sup> Still, —

§ 910. **Vested Rights.** — There is some obscurity in the books as to the effect of a pardon on what are termed vested rights.<sup>5</sup> A distinction exists between a vested right in action, or *chase in action*, and property vested in possession, or reduced to possession. And, though the cases are in confusion, and not all are harmonious with any principle, the doctrine seems to be, that, as to the former, the pardon cannot take away such a right from an individual,<sup>6</sup> but it can from the State; while, as to the latter, under our constitutions, the pardoning power cannot even divest the State of property vested in it in possession. Nor, in England, will it be construed to do the latter unless its words are express.<sup>7</sup> But, more particularly, —

**Costs.** — If costs are coming to a prosecutor or an attorney, and

<sup>1</sup> *Cooke v. Hall*, 5 Co. 51 *a*; *Cuddington v. Wilkins*, Hob. 81; *Rex v. Turvil*, 2 Mod. 53; *Smith v. Shelbourn*, Cro. Eliz. 685, 686; *Winchcombe v. Winchester*, Hob. 165, 167; *Trollop's Case*, 8 Co. 68 *a*.

<sup>2</sup> 3 Inst. 283; 2 Hawk. P. C. Curw. ed. p. 543, § 83. See *Bentley v. Ely*, 2 Stra. 912.

<sup>3</sup> *Thomas v. Sorrell*, Vaugh. 330, 333; *Cooke v. Hall*, 5 Co. 51 *a*; *Pool v. Trumbal*, 3 Mod. 56; *Howell v. James*, 2 Stra. 1272; 2 Hawk. P. C. Curw. ed. p. 543, § 34; *In re Deming*, 10 Johns, 232, 483.

<sup>4</sup> Story Const. § 1504; *Osborn v. United States*, 91 U. S. 474; *United States v. Harris*, 1 Abb. U. S. 110; *United States v. Thommasson*, 4 Bis. 336; *United States v. Athens Armory*, 2 Abb. U. S. 129; *The State v. Timmons*, 2 Harring. Del. 528; *The State v. Underwood*, 64 N. C. 599; *Libby v. Nicola*, 21 Ohio State, 414. In Kentucky, "The 10th section of the 8d article of the constitution," it was observed, "vests in the governor power to remit fines and forfeitures, but prohib-

its him from remitting the fees of a commonwealth attorney, &c., in penal or criminal cases." And the court held, that, before judgment, the governor can remit the forfeiture incurred on a recognizance, in favor of the sureties. *Commonwealth v. Morgan*, 14 B. Monr. 392. Indeed, the right of the commonwealth's attorney, which cannot be remitted, does not accrue till judgment is rendered. *Commonwealth v. Spraggins*, 18 B. Monr. 512. See also *Commonwealth v. Denniston*, 9 Watts, 142; *Haynes v. The State*, 3 Humph. 480; *Wilkerson v. Allan*, 23 Grat. 10; *United States v. McKee*, 4 Dil. 128.

<sup>5</sup> As to what rights of property are vested, see 2 Bishop Mar. Women, § 38-53.

<sup>6</sup> See Stat. Crimes, § 178, 179; 2 Bishop Mar. Women, § 32-34.

<sup>7</sup> *Toomes v. Etherington*, 1 Saund. 361; *Rex v. Turvil*, 2 Mod. 53; *Rex v. Saloway*, 3 Mod. 100; *Rex v. Johnson*, 3 Mod. 241; 2 Hawk. P. C. c. 37, § 54; *Knote v. United States*, 95 U. S. 149.



are already taxed; <sup>1</sup> or probably, in our practice, if final judgment is rendered, leaving the taxation a mere ministerial act to be done by the clerk; <sup>2</sup> they are recoverable after pardon. And if the costs are to go into the treasury of the State, not every form of words in a general pardon will remit them after judgment; and possibly there are courts which will hold that they cannot be remitted, being a right vested in the State. <sup>3</sup> If the pardon comes before sentence, though after conviction, the costs are always remitted, or rather they are never incurred. <sup>4</sup> Even after sentence, it is believed that the general American doctrine holds it to be competent for the pardoning power to remit, if it chooses, such costs as are payable to the State. <sup>5</sup> Again, —

**Penalties and Forfeitures.** — If, on a judgment against a convicted person, there is a penalty which is payable to a private individual, it cannot be remitted by a pardon. <sup>6</sup> And, in general, when by judicial process property has become vested in one, it cannot be taken from him. <sup>7</sup> But here we come to the distinction, between property vested in possession, and a vested right of action. It appears to be established doctrine that if, for example, a mere judgment of forfeiture vests specific property in the United States, the President, who has no power to dispose of what belongs to the nation, cannot, by his pardon, divest the nation

<sup>1</sup> *Cooke v. Hall*, 5 Co. 51 a; 2 Hawk. P. C. Curw. ed. p. 546; *Anglea v. Commonwealth*, 10 Grat. 696; *The State v. McO'Blenis*, 21 Misso. 272; *Duncan v. Commonwealth*, 4 S. & R. 449. See also *Lyon v. Morris*, 15 Ga. 480; *Routt v. Feemster*, 7 J. J. Mar. 131; *Edwards v. The State*, 7 Eng. 122; *The State v. Farley*, 8 Blackf. 229; *Schuykill v. Reifsnnyder*, 10 Wright, Pa. 446.

<sup>2</sup> *Duncan v. Commonwealth*, 4 S. & R. 449; *Ex parte McDonald*, 2 Whart. 440.

<sup>3</sup> *Libby v. Nicola*, 21 Ohio State, 414; *Schuykill v. Reifsnnyder*, 10 Wright, Pa. 446; *Estep v. Lacy*, 35 Iowa, 419. See *Parrott v. Wilson*, 51 Ga. 255.

<sup>4</sup> *Harris v. White*, Palmer, 412; *Watts's Case*, Cro. Jac. 336; *Commonwealth v. Hitchman*, 10 Wright, Pa. 357; *White v. The State*, 42 Missis. 635; *The State v. Underwood*, 64 N. C. 599; *Commonwealth v. Ahl*, 7 Wright, Pa. 53. The case of

*Playford v. Commonwealth*, 4 Barr, 144, seems to lay down the doctrine, that, when a pardon comes between the verdict and the sentence, the payment of costs may still be compelled. But the case plainly is misunderstood by the reporter. The judges decided whatever they did decide in it on the strength of *Duncan v. Commonwealth*, supra, which expressly holds the contrary; namely, that costs do not follow under such circumstances. And so are the later Pennsylvania cases above cited.

<sup>5</sup> *Libby v. Nicola*, supra; post, § 916.

<sup>6</sup> *Frazier v. Commonwealth*, 12 B. Monr. 369; *Rowe v. The State*, 2 Bay, 565; *The State v. Williams*, 1 Nott & McC. 26; *Rucker v. Bosworth*, 7 J. J. Mar. 645; *Shoop v. Commonwealth*, 3 Barr, 126. See *Rankin v. Beard*, Breese, 123.

<sup>7</sup> *Osborn v. United States*, 91 U. S. 474.

of it, and give it back to its former owner.<sup>1</sup> And it is the same with the governor of a State.<sup>2</sup> A judgment of fine and costs is, as already intimated, distinguished from a judgment of forfeiture of specific property in this, that the latter vests the property itself in the state, while the former vests in it a mere *chose in action*. At all events, the accepted doctrine appears to be, that it is competent for a pardon to remit the fine and costs yet unpaid to the State.<sup>3</sup> Even —

**County.** — There is authority that a county is liable to have penalties, which have vested in it, divested by the executive pardon.<sup>4</sup> And —

**Revenue Forfeiture.** — The Supreme Court of the United States has decided, that the authority given to the Secretary of the Treasury by the act of March 3, 1797, c. 361, to remit forfeitures under the revenue laws, may be exercised at any time before payment of the money to the collector.<sup>5</sup>

§ 911. **Qui Tam, &c.** — If the proceeding is by penal action in the civil form, and the penalty is to accrue in part to the prose-

<sup>1</sup> The Confiscation Cases, 20 Wal. 92, 112; *United States v. Six Lots of Ground*, 1 Woods, 234; *Bragg v. Lorio*, 1 Woods, 209; *Knote v. United States*, 10 Ct. Cl. 397. But see *Brown v. United States*, McCahon, 229; *United States v. Harris*, 1 Abb. U. S. 110.

<sup>2</sup> *Aldrich v. Jessup*, 8 Grant, Pa. 158.

<sup>3</sup> See post, § 911, 916. *The State v. Timmons*, 2 Harring. Del. 528; *United States v. Harris*, 1 Abb. U. S. 110; *United States v. Thomasson*, 4 Bis. 336. **Informer's Share.** — In *United States v. Harris*, it was held that after judgment the President may by pardon remit the part of a fine, penalty, or forfeiture which accrues to the United States, but not the informer's share. In *United States v. Thomasson*, the latter clause of this doctrine was disapproved, and it was held that both the informer's moiety and the other may be remitted by pardon even after judgment. The court deemed, that the English doctrine is not applicable as a rule to ascertain the President's power under our National Constitution. I simply state these cases, not undertaking to say how far either is sound.

<sup>4</sup> *Holliday v. People*, 5 Gilman, 214.

But see *Shoop v. Commonwealth*, 3 Barr, 126. And see *The State v. Simpson*, 1 Bailey, 378. In the Pennsylvania case of *Cope v. Commonwealth*, 4 Casey, 297, it was held, that a pardon of one convicted of conspiracy, even after sentence, will operate as a release of all fines imposed for the offence, though due, not to the commonwealth, but to the county. In another Pennsylvania case it was observed: "Sometimes the sentence of the court is, that the party in default be fined, as well as imprisoned; and it would be a distinction the reason of which would not be very obvious, to give power to the governor to remit the imprisonment, but deny him the right to remit the fine, upon the pretence that the right to the money was vested in the county. In the case of costs, private persons are interested in them; but, as to fines and forfeitures, they are imposed upon principles of public policy." *Rogers, J., in Commonwealth v. Denniston*, 9 Watts, 142, 148.

<sup>5</sup> *United States v. Morris*, 10 Wheat, 246. See *The Hollen*, 1 Mason, 481, 484, 485.

cutor and the residue to the State, still the pardoning power extends to such a case.<sup>1</sup> But, according to the English doctrine, to bar the action, so as to defeat the claim of the private person, the pardon must transpire before suit commenced; for the commencement of it vests the right.<sup>2</sup> Where a forfeiture is to be enforced by a seizure and condemnation *in rem*, the private interest vests, certainly on the condemnation, probably on the seizure.<sup>3</sup> But—

**Proceeding by Indictment, &c.**—If the proceeding is in the name of the king or state, by indictment or criminal information, the rule, we have seen,<sup>4</sup> is different; and the private interest does not vest, even on the verdict of the jury, but only on the final judgment of the court.<sup>5</sup> Yet, subject to any doubt suggested by some of the foregoing paragraphs, though the pardon cannot take away the individual claim, it can that of the state;<sup>6</sup> even, it appears, so far as to require, under special circumstances, the remission of money which has already passed out of the hands of the convict.<sup>7</sup>

§ 912. **Impeachments.**—The Constitution of the United States expressly excepts out of the pardoning power cases of impeachment,<sup>8</sup> and the like exception exists in most of the State constitutions. It is the same also in England by act of parliament.<sup>9</sup>

§ 913. **Legislative Contempts.**—Of legislative contempts, Story says: “The Constitution [of the United States] is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and, to make it effectual, the former is excluded by implication.”<sup>10</sup> But—

**Contempts of Court.**—Contempts of court are public offences, pardonable like any other.<sup>11</sup>

<sup>1</sup> Ante, § 909.

<sup>2</sup> 2 Hawk. P. C. Curw. ed. p. 543, § 83, 84; Grosset v. Ogilvie, 5 Bro. P. C. 527.

<sup>3</sup> United States v. Lancaster, 4 Wash. C. C. 64; McLane v. United States, 6 Pct. 404. See The Hollen, 1 Mason, 431, 434, 435.

<sup>4</sup> Ante, § 910.

<sup>5</sup> Duncan v. Commonwealth, 4 S. & R. 449; The State v. Youmans, 5 Ind. 280. And see Greonvelt's Case, 1 Ld. Raym. 213, 214.

<sup>6</sup> Rowe v. The State, 2 Bay, 565; The State v. Williams, 1 Nott & McC. 26; The State v. Timmons, 2 Harring. Del. 528.

<sup>7</sup> In re Flournoy, 1 Kelly, 606. See post, § 916; Parrott v. Wilson, 51 Ga. 255.

<sup>8</sup> Ante, § 899.

<sup>9</sup> Reg. v. Boyes, 1 B. & S. 311.

<sup>10</sup> Story Const. § 1503. It is the same in England by Stat. 12 & 13 Will. 3, c. 2. 4 Bl. Com. 261. “But after the impeachment is solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged.” 2 Hawk. P. C. Curw. ed. p. 547, § 44.

<sup>11</sup> Hawk. ut sup, p. 540, § 26; Trollop's Case, 8 Co. 68 a; Reg. v. Watson,

§ 914 **Full — Partial — Conditional.** — A pardon may, by the English law, be full, partial, or conditional. It may be conditional, if the pardoning power please, by the constitutions of some of our States.<sup>1</sup> And where, as in other States, and under the Constitution of the United States, the power of pardon is granted simply in general terms, the pardon may still be partial or conditional, as well as full, the same as in England; for the greater includes the less.<sup>2</sup> Where the pardon is full, its collateral and consequential effects cannot be abridged by its language; for they depend on the law of the land.<sup>3</sup>

**Conditional.** — A conditional pardon may be on condition either precedent or subsequent; if precedent, — that is, if by its terms some event is to transpire before it takes effect, — its operation is deferred until the event occurs.<sup>4</sup> If the condition is subsequent, the pardon goes into operation immediately, yet becomes void whenever the condition is broken.<sup>5</sup>

§ 915. **Nature of the Condition.** — It is said that the condition must not be impossible, criminal, or illegal.<sup>6</sup> But, within this limit, the approved conditions are quite diverse. One is, that the prisoner shall leave, permanently or for a time, the State or country.<sup>7</sup> Another is, that he shall submit to a punishment men-

2 *Ld. Raym.* 817, 818; *Ex parte Hickey*, 4 *Sm. & M.* 751; *The State v. Sauvinet*, 24 *La. An.* 119; *In re Mullee*, 7 *Blatch.* 23.

<sup>1</sup> *Ex parte Hunt*, 5 *Eng.* 284; *Libby v. Nicola*, 21 *Ohio State*, 414, 418.

<sup>2</sup> *Flavell's Case*, 8 *Watts & S.* 197; *The State v. Addington*, 2 *Bailey*, 616; *The State v. Twitty*, 4 *Hawks*, 193; *Perkins v. Stevens*, 24 *Pick.* 277; *People v. Potter*, 1 *Parker, C. C.* 47; *Ex parte Wells*, 18 *How. U. S.* 307; *Osborn v. United States*, 91 *U.S.* 474; *United States v. Six Lots of Ground*, 1 *Woods*, 234; *People v. Potter*, *Edm. Sel. Cas.* 235. Contra, as to conditional pardons, *Commonwealth v. Fowler*, 4 *Call*, 35. The statutes of the United States provide, that, "whenever, by the judgment of any court or judicial officer of the United States, in any criminal proceeding, any person is sentenced to two kinds of punishment, the one pecuniary and the other corporal, the President shall have full discretionary power to pardon or remit,

in whole or in part, either one of the two kinds, without, in any manner, impairing the legal validity of the other kind, or of any portion of either kind, not pardoned or remitted." *R. S. of U. S.* § 5330.

<sup>3</sup> *People v. Pease*, 3 *Johns. Cas.* 333; *Cook v. Middlesex*, 3 *Dutcher*, 637; *Cook v. Middlesex*, 2 *Dutcher*, 326.

<sup>4</sup> *Haym v. United States*, 7 *Ct. Cl.* 443; *Waring v. United States*, 7 *Ct. Cl.* 501; *Scott v. United States*, 8 *Ct. Cl.* 457; *Commonwealth v. Haggerty*, 4 *Brews.* 326.

<sup>5</sup> *Flavell's Case*, 8 *Watts & S.* 197; *Reg. v. Foxworthy*, *Holt*, 521.

<sup>6</sup> *Lee v. Murphy*, 22 *Grat.* 789; *People v. Potter*, *Edm. Sel. Cas.* 235.

<sup>7</sup> *The State v. Smith*, 1 *Bailey*, 283; *People v. Potter*, 1 *Parker, C. C.* 47; *Reg. v. Foxworthy*, 7 *Mod.* 153; *Commonwealth v. Philadelphia County Prison*, 4 *Brews.* 320; *Commonwealth v. Haggerty*, 4 *Brews.* 326. But see *Commonwealth v. Hatsfield*, 1 *Pa. Law Jour. Rep.* 177.

tioned, not originally pronounced.<sup>1</sup> If the condition is of a sort not allowable, it is void, and the pardon is absolute.<sup>2</sup>

**Breach of Condition.**—If the condition is violated,—as if, it being that the party shall leave the country and not return, yet either he declines to go,<sup>3</sup> or goes and comes back,<sup>4</sup>—the original sentence may be enforced.<sup>5</sup> But—

**How Condition construed.**—A condition in a pardon, as in a grant, is construed strictly. Therefore, if the words are “depart without delay” from the State, it is not broken, says the Arkansas court, by the prisoner’s return to the State after he has left it.<sup>6</sup> And when the condition was, that the pardoned person should leave the State within a specified time, the court deducted a period when he was sick and deranged.<sup>7</sup>

§ 916. **Effect of Pardon.**—Though a pardon is not conditional, it may be partial, in which case it is to be construed according to its special terms.<sup>8</sup> A full pardon absolves the party from all the

<sup>1</sup> *The State v. Addington*, 2 Bailey, 516; *The State v. Smith*, 1 Bailey, 283; *Lee v. Murphy*, supra. But see *The State v. Twitty*, 4 Hawks, 193.

<sup>2</sup> *Commonwealth v. Hatsfield*, supra; *People v. Potter*, supra. See *United States v. Six Lots of Ground*, 1 Woods, 234.

<sup>3</sup> *The State v. Fuller*, 1 McCord, 178; *The State v. Addington*, 2 Bailey, 516; *The State v. Smith*, 1 Bailey, 283; *Rex v. Madan*, 1 Leach, 4th ed. 223; *Roberts v. The State*, 14 Misso. 138.

<sup>4</sup> *The State v. Smith*, 1 Bailey, 283; *The State v. Chancellor*, 1 Strob. 347; *People v. Potter*, 1 Parker, C. C. 47. And see *Rex v. Aickles*, 1 Leach, 4th ed. 390; *Rex v. Thorpe*, 1 Leach, 4th ed. 396, note.

<sup>5</sup> *Flavell’s Case*, 8 Watts & S. 197; *Commonwealth v. Philadelphia County Prison*, 4 Brews. 320; *Commonwealth v. Haggerty*, 4 Brews. 326. See *West’s Case*, 111 Mass. 443.

<sup>6</sup> *Ex parte Hunt*, 5 Eng. 284. Yet see, on this general question, *Rex v. Miller*, 1 Leach, 4th ed. 74, 2 W. Bl. 797; *Reg. v. Foxworthy*, 7 Mod. 153.

<sup>7</sup> *People v. James*, 2 Caines, 57. And see *Rex v. Madan*, 1 Leach, 4th ed. 223; *Rex v. Badcock*, Russ. & Ry. 248. *Mort-*

*gage to secure Condition.*—A mortgage given to secure to a county a sum of money payable as the condition of a pardon was held to be valid,—not void as executed under duress. “The money, for which the mortgage was given,” said the judge, “was a fine imposed by the circuit court of the county, and which, when paid, was to pass into the county treasury, to be distributed among the school districts in the county, for the support of school libraries.” *Rood v. Winslow*, 2 Doug. Mich. 68. **Release of Damages by Prisoner to obtain Pardon.**—A release, by one imprisoned for unlawfully selling liquors which have been destroyed under a statute the constitutionality of which is doubted, of all claims for damages against the official persons who ordered and executed the destruction, in consideration that a third person agrees fairly to bring before the governor and council an application for his pardon, to be delivered to the releasees when the pardon arrives, cannot be revoked; but upon the performance of the agreement, and the arrival of the pardon, takes effect as from the first delivery; and is not contrary to public policy. *Timothy v. Wright*, 8 Gray, 522.

<sup>8</sup> Ante, § 910, 914; *Libby v. Nicola*, 21

legal consequences of his crime, and of his conviction, direct and collateral;<sup>1</sup> including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided.<sup>2</sup> Yet, we have seen,<sup>3</sup> it cannot divest rights vested in individuals, or always those vested in the State; and, if a fine coming to the government has been already paid over, or if property has vested on an attainder, it will not be restored unless by express words in the instrument of pardon.<sup>4</sup> And even should there be such express words, the better doctrine under our constitutions is, that the pardon cannot undo what has been done, so as to entitle the recipient to have again the money which he has paid in the way of fine, or have compensation for his services rendered the State while a prisoner under sentence.<sup>5</sup> Still, if a fine has not been paid, the pardoned person, according, at least, to the common opinion, can no more be made to pay it, after pardon, than to serve out his term of imprisonment.<sup>6</sup> Neither will the pardon of one offence operate as a discharge from any other.<sup>7</sup> Nor will it defeat a suit by an individual for damages, founded on the same transaction.<sup>8</sup>

§ 917. **Capacity to be Witness.** — Among the collateral consequences of an attainder, or final sentence against the prisoner, removed by pardon, is the incapacity to be a witness.<sup>9</sup> Yet only

Ohio State, 414; Franklin's Case, 5 Co. 46 b.

<sup>1</sup> Rex v. Greenvelt, 12 Mod. 119; Strickland v. Thorpe, Yelv. 126; Perte v. Cambridge, 3 Lev. 332; In re Deming, 10 Johns. 232, 488; Carlisle v. United States, 16 Wal. 147; Wood v. Fitzgerald, 3 Oregon, 568.

<sup>2</sup> Thomas v. Sorrell, Vaugh. 330, 333; Hall v. Vaughan, 5 Co. 49 a; Tombes v. Ethrington, 1 Lev. 120; Foxley's Case, 5 Co. 109 a.

<sup>3</sup> Ante, § 910, 911.

<sup>4</sup> Tombes v. Ethrington, 1 Lev. 120; In re Church's Will, 11 Eng. L. & Eq. 240. And see ante, § 911.

<sup>5</sup> Cook v. Middlesex, 3 Dutcher, 637; Cook v. Middlesex, 2 Dutcher, 326; ante, § 910.

<sup>6</sup> Baldwin v. Scoggin, 15 Ark. 427; Holliday v. People, 5 Gilman, 214; ante, § 910.

<sup>7</sup> Hawkins v. The State, 1 Port. 475;

Commonwealth v. Roby, 12 Pick. 496, 508; Anonymous, Sir F. Moore, 756. pl. 1044; The State v. McCarty, 1 Bay, 334; Reg. v. Harrod, 2 Car. & K. 294.

<sup>8</sup> Hedges v. Price, 2 W. Va. 192.

<sup>9</sup> Hoffman v. Coster, 2 Whart. 453; Jones v. Harris, 1 Strob. 160; Rex v. Reilly, 1 Leach, 4th ed. 454; Rex v. Crosby, 1 Ld. Raym. 39, 5 Mod. 15; Rex v. Celier, T. Raym. 369; Rex v. Castlemain, T. Raym. 379; People v. Pease, 3 Johns. Cas. 333. The State v. Blaisdell, 33 N. H. 388. In New York a statute provides, that a person convicted of perjury "shall not thereafter be received as a witness to be sworn in any matter or cause whatsoever, until the judgment against him be reversed," — the effect of which statute is to prevent the pardon from restoring the competency of the witness. Houghtaling v. Kelderhouse, 1 Parker, C. C. 241. And see Blanc v. Rodgers, 49 Cal. 15.

a full pardon has this effect.<sup>1</sup> Even then the conviction may be shown as impairing the witness's credit.<sup>2</sup> Also, as explained in a note,<sup>3</sup> one sued for the slander of calling another a thief, or the like, cannot defend himself by proving the charge, if the offence has been pardoned, — a proposition possibly, but not probably, limited in a manner to take away most of its practical operation for this country; namely, limited to cases wherein the pardon precedes the conviction.<sup>4</sup> Again, —

**Criminate Self.** — After pardon, a witness cannot object to answering a question on the ground that the answer will criminate himself.<sup>5</sup>

§ 918. **Corruption of Blood.** — Under the English common law, corruption of blood is not restored by a pardon from the Crown.<sup>6</sup> And —

**Statutory Disability.** — There seems to be a doctrine, not well defined, and especially not satisfactory in itself, namely, that a disability imposed expressly by statute as a consequence of the offence is not thus taken away.<sup>7</sup>

**Right to Vote.** — Generally a pardon restores the forfeited right to vote.<sup>8</sup> Otherwise in Rhode Island.<sup>9</sup> And, —

§ 919. **Second Offence.** — According to a Kentucky decision, if a second offence is more heavily punishable than the first, a pardon of the first does not prevent the infliction of the heavier punishment on the second. "The pardon," observed Robertson, J., "relieved the convict of the entire penalty incurred by the offence pardoned, and nothing else or more. It neither did nor could relieve from any penal consequence resulting from a different offence, committed after the pardon, and never pardoned."<sup>10</sup>

§ 920. **United States.** — A pardon by the President of the United States does not remove disabilities imposed by State laws.<sup>11</sup>

<sup>1</sup> *Perkins v. Stevens*, 24 Pick. 277.

<sup>2</sup> *Baum v. Clause*, 5 Hill, N. Y. 196.

<sup>3</sup> Ante, § 898, note.

<sup>4</sup> *Cuddington v. Wilkins*, Hob. 81; 2 Hawk. P. C. Curw. ed. p. 547, § 48; 1 Stark. Slander, 237, 238.

<sup>5</sup> *Reg. v. Boyes*, 1 B. & S. 311, 9 Cox C. C. 32, 2 Fost. & F. 157.

<sup>6</sup> *Co. Lit.* 391 b; *Walsingham's Case*, 2 Plow. 547, 558.

<sup>7</sup> *Rex v. Castlemain*, T. Raym. 379; *Anonymous*, 3 Salk. 155; *Commonwealth v. Fugate*, 2 Leigh, 724; 1 Greenl. Ev.

§ 378 and note. See *Rex v. Crosby*, 2 Salk. 689; *Stat. Crimes*, § 139, 140; ante, § 917, note.

<sup>8</sup> *Jones v. Alcorn Registrars*, 56 Missis. 766.

<sup>9</sup> Opinion of Judges, 4 R. I. 583.

<sup>10</sup> *Mount v. Commonwealth*, 2 Duvall, 93, 95.

<sup>11</sup> *Ridley v. Sherbrok*, 3 Coldw. 569; *Ex parte Hunter*, 2 W. Va. 122. And see *Armstrong's Foundry*, 6 Wal. 766. But see *Jones v. Alcorn Registrars*, supra.

§ 921. *Practical Views on Granting Pardons* : —

**Important.** — Of practical importance not exceeded by any questions ordinarily discussed in law books, are some, heretofore neglected by legal authors, relating to the principles which should guide the executive power in granting and withholding pardons. Let us look at some of these.

§ 922. **Public Motives, not Private.** — No official person, whatever his station or the nature of his office, is justified in performing any official acts from private motives, or in pursuance of mere private views. An executive officer, asked to grant a pardon, should neither comply nor refuse merely because he would personally be pleased to see the prisoner suffer or to see him go free. He is bound to act upon public considerations. For example, —

**Appeal from Legislature.** — He does not sit as a court of appeal from the legislature. If he believes the law under which a prisoner is suffering to be unwise or unjust, still this opinion cannot properly incline him to grant the pardon; because the power which makes and unmakes laws is not in him, and officially he is required to look upon the law as just and wise, however his private opinion may revolt.<sup>1</sup> Again, —

§ 923. **Appeal from Judicial Decision.** — The executive officer, in whom is the power of pardon, is not, therefore, a judicial functionary to whom lies an appeal from the ordinary courts. Consequently it would be unlawful for the President, or for the governor of a State, to grant a pardon simply because he differed from the judges in the construction to be put upon a law.<sup>2</sup> If the court was divided in opinion, but the majority was against the prisoner, that might, under some circumstances, furnish ground for leaning to mercy by issuing a pardon. Likewise, —

§ 924. **Appeal from Jury.** — An appeal does not lie from the verdict of a jury to the governor or President on a mere question of fact. Still there may be circumstances in which it is both the right and the duty of the pardoning officer to look below the verdict into what appears, at the time of the application for the pardon, to have been the real facts. And facts unknown at the time of the trial, or within the period allowed by law for

<sup>1</sup> And see Stat. Crimes, § 235; ante, § 303 a, note, 303 b.

<sup>2</sup> See, in connection with this ques-

tion, for another somewhat differing one, Crim. Proced. I. § 287-294.



applications for a new trial, may properly be considered by the pardoning officer.

§ 925. **Proceed by Rule.**—The pardoning officer, therefore, should proceed by rule, as do the judges in the exercise of judicial functions. Technically, the power of pardon is termed discretionary; so are a large part of the powers exercised by the courts. With a court, for instance, it is discretionary whether to try a cause when it is reached on the calendar, or to continue it. Yet this discretion should be exercised on public considerations, and according to rule, not from mere private impulses or views. And a judge who should continue causes, or bring them on for trial, as personal motives impelled, to the injury of suitors, would commit thereby a high misdemeanor in office, for which he ought to be impeached. And the same would follow if the President or a governor should act thus on private views in granting or withholding pardons.

§ 926. **Practical Restraint — (Impeachment).**—These suggestions are important, because lawyers are apt to sympathize with public sentiment, and accept, without reflection, the legal expositions of newspapers and politicians however erroneous. And nothing is more absolutely a perversion of all just doctrine than the opinion which assigns to the President, or to a governor, the power to pardon without limit, and denies to the impeaching power the right to interfere. The pardoning power is necessarily discretionary in its nature; therefore it is necessarily the more open to control by the impeaching power. If it comes to be understood that a single man, intrusted with the high function of pardon, can, because he is so intrusted, open all the prisons of the country, and let every guilty person go free, thus at a blow striking down the law itself, and not be himself punished for the high misdemeanor, the most disastrous consequences to liberty and law will sooner or later follow. Such a conclusion is itself the annihilation of law, and only upon law can liberty repose. Still, —

**Pardon effectual.**—This sort of executive abuse will not authorize the courts to decline giving effect to the executive pardon.<sup>1</sup>

<sup>1</sup> The State v. Ward, 9 Heisk. 100.

## BOOK VIII.

## CONSEQUENCES OF CRIME AND ITS PROSECUTION.

## CHAPTER LX.

THE PUNISHMENT BY SENTENCE OF COURT.<sup>1</sup>

§ 927-929. Introduction.

930-932. Erroneous Sentences.

933-953. What Punishment should be awarded.

954-958. What Punishment in Joint Convictions.

§ 927. **Consequences proceed from Sentence, not Crime.** — There are strictly no consequences of crime, except that a person really guilty is more likely to be troubled with a prosecution, and found guilty by the jury, than one who is not. The consequences which in a sort of general way are said to follow crime, come, not from it, but from the proceedings in court, or the sentence.<sup>2</sup>

§ 928. **Scope of this Chapter.** — This chapter is in matter closely related to those in "Criminal Procedure," entitled "The Sentence," "The Execution of the Sentence," "The Record,"<sup>3</sup> and some others. Yet nothing which is there considered is treated of here. In that work, the formal proceedings are discussed; in the present chapter, we are to look at the substance of the judgment to be pronounced against a convicted wrong-doer.

§ 929. **Order of the Chapter.** — We shall consider, I. Erroneous Sentences; II. What Punishment should be awarded; III. What Punishment in Joint Convictions.

I. *Erroneous Sentences.*

§ 930. **Erroneous Sentence defined.** — An erroneous sentence is one to which the defendant is not, by the record, liable.

<sup>1</sup> For the procedure as concerns the punishment, see *Crim. Proced. I.* § 1289 et seq., and other places.

<sup>2</sup> *Crim. Proced. I.* § 89 et seq.

<sup>3</sup> *Crim. Proced. I.* § 1289-1374.

**Subject to Reversal.** — The general doctrine is, that such a sentence will, on due application to the court, be reversed.<sup>1</sup> But —

**Error in Defendant's Favor.** — Some of the American courts hold, that one cannot take advantage of an error in his favor, as where the punishment is less than the law prescribes.<sup>2</sup> According to which view, if the sentence is, for example, to two years' imprisonment, where the minimum allowed by the statute is three years, this error is not available to him on an application to have the proceedings reversed.<sup>3</sup> Other American courts<sup>4</sup> and the English<sup>5</sup> hold, that, since it violates the law to inflict a less severe punishment than the minimum set down in the statute, one may assign this sort of mistake in his favor for error. Yet, —

§ 931. **Continued.** — Harmoniously with the latter view it is held, that, if the judgment is divisible, and the one part is lawful and the other unlawful, the lawful part may be affirmed and the unlawful reversed. Thus, —

**Unlawful Fine and Lawful Order to Abate Nuisance.** — In Connecticut, where the fine for a nuisance was by statute to be not less than five dollars, yet in a sentence it was four, together with an order of abatement, the court reversed this, as to the fine, but affirmed it as to the abatement.<sup>6</sup> And, —

**Lawful Fine, omitting Order to repair Way.** — In a New York case, "the objection," said Chancellor Walworth in the Court of Errors, "that the defendant was fined only, and that he was not also compelled to repair the road, is one which cannot be urged by the plaintiff in error, even if a judgment to repair could have been given on this conviction. The defendant may, on a writ of error, object that the punishment inflicted upon him is too great in its

<sup>1</sup> *Rex v. Ellis*, 5 B. & C. 395, 8 D. & R. 173; *Bourne v. Rex*, 2 Nev. & P. 248, 7 Ad. & E. 58, 1 Jur. 542; *Silversides v. Reg.*, 2 Gale & D. 617; *Tully v. Commonwealth*, 4 Met. 357; *Daniels v. Commonwealth*, 7 Barr, 371; *Wilde v. Commonwealth*, 2 Met. 408; *The State v. Gray*, 8 Vroom, 368.

<sup>2</sup> *Ooton v. The State*, 5 Ala. 463; *Commonwealth v. Shanks*, 10 B. Monr. 304; *Barada v. The State*, 13 Misso. 94. And see *Jones v. The State*, 13 Ala. 153; *Campbell v. The State*, 16 Ala. 144.

<sup>3</sup> *Wattingham v. The State*, 5 Sneed, 64; *McKinney, J.*, observing: "The rule

that a party cannot assign for error that which is for his own advantage applies as well to criminal as to civil proceedings." p. 65. And see *Hoskins v. The State*, 27 Ind. 470; *Behler v. The State*, 22 Ind. 345; *Crim. Proc.* I. § 1374.

<sup>4</sup> *Rice v. Commonwealth*, 12 Met. 246; *Taff v. The State*, 39 Conn. 82.

<sup>5</sup> *Whitehead v. Reg.* 7 Q. B. 582, 9 Jur. 594, 1 Cox C. C. 199; *Bourne v. Rex*, 2 Nev. & P. 248, 7 Ad. & E. 58.

<sup>6</sup> *Taff v. The State*, 39 Conn. 82, on the authority of *In re Sweatman*, 1 Cow. 144, and *The State v. James*, 37 Conn. 355.

extent, or that it is different in form from what the law has prescribed; but, where a party is subject to two distinct and independent punishments for the same offence, if one of them is inflicted upon him by the sentence of the court, he cannot object that the court has not gone further and inflicted the other penalty also.”<sup>1</sup> Again, —

§ 932. **Error unimportant to Prisoner.** — According to a Maryland case, if the statute makes a fine payable one half to the informer and the other half to the State, yet the whole is adjudged to the State, this judgment will not be reversed on prayer of the defendant; since he has no interest in the disposition of the fine.<sup>2</sup>

## II. *What Punishment should be awarded.*

§ 933. **Both Statutory and at Common Law.** — The common law provides punishments for all its offences. But, with us, it is the general course for legislation, while creating statutory offences, to fix the penalties for those at common law as well. Yet sometimes a common-law punishment remains. And often questions arise under the statutes, making a knowledge of the common law of the subject essential to their interpretation.

§ 934. **By whom Punishment assessed.** — Under the common-law procedure, it is for the court, not the jury, to determine what, within the limits of the law, shall be the punishment in each case. The question is for the judicial discretion.<sup>3</sup> But, in some of our States, the statutes direct that the jury shall assess the punishment in their verdict.<sup>4</sup> In some others, there is, relating to it, a sort of division of responsibility between judge and jury.<sup>5</sup>

<sup>1</sup> Kane v. People, 8 Wend. 203, 211, s. p. McQuoid v. People, 3 Gilman, 76; Dodge v. The State, 4 Zab. 455. See Barth v. The State, 18 Conn. 432.

<sup>2</sup> Rawlings v. The State, 2 Md. 201. See further, on this subject, Nemo v. Commonwealth, 2 Grat. 558; Sword v. The State, 5 Humph. 102; Daniels v. Commonwealth, 7 Barr, 871; Logan's Case, 5 Grat. 692.

<sup>3</sup> United States v. Mundel, 6 Call, 245, 248.

<sup>4</sup> As to which see Foote v. The State, 7 Misso. 502; McWhirt's Case, 3 Grat.

594; Cook v. United States, 1 Greene, Iowa, 56; Commonwealth v. Frye, 1 Va. Cas. 19; Dias v. The State, 7 Blackf. 20; Doty v. The State, 6 Blackf. 529; The State v. Douglass, 1 Greene, Iowa, 550; Nemo v. Commonwealth, 2 Grat. 558; Ervine v. Commonwealth, 5 Dana, 216; Hawkins v. The State, 3 Stew. & P. 63; Chesley v. Brown, 2 Fairf. 143, 147; Blevings v. People, 1 Scam. 172; O'Herrin v. The State, 14 Ind. 420; The State v. Bean, 21 Misso. 269; Morton v. Princeton, 18 Ill. 383; Leech v. Waugh, 24 Ill. 228.

<sup>5</sup> Cook v. United States, 1 Greene,

**Constitutional.** — Legislation, putting the question of punishment into the hands of the jury, has been held in Indiana not to be unconstitutional.<sup>1</sup>

§ 935. **Common-law Punishment for Felony** — (Rape — Petit Larceny — Mayhem). — The ordinary common-law punishment for felonies is, as before shown,<sup>2</sup> death by hanging; the exceptions being, it is said, petit larceny,<sup>3</sup> rape, and mayhem.<sup>4</sup> Therefore death is the award of the law for any statutory felony, unless the statute specifically directs otherwise.<sup>5</sup> But, —

§ 936. **Benefit of Clergy.** — As felonies, statutory and by common law, comprehend a large part of the crimes, the uniform infliction of this highest penal consequence would be too bloody. Accordingly the legislation and judicial wisdom of our fatherland found for the evil a remedy in the plea of clergy, or benefit of clergy; or, as it was sometimes termed after the passage of various acts of Parliament on the subject, the benefit of the statutes. A word explanatory of this benefit of clergy, by way of memento of departed piety, humanity, and genius, may not be inappropriate.

§ 937. **Continued.** — Lord Coke observes, that the privilege of clergy “took its roots from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge.”<sup>6</sup> The English clergy, therefore, demanded to be exempt from the jurisdiction of the lay tribunals; and, to an extent not quite certain, the demand was yielded to by the ancient common law and by acts of Parliament as early as Edw. 1 or earlier. It seems that, generally, when a priest in orders<sup>7</sup> was brought before a temporal judge on a charge of felony,<sup>8</sup> his case was transferred, either with or without trial, to the ecclesiastics.<sup>9</sup> Yet the clergy frequently complained that their privilege was violated, and accordingly acts of Parliament were passed from time to time to remove the difficulty; till this indulgence became the right, not

Iowa, 56; *The State v. McQuaig*, 22 Misso. 319; *Behler v. The State*, 22 Ind. 345; *Moss v. The State*, 42 Ala. 546; *Melton v. The State*, 45 Ala. 56.

<sup>1</sup> *Rice v. The State*, 7 Ind. 332.

<sup>2</sup> *Ante*, § 615.

<sup>3</sup> *Rex v. Ellis*, 5 B. & C. 395, 8 D. & R. 173; *Gray v. Reg.*, 6 Ir. Law, 482, 502.

<sup>4</sup> 2 Hawk. P. C. Curw. ed. p. 472, § 7.

<sup>5</sup> 4 Bl. Com. 98; *The State v. Scott*, 1 Hawks, 24, 34. And see *ante*, § 622.

<sup>6</sup> 2 Inst. 636. See also 1 Burn, Ec. Law, Phillim. ed. 185.

<sup>7</sup> *Searle v. Williams*, Hob. 288.

<sup>8</sup> 2 Inst. 636.

<sup>9</sup> 2 Hawk. P. C. Curw. ed. p. 498, § 110; 4 Bl. Com. 333; 2 Inst. 633.

only of clerks in orders, but of all persons capable of becoming such; namely, of all males, without canonical impediment, able to read.<sup>1</sup> At a later period, the canonical impediments were declared to be no longer barriers, women also were admitted into the happy circle,<sup>2</sup> and the disqualification of ignorance was abolished.<sup>3</sup> Finally, the privilege became pleadable only after conviction,<sup>4</sup> and the offender was not to be delivered to the ecclesiastics.<sup>5</sup> During almost the entire period in which this plea was allowed, the convict was burned in the hand before being discharged; and, for a short time, for larceny, he was burned on the left cheek, near the nose.<sup>6</sup> Yet to prevent a general immunity from punishment for felony, statutes were also passed, taking away the benefit of clergy from specific felonies; and sometimes the same act which created a felony provided that it be punished with death without benefit of clergy.<sup>7</sup> The plea was abolished in England, in 1827, by 7 & 8 Geo. 4, c. 28, § 6; and, in the following year, for Ireland by 9 Geo. 4, c. 54.<sup>8</sup> This outline the reader can fill up by consulting the older English books on the criminal law.<sup>9</sup>

§ 938. **Benefit of Clergy with us.**—In this country, the plea of benefit of clergy has been usually acknowledged as belonging to our common law,<sup>10</sup> and the books contain some cases in which it was pleaded. The Indiana<sup>11</sup> and Minnesota<sup>12</sup> courts have rejected it. In North Carolina, the privilege has been conceded to women, the court observing: “No reason can at this day exist, why females shall not be entitled to the benefit of clergy, as well as males.”<sup>13</sup>

<sup>1</sup> 2 Hawk. P. C. Curw. ed. p. 471, § 4, 5.

<sup>2</sup> *Ib.* p. 472, § 6, 8.

<sup>3</sup> *Ib.* p. 501, § 115.

<sup>4</sup> *Ib.* p. 498, § 110.

<sup>5</sup> 4 Bl. Com. 369.

<sup>6</sup> 2 Hawk. P. C. Curw. ed. p. 502–507, § 121–135.

<sup>7</sup> 2 Hawk. P. C. Curw. ed. p. 483 et seq.

<sup>8</sup> *Gray v. Reg.*, 6 Ir. Law, 482, 504.

<sup>9</sup> And see *Duchess of Kingston's Case*, 1 Leach, 4th ed. 146; *Armstrong v. L'Isle*, 12 Mod. 109, 110; *Rex v. Mouncer*, 2 Leach, 4th ed. 567, 2 East P. C. 639; *Rex v. Byford*, Russ. & Ry. 521.

<sup>10</sup> The State *v. Jernigan*, 8 Murph. 12; s. c. nom. The State *v. Jernagan*, N. C.

Term R. 44; The State *v. Kearney*, 1 Hawks, 53; The State *v. Scott*, 1 Hawks, 24; The State *v. Isham*, 3 Hawks, 185; The State *v. Boon*, Taylor, 246; The State *v. Seaborn*, 4 Dev. 305; The State *v. Henderson*, 2 Dev. & Bat. 548; The State *v. Carroll*, 2 Ire. 257; The State *v. Sutcliffe*, 4 Strob. 372; Commonwealth *v. Posey*, 4 Call, 109; Commonwealth *v. Miller*, 2 Ashm. 61; Commonwealth *v. Gable*, 7 S. & R. 423; Mass. Stat. 1784, c. 56.

<sup>11</sup> *Fuller v. The State*, 1 Blackf. 68.

<sup>12</sup> The State *v. Bilansky*, 3 Minn. 246.

<sup>13</sup> The State *v. Gray*, 1 Murph. 147. Also, in this State, it seems that the statutory pardon, which is an incident to the benefit of clergy, does not take effect un-

Yet, with us, as in England and Ireland, it has generally been abolished by statutes. How it is in two or three States, such as North Carolina and South Carolina,<sup>1</sup> where it was in force at dates comparatively recent, the author is not informed.

§ 939. **Common-law Punishment for Felony, continued.** — Hanging, therefore, which is the original punishment for felony, is, with us, nearly done away with; the usual penalty being imprisonment in the State prison.<sup>2</sup>

**Transportation.** — The modern English transportation is unknown at the common law,<sup>3</sup> while neither is it among the legislative penalties imposed in this country.<sup>4</sup>

§ 940. **Common-law Punishment for Misdemeanor.** — The ordinary and appropriate common-law punishment for misdemeanor is fine and imprisonment, or either of them, at the discretion of the court.<sup>5</sup> It extends to all cases in which the law has not provided some other specific penalty. For example, when a statute forbids or commands an act of a public nature,<sup>6</sup> but is silent as to the punishment, the common law imposes, for disobedience, fine and imprisonment.<sup>7</sup> A majority of the Connecticut court held, that the fine must be for a limited sum, not for all the defendant's property; and the imprisonment, for a stated number of years, not for life.<sup>8</sup> But this distinction is doubtful, as one of principle.

§ 941. **Statutory Fine "and" Imprisonment — "Or."** — If a statute provides a fine *and* imprisonment, both must be inflicted;<sup>9</sup> but if, instead of the word *and*, it uses the disjunctive *or*, only one of them can be imposed.<sup>10</sup>

til the party is burned in the hand and delivered. If the record accidentally omits to set out such execution of the sentence, it may be shown by a witness. *Keith v. Goodwin*, 6 Jones, N. C. 398.

<sup>1</sup> *The State v. Bosse*, 8 Rich. 276; *The State v. Sutcliffe*, 4 Strob. 372.

<sup>2</sup> See ante, § 616, 933.

<sup>3</sup> Archb. New Crim. Proced. 182; 2 Hawk. P. C. Curw. ed. p. 507 et seq; *Rex v. Lewis*, 1 Moody, 372; *Rex v. Hope*, 1 Moody, 396; *Bullock v. Dodds*, 2 B. & Ald. 258.

<sup>4</sup> *The State v. Bosse*, 8 Rich. 276. But see *Aldridge v. Commonwealth*, 2 Va. Cas. 447.

<sup>5</sup> *The State v. Roberts*, 1 Hayw. 176;

*Northampton's Case*, 12 Co. 132, 134. To these, other inflictions, such as are mentioned in the next section, may, under the common law of England, sometimes be added. 2 East P. C. 838.

<sup>6</sup> Ante, § 237.

<sup>7</sup> *United States v. Coolidge*, 1 Gallis. 488, 493.

<sup>8</sup> *The State v. Danforth*, 3 Conn. 112. And see *Republica v. De Longchamps*, 1 Dall. 111; *The State v. Myhand*, 12 La. An. 504; *Shuttleworth v. The State*, 35 Ala. 415.

<sup>9</sup> *United States v. Vickery*, 1 Har. & J. 427.

<sup>10</sup> *The State v. Kearney*, 1 Hawks, 53. And see, further, *Wilde v. Commonwealth*,

§ 942. **Other Common-law Punishments for Misdemeanor.** — There are other common-law punishments, used chiefly in particular cases of misdemeanor. Among these are, —

**Pillory — Whipping — Ducking — Slitting Nostrils** — and perhaps some other of the like disgraceful kind.<sup>1</sup> Said an American judge: “The general rule of the common law was, that the punishment of all infamous crimes should be disgraceful: as the pillory for every species of *crimen falsi*,<sup>2</sup> as forgery, perjury, and other offences of the same kind. Whipping was more peculiarly appropriated to petit larceny, and to crimes which betray a meanness of disposition, and a deep taint of moral depravity.”<sup>3</sup>

§ 943. **Whipping and Pillory with us.** — But though whipping<sup>4</sup> and the pillory have been sometimes employed in this country, we may doubt whether any of our courts would now inflict either, merely on the strength of English common-law authority. Under the national government, they were abolished by act of Congress in 1839.<sup>5</sup>

**Ducking with us — (Common Scold).** — The common-law punishment of a common scold is ducking,<sup>6</sup> by being “placed in a certain engine of correction called the trebucket, castigatory, or *cucking-stool*, which in the Saxon language is said to signify the scolding-stool; though now it is frequently corrupted into *ducking-stool*, because the residue of the judgment is, that, when she is so

2 Met. 408. That a fine is not a debt, see *Dixon v. The State*, 2 Texas, 481.

<sup>1</sup> 4 Bl. Com. 377. And see *Rex v. Bland*, 2 Leach, 4th ed. 595, 2 East P. C. 760; *Rex v. Thanet*, 1 East P. C. 408; *Oldfield's Case*, 12 Co. 71; *Rex v. Howell*, Russ. & Ry. 253.

<sup>2</sup> S. P., *Lewis v. Commonwealth*, 2 S. & R. 551.

<sup>3</sup> Taylor, C. J., in *The State v. Kearney*, 1 Hawks, 53, 54. Pulton observes: “Our lawes do chastise those that breake the peace by fraies, assault, batteries, riots, or routs, with imprisonment of their bodies, until their hot bloods be cooled, and their distemperat humors be qualified: but they do impose sharper and more durable punishments upon such as do forge deeds, commit or procure perjurie, or be maintainors of other mens suits or quarrels: accounting these last offences to tend more and for a longer time to the breach or blemish of the

peace, or hinderance of the justice of the realme than the former doe; as he that committeth forgerie in some cases, shall be set on the pillorie, loose his eares, have his nostrils slit, and pay to the partie grieved his double costs and damages: and in some cases, shal be hanged as a felon: he that committeth perjurie, shall in some cases be one yeare imprisoned, be set upon the pillorie, and never after be allowed as a witnesse: and he that maintayneth other men's suits, shall in some cases be three yeres imprisoned, and further punished at the king's pleasure: and some other cases sustaine other disgraces.” Pulton de Pace, ed. of 1615, 42 b.

<sup>4</sup> *Commonwealth v. Wyatt*, 6 Rand. 694; *The State v. Kearney*, 1 Hawks, 53.

<sup>5</sup> 5 U. S. Stats. at Large, c. 36, § 5; R. S. of U. S. § 5327.

<sup>6</sup> *Reg. v. Foxby*, 6 Mod. 11.



placed therein, she shall be plunged in the water for her punishment.”<sup>1</sup> But our courts hold, that fine and imprisonment with us take the place of ducking.<sup>2</sup>

§ 944. **Forfeitures of Specific Articles.** — We have no precedents for a general practice of sentencing prisoners to forfeit particular articles of property, instead of, or in addition to, a fine of a specified sum of money. But such forfeitures are sometimes required by statutes;<sup>3</sup> and they rest on the same reasons as fines.

**Forfeitures of Office, &c.** — Sometimes, also, statutes impose as a punishment the forfeiture of an office,<sup>4</sup> or of the capacity to hold office.<sup>5</sup>

**Distinguished.** — We have elsewhere distinguished this class of forfeitures from another.<sup>6</sup>

§ 945. **Bonds for Peace and Good Behavior.** — In all cases of misdemeanor, the court has, from the common law, authority, to be exercised or not as a sound discretion may dictate, to require, as a part of the sentence, that the defendant give bonds to keep the peace and be of good behavior.<sup>7</sup> As to when the discretion will be exercised, —

**In Gross Misdemeanor** — (**Gaming** — **Bawdy-house** — **Liquor-selling** — **Libel**). — In Tennessee, it was deemed that sureties should not be required on conviction for a single act of gaming, under circumstances not aggravating; the misdemeanor must be gross. And Green, J., enforced the doctrine, and drew the distinction, as follows: “The offence of keeping a bawdy-house is, in its nature, a *gross misdemeanor*; so also of a gaming-house, or disorderly house. But the selling of a single half-pint of whiskey, unaccompanied by any other fact, although against law, and a misdemeanor, would not be a *gross misdemeanor*. But if it were to appear in evidence, that the party selling was surrounded with drunken, noisy, obscene men, to the great annoyance of the public, this state of things, produced by this practice, and in part by

<sup>1</sup> 4 Bl. Com. 169.

<sup>2</sup> *James v. Commonwealth*, 12 S. & R. 220; *United States v. Royall*, 3 Cranch, C. C. 620.

<sup>3</sup> *Boles v. Lynde*, 1 Root, 195.

<sup>4</sup> *Commonwealth v. Fugate*, 2 Leigh, 724.

<sup>5</sup> *Doty v. The State*, 6 Blackf. 529;

*Barker v. People*, 3 Cow. 686, 20 Johns. 457.

<sup>6</sup> Ante, § 816 et seq.

<sup>7</sup> *Dunn v. Reg.*, 12 Q. B. 1031; *O’Connell v. Reg.*, 11 Cl. & F. 155; *Rex v. Hart*, 30 Howell St. Tr. 1131, 1194, 1344, 12 Q. B. 1041, note; *Reg. v. Dunn*, 12 Jur. 99; *Rex v. Rainer*, 1 Sid. 214; *Territory v. Nugent*, 1 Mart. La. 103.

the very whiskey he might be convicted of selling, would constitute *such* violation of the law a *gross misdemeanor*. So a libel might, or might not, be a *gross* offence, according as the circumstances of the publication, and its character, might mitigate or aggravate it. So a game of cards might be played against law, but under circumstances that would not justify, in this *legal* view of the subject, the denomination of a *gross* misdemeanor. But, if played in connection with common gamblers associated at a gaming-house, or, as is sometimes the case, by the road-side on Sunday, with *negroes*, it would be a *gross* misdemeanor. These illustrations are only intended to indicate the general character of offence to which, we think, this power of requiring sureties for good behavior pertains.”<sup>1</sup>

§ 946. “Cruel and Unusual Punishment” — (Unconstitutional). — The infliction of “cruel and unusual punishment” is forbidden by the Constitution of the United States.<sup>2</sup> This clause restrains the national government only, not the States.<sup>3</sup> But there is a like provision in some of the State constitutions.

§ 947. What is such Punishment — (Fine — Imprisonment — Stripes — Disfranchisement). — It is not possible to derive, from the few decisions in the books, any distinct rule as to what is a “cruel and unusual punishment.”<sup>4</sup> Fine and imprisonment are not.<sup>5</sup> And stripes, inflicted at the discretion of the court, have been held not to be.<sup>6</sup> Neither are disfranchisement, and the forfeiture of citizenship.<sup>7</sup> Evidently, in reason, the punishments commonly inflicted at the time when the Constitution was adopted, could not be deemed “unusual,” and no punishment is “cruel” simply because it is severe, or “cruel and unusual” because it is disgraceful. But mere torture, however slight, would be within the prohibition.

§ 948. Aggravation and Mitigation. — The entire criminal transaction, in a particular case, may embrace more of wickedness than the indictment charges; or there may be other circumstances

<sup>1</sup> *Estes v. The State*, 2 Humph, 496, 499.

<sup>2</sup> Const. U. S. Amendm. art. 8.

<sup>3</sup> Story Const. § 1904; *Pervear v. Commonwealth*, 5 Wal. 475; *James v. Commonwealth*, 12 S. & R. 220; *Barker v. People*, 3 Cow. 686, 20 Johns. 457.

<sup>4</sup> See Story Const. § 1903; *The State*

*v. Adams*, 1 Brev. 279; *Turnipseed v. The State*, 6 Ala. 664.

<sup>5</sup> *Ligan v. The State*, 3 Heisk. 159.

<sup>6</sup> *Commonwealth v. Wyatt*, 6 Rand. 694. See *Aldridge v. Commonwealth*, 2 Va. Cas. 447.

<sup>7</sup> *Huber v. Reily*, 3 Smith, Pa. 112. See *Wilson v. The State*, 28 Ind. 393.

of aggravation, on the one hand, or of mitigation, on the other. So when the court pronounces sentence, if the law has given it a discretion, it looks at any evidence proper to influence a judicious magistrate to make the punishment heavier or lighter,<sup>1</sup> yet not to exceed the limits fixed for what of crime is within the allegation and the verdict.<sup>2</sup> It is the doctrine in Alabama, where the jury assess the punishment, that, to aggravate an offence, evidence is not admissible of what amounts to a crime separate from the one charged in the indictment.<sup>3</sup> If the discretion is to be exercised by the judge after the trial is ended, there does not seem to be any sound reason for restricting him by a technical rule of this sort, though the point has not probably been adjudged. Guilt, on this issue, is not to be denied, the verdict being conclusive; therefore testimony will not be heard tending to prove that no crime in law was committed.<sup>4</sup> Yet, —

**On Nolo Contendere.** — If the defendant merely enters, by permission, a plea of *nolo contendere*,<sup>5</sup> he seems to be allowed to show under this plea his innocence.<sup>6</sup>

§ 949. **Aggravation and Mitigation in Felony.** — The English rule seems to be, that the evidence we are considering is receivable only in misdemeanor, not in felony.<sup>7</sup> And such is doubtless the true

<sup>1</sup> The State v. Townsend, 2 Harring. Del. 543; Robbins v. The State, 20 Ala. 36; Rex v. Mahon, 4 A. & E. 575; Rex v. Lynn, 2 T. R. 733; Rex v. Grey, 2 Keny. 307; Wilson v. The Mary, Gilpin, 31; Rex v. Turner, 1 Stra. 139; Rex v. Burdett, 4 B. & Ald. 314; The State v. Smith, 2 Bay, 62; Rex v. Sharpness, 1 T. R. 228; Rex v. Withers, 3 T. R. 428; Rex v. Williams, Lofft, 759; Rex v. Pinkerton, 2 East, 357; Rex v. Mawbey, 6 T. R. 619, 627; Morton v. Princeton, 18 Ill. 383; Sarah v. The State, 18 Ark. 114. See Rex v. Cox, 4 Car. & P. 538; Rex v. Esop, 7 Car. & P. 456; People v. Cochran, 2 Johns. Cas. 73.

<sup>2</sup> Rex v. Withers, 3 T. R. 428, 432; Leech v. Waugh, 24 Ill. 228, ante, § 930.

<sup>3</sup> Ingram v. The State, 39 Ala. 247, 253, 254; R. W. Walker, J., observed: "It is said that, 'in giving evidence of matter in aggravation, the distinction is, that, where the aggravating matter is the immediate consequence of the offence for which the defendant is on trial, it may

be shown; but, if it is a distinct crime, not necessarily connected with the offence charged in the indictment, it cannot be received.' Baker v. The State, 4 Pike, 56, 61. The decision in Skains v. The State, 21 Ala. 218, 222, is express to the point, that evidence of distinct offences, not charged in the indictment, cannot be looked to in aggravation of the fine."

<sup>4</sup> The State v. Brinyea, 5 Ala. 241; 2 Gab. Crim. Law, 540.

<sup>5</sup> Crim. Proced. I. § 802-804.

<sup>6</sup> Reg. v. Templeman, 1 Salk. 55, in which case it is said, that Lord Holt, C. J. "took a difference where a man confesses an indictment, and where he is found guilty; in the first case a man may produce affidavits to prove [this was for assault and battery] *son assault*, upon the prosecutor in mitigation of fine; otherwise, when the defendant is found guilty." See also Rex v. Minify, 1 Stra. 642.

<sup>7</sup> Rex v. Ellis, 9 D. & R. 174, 6 B. & C. 145.

view, when the felony is punished by hanging; for of hanging there can be no mitigation. But if the court has a discretion, the practice ought, on principle, to be the same in the higher crimes as in the lower; and so it is in Massachusetts, and probably elsewhere generally in the United States.

§ 950. **Form of the Evidence.** — Evidence addressed to the discretion of the judge, in mitigation or aggravation of punishment, need not be attended by the formalities required before the jury, on the trial of the main issue. The court will now, if it sees no reason to order otherwise, listen to mere *ex parte* affidavits.<sup>1</sup> And even hearsay evidence, wholly inadmissible on general principles, has, under special circumstances, been suffered to be brought before the court on this issue.<sup>2</sup> A witness may be compelled, by subpoena, to attend the court on this issue, the same as on any other.<sup>3</sup> And counsel will be heard.<sup>4</sup>

§ 951. **Day of executing Sentence.** — The day on which death or other corporal pain is to be inflicted need not be inserted in the judgment.<sup>5</sup> If it is not, it may be in the warrant;<sup>6</sup> or, if it is in the judgment, and execution fails to be done on that day, — as where the sheriff dies,<sup>7</sup> or the prisoner escapes, being afterward retaken,<sup>8</sup> — the court may direct it to be done on a subsequent day. And —

§ 952. **Statutory Time as to Punishment.** — A statute defining the time after conviction, or after any other period, within which sentence shall be executed, is to be construed as merely directory to the court,<sup>9</sup> and the execution may be on a later day;<sup>10</sup> though, if it is not to be until after a period named, the prisoner may claim the space thus allowed him.<sup>11</sup>

§ 953. **Judgment for Two or more Offences.** — When a prisoner,

<sup>1</sup> Reg. v. Templeman, 1 Salk. 55; Rex v. Morgan, 11 East, 457; Rex v. Pinkerton, 2 East, 357; Reg. v. Wilson, 4 T. R. 487; Rex v. Williams, 26 Howell St. Tr. 654, 709; Rex v. Thanet, 27 Howell St. Tr. 821, 943.

<sup>2</sup> Rex v. Archer, 2 T. R. 203, note.

<sup>3</sup> The State v. Smith, 2 Bay, 62.

<sup>4</sup> Rex v. Equitable Gas Co., 3 Nev. & M. 759; Rex v. Bunts, 2 T. R. 683.

<sup>5</sup> Atkinson v. Rex, 3 Bro. P. C. 517; Rex v. Wyatt, Russ. & Ry. 230; Rex v. Doyle, 1 Leach, 4th ed. 67. And see Webster v. Commonwealth, 5 Cush. 386,

407; Rex v. Hartnett, Jebb, 302; Crim. Proced. I. § 1311. And see People v. Murphy, 45 Cal. 137.

<sup>6</sup> Rex v. Doyle, 1 Leach, 4th ed. 67.

<sup>7</sup> The State v. Kitchens, 2 Hill, S. C. 612.

<sup>8</sup> Bland v. The State, 2 Ind. 608.

<sup>9</sup> Stat. Crimes, § 255, 256. See Brightwell v. The State, 41 Ga. 482.

<sup>10</sup> Seaborn v. The State, 20 Ala. 15; Rex v. Wyatt, Russ. & Ry. 230; Stat. Crimes, § 255.

<sup>11</sup> John v. The State, 2 Ala. 290. But see Rex v. Wyatt, Russ. & Ry. 230.

under an unexpired sentence of imprisonment, is convicted of a second offence; or when there are two or more convictions on which sentence remains to be pronounced; the judgment may direct, that each succeeding period of imprisonment shall commence on the termination of the period next preceding,<sup>1</sup>—a doctrine, however, which has been, it is believed without due consideration, denied in Indiana.<sup>2</sup> And, —

**Pardon of one Offence — Reversal on Error, &c.** — If, in such a case, the earlier period is afterward shortened in consequence of good conduct, or by a pardon of the offence, or a reversal of the sentence on writ of error, the next following one commences immediately, the same as if the earlier were ended by lapse of time.<sup>3</sup>

<sup>1</sup> *Commonwealth v. Leath*, 1 Va. Cas. 151; *Mills v. Commonwealth*, 1 Harris, Pa. 631, 634; *The State v. Smith*, 5 Day, 175; *Wilkes v. Rex*, 4 Bro. P. C. 360, 367; *Kite v. Commonwealth*, 11 Met. 581; *People v. Forbes*, 22 Cal. 135; *Ex parte Dalton*, 49 Cal. 463; *Williams v. The State*, 18 Ohio State, 46. And see *Rex v. Bath*, 1 Leach, 4th ed. 441; *Cole v. The State*, 5 Eng. 318; *People v. Forbes*, 22 Cal. 135. *Reg. v. Cutbush*, Law Rep. 2 Q. B. 379, 10 Cox C. C. 489; *Ex parte Meyers*, 44 Misso. 279; *Ex parte Turner*, 45 Misso. 331. As to the rule where there are convictions on several counts of one indictment, compare *Rex v. Robinson*, 1 Moody, 413, and *Gregory v. Reg.* 15 Jur. 79, 19 Law J. N. S. Q. B. 366, with *Carlton v. Commonwealth*, 5 Met. 532, and *Booth v. Commonwealth*, 5 Met. 535; and see *Baker v. The State*, 4 Pike, 56; *Barnes v. The State*, 19 Conn. 398; *Rex v. Tandy*, 2 Leach, 4th ed. 833, 1 East P. C. 182; *Crowley v. Commonwealth*, 11 Met. 575; *Kite v. Commonwealth*, 11 Met. 581; *Josslyn v. Commonwealth*, 6 Met. 236; *Commonwealth v. Kirk*, 9 Leigh, 627; *The State v. Turner*, 2 McMullan, 399; *Townsend v. People*, 3 Scam. 326; *The State v. Davidson*, 12 Vt. 300; *The State v. Lassley*, 7 Port. 526; *Friar v. The State*, 3 How. Missis. 422; *The State v. Hood*, 51 Maine, 363.

But this question is more particularly for "Crim. Proc." I. § 458, 1327, and notes.

<sup>2</sup> *Miller v. Allen*, 11 Ind. 389. In this case, a prisoner, having been sentenced to two years' imprisonment on each of two separate indictments, the one sentence to commence on the expiration of the other, applied, after serving in prison two years, for his discharge on habeas corpus; on the ground, that, in the absence of any statutory direction, the court could not postpone the time at which either sentence should begin to run, therefore that the two sentences did in matter of law run concurrently. And the discharge was granted. The judges were not aware that the question had been elsewhere decided the other way, and said: "We have been furnished with no authorities on the question involved; and, in the absence of authority to the contrary, it seems to us that the discharge of the petitioner was correct." p. 391. And see *James v. Ward*, 2 Met. Ky. 271. Cases like this should admonish prosecuting officers of their duty to study the criminal law, and furnish the courts with needed authorities.

<sup>3</sup> Opinion of Justices, 13 Gray, 618; *Kite v. Commonwealth*, 11 Met. 581; *Brown v. Commonwealth*, 4 Rawle, 259; *Ex parte Roberts*, 9 Nev. 44.

### III. *What Punishment in Joint Conviction.*

§ 954. **How in Principle.** — The law as the earlier discussions of this volume disclose, deems a man who participates with others in an offence, just as culpable as if he did the whole alone. The same is the rule also in morals. Therefore, in legal reason, if more persons than one are jointly convicted of a crime, or if one has already been convicted and punished and the others are convicted afterward, each should receive a several sentence, and the same in extent of punishment, as if he had done the whole alone and had been alone convicted. And we are about to see that this is so likewise in authority.

§ 955. **Distinguished from Civil Suit.** — Looking, then, at this subject in the light of the decisions, we have seen, that the object of a civil suit is to recover damages for what an individual has suffered ; while a criminal prosecution is for punishment, and the cure of a public wrong ; and we have observed some distinctions growing out of this diversity.<sup>1</sup> Consequently, in the civil suit, the plaintiff is to be compensated but once, however many the persons against whom he proceeds. But, in crime, each man whose will contributes to what another executes, is guilty of it the same as though done by his own hand ; and he is to be punished accordingly.<sup>2</sup> Even, in some cases, the mere combining with others will make a man indictable, when he would not be if he had undertaken, and even performed, the same wrong singly. But, aside from this doctrine of conspiracy, —

**The Rule.** — Where two or more are convicted together of the same offence, the sentence against them is several, each to pay the whole forfeiture, or suffer the whole of whatever other penalty or punishment the law provides, precisely as if he were the only person who had participated in the act.<sup>3</sup>

<sup>1</sup> Ante, § 208, 221, 235, 256–263, 264, 265, 301.

<sup>2</sup> 2 East P. C. 740; Reg. v. King, 1 Salk. 182; Commonwealth v. McAtee, 8 Dana, 28; The State v. Smith, 1 Nott & McCord, 18; Reg. v. Atkinson, 2 Ld. Raym. 1248, 1 Salk. 382, 11 Mod. 79, as to which see the report in Mod. where Holt, C. J., said, “but they shall severally have judgment;” Godfrey’s Case,

11 Co. 42 a, 1 Rol. 32, 35; The State v. Smith, 1 Nott & McC. 13; United States v. Babson, 1 Ware, 450; The State v. Hopkins, 7 Blackf. 494; The State v. Berry, 21 Misso. 504.

<sup>3</sup> Caldwell v. Commonwealth, 7 Dana, 229; The State v. Gay, 10 Misso. 440; Jones v. Commonwealth, 1 Call, 555; Rex v. Morris, 2 Leach, 4th ed. 1096; Commonwealth v. Harris, 7 Grat. 600;

§ 956. **How in Penal Actions.** — The doctrine is different where a penalty is to be recovered in a proceeding civil in form, — as, in a *qui tam* action, — though the thing done is in its nature criminal. For the law does not regard the act as being properly a crime; or, if it does, still the rules which regulate civil proceedings must be applied. If the thing complained of is a single act, joint in its nature, the participants may be sued jointly; and the judgment must be joint, for one damage, contrary to the rule which would prevail if the proceeding were by indictment.<sup>1</sup> And when the full penalty has been adjudged against one, and by him paid, no suit can afterward be carried on against others who offended jointly with him.<sup>2</sup> For illustration, —

§ 957. **In Liquor-selling — (By Action or Indictment).** — Where a statute provides a pecuniary penalty for a sale of intoxicating liquor without license, all who participate in it may be proceeded against jointly, whether by action or indictment.<sup>3</sup> But, if by indictment, the judgment is several against each for the whole penalty; <sup>4</sup> while, if by action, it is joint, and the penalty can be collected only once out of all.<sup>5</sup> Yet, —

**Form Civil where Act is Several.** — In another class of cases, the acts of the participants are in nature several; and, if the proceeding is civil in form, there must be a separate action against each, and the whole penalty will be adjudged to each.<sup>6</sup>

*Calico v. The State*, 4 Pike, 480; *The State v. Smith*, 1 Nott & McC. 13; *The State v. Hunter*, 33 Iowa, 361; *Rex v. Manning*, 2 Comyns, 616; *McLeod v. The State*, 35 Ala. 395; *Waltzer v. The State*, 3 Wis. 785, 786, where *Smith, J.*, remarked: "The guilt of one is neither mitigated nor enhanced from the fact that another may be also guilty;" *Curd v. Commonwealth*, 14 B. Monr. 386. **Husband and Wife.** — This is so even where husband and wife are jointly indicted, and the punishment is a fine, — each is to be sentenced to pay the whole fine severally; and, where the fine was joint, judgment was arrested. *Commonwealth v. Ray*, 1 Va. Cas. 262. **Sentence following Verdict.** — See *Cain v. The State*, 20 Texas, 355.

<sup>1</sup> See the cases, generally, cited to the next section and the last; *Warren v. Doolittle*, 5 Cow. 678; *People v. Kolb*, 3 Abb. Ap. Dec. 529.

<sup>2</sup> *Boutelle v. Nourse*, 4 Mass. 431; *Frost v. Rowse*, 2 Greenl. 130.

<sup>3</sup> *Commonwealth v. Sloan*, 4 Cush. 52; *Commonwealth v. Tower*, 8 Met. 527. And see *Stephens v. The State*, 14 Ohio, 386; *Rex v. Crofts*, 7 Mod. 397. **Auctioneer without License.** — In *Vaughn v. The State*, 4 Misso. 530, it was held, that two persons could not be jointly indicted for pursuing the business of auctioneers without license. See also *The State v. Coleman*, *Dudley*, S. C. 32.

<sup>4</sup> *Commonwealth v. Harris*, 7 Grat. 600.

<sup>5</sup> *Ingersoll v. Skinner*, 1 Denio, 540; *Tracy v. Perry*, 5 N. H. 504.

<sup>6</sup> *Marsh v. Shute*, 1 Denio, 230; *Curtis v. Hurlburt*, 2 Conn. 309; *Arnold v. Loveless*, 6 Rich. 511. **The Distinctions further considered.** — I am sufficiently clear, that the distinctions set down in the text are sustained alike by legal reason and actual adjudication, though they

§ 958. **General Views — Conclusion.** — The distinctions thus drawn have not always lain clear in the minds of the judges ;

seem not to have occurred to the judges generally. The case of *Rex v. Bleasdale*, 4 T. R. 809, little considered by the court, seems perhaps adverse. In *Barada v. The State*, 13 Misso. 94, this question was not decided ; but the case went off on the point (see ante, § 982), that the defendants could not object to a joint fine, it not being to their injury. And possibly there may be such a thing as the matter being sufficiently civil in nature, while criminal in form, to justify a joint sentence ; yet the suggestion should be received cautiously, if at all. The true doctrine was pretty plainly stated by Powell, J., in *Reg. v. King*, 1 Salk. 182, a case criminal in form. "This penalty," says the report, "is not in the nature of a satisfaction to the party grieved, but a punishment on the offender ; and crimes are several, though debts be joint, which, per Powell, distinguishes this from the case of *Partridge v. Naylor*, Cro. Eliz. 480 ; and s. c. nom. *Partridge v. Emson*, Noy, 62." *Partridge v. Naylor*, was an action against three persons, upon Stat. 1 & 2 Phil. & M. c. 12, to recover a penalty for wrongly impounding a distress ; and the court held, that the judgment should be joint for one penalty against all. This case was pressed upon the court in the criminal one of *Rex v. Clarke*, Cowp. 610, where the defendants sought to avoid an information which alleged that they "had severally forfeited the sum of £40" for assaulting and resisting custom-house officers, contrary to 8 Geo. 1, c. 18, § 25. The court sustained the information ; but Lord Mansfield, on the bench, not advertg to the distinction presented in our text, drew another, which may possibly be just in a degree when applied to cases civil in form, though probably not even then in full ; while clearly it can have no proper application to cases, like the one before him, in which the proceeding is criminal. This will appear when we look at his observations in connection with a few words interspersed in brackets by me. He said : "Where the offence is, in its nature, single, and cannot be severed, there the penalty shall be only single ; be-

cause, though several persons may join in committing it, it still continues but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, there, each offender is separately liable to the penalty ; because the crime of each is distinct from the offence of the others, and each is punishable for his own crime. For instance : the offence enacted by Stat. 1 & 2 Phil. & M. c. 12, is the impounding a distress in a wrong place. [We have seen, that the proceeding to recover the penalty under the statute is in form civil.] One, two, three, or four may impound it wrongfully ; it still is but one act of impounding, it cannot be severed. It is but one offence ; and therefore shall be satisfied by one forfeiture. [Suppose the object impounded was a man, and numbers were jointly indicted for the false imprisonment ; there would be then but one act, one offence ; yet the doctrine is clear, that each should receive his several sentence for the full penalty of the law.] So, under the statute, 5 Anne, c. 14, for the preservation of game [as to which see *Hardyman v. Whitaker*, 2 East, 573, note, and *Rex v. Bleasdale*, supra] ; killing a hare is but one offence in its nature ; whether one or twenty kill it, it cannot be killed more than once. [So of killing a man ; but if twenty kill him once, the twenty must be severally hung.] If partridges are to be netted by night ; two, three, or more may draw the net ; but still it constitutes only one offence. [So when the partridge net is stolen, two, three, or more may jointly draw it away ; yet, if they are indicted for the larceny, each must receive the full penalty.] But this statute relates to an offence in its nature several, a several offence at common law ; and the statute adds a further sanction against that, which each man must commit severally. One may resist, another molest, another run away with the goods : one may break the officer's arm, another put out his eye. All these are distinct acts ; and every one's offence entire and complete in its nature. [The reader will remember, that, according to



consequently there are in the books some enunciations, chiefly *dicta*, which might seem at one or two points adverse. The careful reader will consult the note to the last paragraph. And he should remember, that there are, in the law, as in other departments of human knowledge, axiomatic and indestructible truths on which blows have no effect. There are principles which courts cannot overturn, however much they may seem to ignore or reject them.<sup>1</sup>

the doctrine applicable to indictments, ante § 628, et seq., 648, 649, 673, 685, each is guilty for what the other does, the same as if his own hand performed the act.] Therefore each person is liable to a penalty for his own separate offence." These views by Lord Mansfield, obviously ill-considered, have been since commended. *Marsh v. Shute*, 1 Denio, 230; *Ingersoll v. Skinner*, 1 Denio, 540; and see *The State v. Smith*, 1 Nott & McC.

13. *Contra*, *Curtis v. Hurlburt*, 2 Conn. 309. But their palpable incorrectness, as appears on a close inspection, shows with what caution we should take the off-hand words of even the greatest judges; and how valueless is all blind commendation, however high the source whence it proceeds.

<sup>1</sup> See ante, § 64, note par. 11, and § 140, note; *Bishop First Book*, § 401, 455, 456.

## CHAPTER LXI.

## THE PUNISHMENT FOR AN OFFENCE SUBSEQUENT TO THE FIRST.

§ 959. **Of Statutory Regulation.** — It is just that an old offender should be punished more severely, for the same act, than one who transgresses for the first time. Therefore a statute sometimes provides a heavier penalty for a second or third offence than for the first.

**Form of the Provision.** — There are two forms of the provision: the one, in effect, directing that the indictment for an offence may charge it to be a second or third one, the heavier punishment to follow a conviction for the entire matter alleged; the other, permitting the prosecuting officer to bring up from the place of confinement prisoners who have before been convicted, and, on showing the conviction, have the additional penalty imposed.

§ 960. **Statutes diverse.** — The statutes are in terms diverse; and a particular consideration of their varying forms, and the consequent results, would not greatly aid the reader. Some cases, which may be helpful, are cited in a note.<sup>1</sup>

**Foreign Conviction.** — A former conviction in another State or country is not construed to be within a general provision of this sort.<sup>2</sup>

**Optional.** — It is optional with the prosecuting power to rely on the statute, or to proceed for a second or third offence as for a first, as deemed best.<sup>3</sup>

<sup>1</sup> *People v. Butler*, 3 Cow. 347; *Russell v. Commonwealth*, 7 S. & R. 489; *Scot v. Turner*, 1 Root, 163; *Newton v. Commonwealth*, 8 Met. 535; *Commonwealth v. Mott*, 21 Pick. 492; *Commonwealth v. Getchell*, 16 Pick. 452; *Phillips v. Commonwealth*, 8 Met. 588; *Plumbly v. Commonwealth*, 2 Met. 413; *Bump v. Commonwealth*, 8 Met. 533; *Kite v. Commonwealth*, 11 Met. 581; *Smith v. Commonwealth*, 14 S. & R. 69; *Common-*

*wealth v. Phillips*, 11 Pick. 28; *Ross's Case*, 2 Pick. 165; *Riley's Case*, 2 Pick. 172; *Evans v. Commonwealth*, 3 Met. 453; *Ex parte Seymour*, 14 Pick. 40; *Rand v. Commonwealth*, 9 Grat. 738; *Long v. The State*, 36 Texas, 6; *Commonwealth v. Morrow*, 9 Philad. 583.

<sup>2</sup> *People v. Caesar*, 1 Parker C. C. 645.  
<sup>3</sup> *Reg. v. Summers*, Law Rep. 1 C. C. 182.

§ 961. **The Allegation.** — Where the offence is the first, or is prosecuted only as such, the indictment need not charge it to be the first; for this is presumed.<sup>1</sup> But if it is the second or third, and the sentence is to be heavier by reason of its being such, the fact thus relied on must be averred in the indictment;<sup>2</sup> because, by the rules of criminal pleading, the indictment must always contain an averment of every fact essential to the punishment to be inflicted.<sup>3</sup> And —

**Proof of First Offence.** — The allegation of the former offence, or former conviction, as the terms of the statute may be, must be proved.<sup>4</sup>

§ 962. **Particulars of the Allegation.** — How, more minutely, the allegation should be, will depend chiefly on the statutory terms, which vary in the different States. But some propositions are the following: —

**Jurisdiction.** — According to New York doctrine, which seems sound, if the conviction for a first offence was before a court of special or limited jurisdiction, the averment of the conviction on an indictment for the second must show the jurisdiction;<sup>5</sup> but it may be done by general words, without stating the facts on which the jurisdiction depends.<sup>6</sup> Doubtless, on principles explained in “Criminal Procedure,”<sup>7</sup> if the court is a superior one of general jurisdiction, this averment of jurisdiction may be omitted.<sup>8</sup>

§ 963. **“Conviction.”** — If the statute authorizes the increased punishment on a second “conviction,” the indictment need only allege the *conviction*, it need not add that sentence was rendered thereon; because one is convicted on the mere finding of the jury that he is guilty.<sup>9</sup>

<sup>1</sup> Kilbourn v. The State, 9 Conn. 560.

<sup>2</sup> Rex v. Allen, Russ. & Ry. 513; Reg. v. Willis, Law Rep. 1 C. C. 363, 12 Cox, C. C. 192; Smith v. Commonwealth, 14 S. & R. 69; Commonwealth v. Welsh, 2 Va. Cas. 57; Wilde v. Commonwealth, 2 Met. 408; Plumbly v. Commonwealth, 2 Met. 413; Reg. v. Page, 9 Car. & P. 756; Rand v. Commonwealth, 9 Grat. 738; Long v. The State, 36 Texas, 6; The State v. Regan, 63 Maine, 127; Garvey v. Commonwealth, 8 Gray, 382; Walters v. The State, 5 Iowa, 507. See, however, The State v. Smith, 8 Rich. 460; The State v. Freeman, 27 Vt. 523.

<sup>3</sup> Crim. Proced. I. § 77 et seq.

<sup>4</sup> Tuttle v. Commonwealth, 2 Gray, 505; Reg. v. Willis, Law Rep. 1 C. C. 363, 12 Cox C. C. 192; Johnson v. People, 55 N. Y. 512; Commonwealth v. Briggs, 5 Pick. 429, 7 Pick. 177; post, § 963, 964.

<sup>5</sup> People v. Cook, 2 Parker, C. C. 12.

<sup>6</sup> People v. Golden, 3 Parker, C. C. 330. And see People v. Powers, 2 Seld. 50.

<sup>7</sup> Crim. Proced. I. § 663, 664.

<sup>8</sup> And see Stroup v. Commonwealth, 1 Rob. Va. 754.

<sup>9</sup> Stevens v. People, 1 Hill, N. Y. 261;

**Proving the Conviction.** — Plainly the fact of the previous conviction, depending chiefly upon record evidence, is to be established without much resort to oral testimony; yet, as the question involves that of identity, it ought to be passed upon by the jury.<sup>1</sup> The identity may be shown by any evidence which satisfies the jury, it not being necessary to produce a witness who was present at the former trial.<sup>2</sup> In an English case, Lord Campbell, C. J., observed: "A statement of a previous conviction does not charge an offence. It is only the averment of a fact which may affect the punishment. The jury do not find the person guilty of the previous offence; they only find that he was previously convicted of it, as an historical fact."<sup>3</sup> It is no objection to the evidence of the former conviction, that, as it tends to show the prisoner's character to be bad, it may prejudice him on the main issue. Being relevant to a necessary allegation, it must be admitted.<sup>4</sup> If the defendant pleads "guilty of the offence as charged in the indictment," no proof of the former conviction will be required.<sup>5</sup>

§ 964. **Previous "Conviction" in England.** — The English practice in these cases has not been uniform. But in a trial in 1834, Park, J., directed that the evidence of the former conviction should be produced with the other testimony before the defence was called for, — observing: "I used never to allow the jury to know any thing of the previous conviction till they had given their opinion on the charge upon which the prisoner was to be tried; because I thought, that, if the jury were aware of the previous conviction, it was (to use a common expression) like trying a man with a rope about his neck. However, the judges have had a meeting on the subject, at which thirteen of them were present, and they held that my practice, and that of another learned judge, was wrong; and the opinion of the judges is, that

Stat. Crimes, § 348. Contra, under a Pennsylvania statute, which, though the word "convicted" was employed in it, was construed to embrace in meaning, not only the rendering of the verdict of the jury, but the added sentence of the court thereon. *Smith v. Commonwealth*, 14 S. & R. 69. And this averment, like any other, will be required to be more or less broad according to the terms of the statute. *Wood v. People*, 53 N. Y. 511; *Johnson v. People*, 55 N. Y. 512;

*Gibson v. People*, 5 Hun, 542; *The State v. Volmer*, 6 Kan. 379.

<sup>1</sup> *Hines v. The State*, 26 Ga. 614; *Brooks v. Commonwealth*, 2 Rob. Va. 845.

<sup>2</sup> *Reg. v. Leng*, 1 Fost. & F. 77.

<sup>3</sup> *Reg. v. Clark*, Dears. 198, 201, 3 Car. & K. 367, 6 Cox C. C. 210, 20 Eng. L. & Eq. 582.

<sup>4</sup> *Johnson v. People*, 55 N. Y. 512.

<sup>5</sup> *People v. Delany*, 49 Cal. 394.

the previous conviction must be proved before the prisoner is called on for his defence.”<sup>1</sup> Therefore, in 1851, it was by 14 & 15 Vict. c. 19, § 9, provided, “that it shall not be lawful, on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and, whenever in any indictment such previous conviction shall be stated, the reading of such statement shall be deferred until after such finding as aforesaid; provided, that, if upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.” The practice, under this statute, was to arraign the prisoner on the whole indictment in the usual manner. Then, if he plead not guilty, the jury were first charged to inquire of the subsequent offence. Should the verdict be guilty, they were next, without being re-sworn, to pass upon the other part of the indictment. And, in each instance, only the part of the indictment on which they were about to pass was read to them.<sup>2</sup> Directions similar to the foregoing are contained in the subsequent statute of 24 & 25 Vict. c. 99, § 37, and the like procedure has been affirmed as correct.<sup>3</sup>

§ 965. **Twice in Jeopardy.**— One subjected to an increased punishment for a second offence, is not a second time put in jeopardy for the first, contrary to a provision in our constitutions; but the further punishment is for persisting in wrong, by repeating the crime.<sup>4</sup>

**Conclusion.**— A few further cases will be found in a note.<sup>5</sup>

<sup>1</sup> *Rex v. Jones*, 6 Car. & P. 391.

<sup>2</sup> *Reg. v. Key*, 2 Den. C. C. 347, 3 Car. & K. 371, 5 Cox C. C. 369, 8 Eng. L. & Eq. 584.

<sup>3</sup> *Reg. v. Martin*, Law Rep. 1 C. C. 214.

<sup>4</sup> *People v. Stanley*, 47 Cal. 113.

<sup>5</sup> *Evans v. Commonwealth*, 3 Met. 453;

*Wilde v. Commonwealth*, 2 Met. 408;

*Plumbly v. Commonwealth*, 2 Met. 413;

*Phillips v. Commonwealth*, 3 Met. 588;

*Commonwealth v. Keniston*, 5 Pick. 420;

*Murray v. Commonwealth*, 13 Met. 514;

*Cooke petitioner*, 15 Pick. 234; *Common-*

*wealth v. Phillips*, 11 Pick. 28; *Ex parte*

*Dick*, 14 Pick. 86; *Ex parte Stevens*, 14

The foregoing discussion is in part such as belongs to "Criminal Procedure," rather than to this work. But it was deemed to be unnecessary to divide so brief a subject between the two books.

Pick. 94; Commonwealth v. Getchell, 16 — The State v. Riley, 28 Iowa, 547; Commonwealth v. Tuck, 20 Pick. 356; Haggett v. Commonwealth, 3 Met. 457.  
Pick. 452; Ex parte White, 14 Pick. 90.  
Three Convictions in one Term of Court.

## CHAPTER LXII.

## CONSEQUENCES OF THE SENTENCE BY OPERATION OF LAW.

§ 966. **Scope of this Chapter.** — The consequences stated in the last two chapters come only when set down in the sentence. In this chapter, we are to contemplate such as result from it by operation of law, though not mentioned therein.

§ 967. **Attainder defined.** — Attainder, in the primary meaning of the word, is the status, or, as the law formerly was, the taint of blood, of one condemned by final judgment of the court for treason or felony; and, in a secondary sense, it is the judgment itself.<sup>1</sup> It must be a final judgment, rendered after conviction,<sup>2</sup> or after outlawry<sup>3</sup> (where outlawry is known, as it is not generally in this country),<sup>4</sup> and then the offender is said to be attaint or attainted.<sup>5</sup>

**Its Common-law Consequences — (Forfeiture — Corruption of Blood).** — The effects of an attainder are, by the ancient common

<sup>1</sup> In Tomlins's Law Dictionary, attainder is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate, inseparable consequence, by the common law, on the pronouncing the sentence of death." And most of the other definitions, which I have consulted, speak of it as following the death sentence. In Burn's Law Dictionary, however, it is defined to be "where sentence is pronounced against a person convicted of treason or felony; he is thus *attinctus*, tainted, or stained," &c. It is natural that the old books should define it as following the death sentence, because the penalty of all felony and of treason was anciently death. But in actual use in more modern times, it is not limited to capital felonies and to treason. Sometimes it is even applied, not quite accurately, to one under sentence for a high misde-

meanor. In modern language, and in localities where corruption of blood is unknown to the law, the word attainder is not much employed; still I do not understand its use to be improper in such circumstances, and its meaning is then as defined in my text.

<sup>2</sup> Stat. Crimes, § 348.

<sup>3</sup> Rex v. Earbery, Fort. 37.

<sup>4</sup> **Outlawry.** — Outlawry is or has been practised in Virginia. Commonwealth v. Hale, 2 Va. Cas. 241; Commonwealth v. Hagerman, 2 Va. Cas. 244; Commonwealth v. Pearce, 6 Grat. 669; Commonwealth v. Anderson, 2 Va. Cas. 245. And see Republica v. Steele, 2 Dall. 92; Dale v. Gunter, 46 Ala. 118, 137.

<sup>5</sup> 4 Bl. Com. 380, 381; 2 Gab. Crim. Law, 566; 3 Inst. 212; Skinner v. Perot, 1 Ashm. 57; Wells v. Martin, 2 Bay, 20. See Stat. Crimes, § 348.

law, wide and sweeping. Not attempting minute accuracy, all the property of the attainted one, real and personal, is forfeited; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him;<sup>1</sup> he cannot sue in a court of justice,<sup>2</sup> he may simply apply to have his attainder reversed, and he may be sued;<sup>3</sup> and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches.

§ 968. **Other Forfeitures** — (For Flight — Homicide by Accident or in Self-defence — Suicide — Standing Mute — Challenging too Many Jurors). — By the old English law also, if a man, however innocent, is indicted for felony, and flies, he forfeits by the flight his goods. And “he that committeth homicide by misadventure shall forfeit his goods; and so shall he which doth kill a man in his own defence forfeit his goods; and likewise he that killeth himself, and is *felo de se*, shall forfeit his goods; and he that being indicted of felony will stand mute, and not answer directly, or challenge peremptorily above twenty persons, shall forfeit his goods.”<sup>4</sup>

§ 969. **Reasons for these Old Rules.** — The doctrine of forfeiture and corruption of blood is not so destitute of foundation in reason as sometimes it is assumed to be. When a man has committed such flagrant wrong against the community as to be an unfit member of it, the corruption of blood isolates him, so that

<sup>1</sup> Co. Lit. 392; 3 Inst. 211; Toomes v. Etherington, 1 Saund. Wms. ed. 361 and note; Finch's Case, 6 Co. 63 a, 68 b; Coombes v. Queen's Proctor, 16 Jur. 820, 24 Eng. L. & Eq. 598; s. c. nom. Coombs v. Queen's Proctor, 2 Rob. Ec. 547.

<sup>2</sup> Co. Lit. 130 a.

<sup>3</sup> 2 Gab. Crim. Law, 567; 3 Inst. 211.

<sup>4</sup> Pulton de Pace, ed. of 1615, 214 b-216 a; Hales v. Petit, 1 Plow, 253, 262, 263. **Further of Forfeiture and Corruption of Blood.** — This subject of forfeiture and corruption of blood has been frequently legislated upon in England, resulting in a considerable change in the law from what it was anciently. The reader who wishes to become familiar with this considerable title in the jurisprudence of our mother country will do best to consult the older English books. See Pulton de Pace, titles Forfeiture and

Corruption of Blood; 2 Hawk. P. C. Curw. ed. c. 49; 1 Hale P. C. 354 et seq.; 2 Gab. Crim. Law, 566 et seq.; 4 Bl. Com. 380-390. And see 2 Kent Com. 385 et seq.; 4 Ib. 426; Bullock v. Dodds, 2 B. & Ald. 258; The Palmyra, 12 Wheat. 1; Brown v. Waite, 2 Mod. 130, 134. **Deodands.** — As to deodands, which are any personal chattels that are the immediate occasion of the death of a human being, and are by the English common law forfeited, see 1 Bl. Com. 300; Reg. v. Polwart, 1 Gale & D. 211, 1 Q. B. 818; ante, § 827. By the laws of the ancient Saxons, “If one in hewing a tree happened to kill a man, the relations were entitled to the tree, provided they took it within thirty days; which was in the nature, and might perhaps be the origin, of *deodands*.” 1 Reeves Hist. Eng. Law, 3d ed. 17.



he cannot exercise the rights violated; and the forfeiture puts back what the community had given him. And, though his kindred suffer with him, they suffer only the necessary consequence of his severance from the body of persons standing toward the government as participants of its favor.

§ 970. *Continued* — *How in United States.* — While this view of the doctrine appears to be the true one, it is not the same which is sometimes stated. It has been assumed to rest on ancient policy; adopted to make men cautious against injurious accidents, watchful over the conduct of their relatives, and ready, if accused, to give themselves up for trial. At any rate, the doctrine has received little favor in this country;<sup>1</sup> where it has seemed unjust to disinherit men because their kindred become felons, and to take away their goods for accidents unavoidable. Indeed, as concerns some of the ancient forfeitures, they evidently rest on no satisfactory reason; and the others are unnecessary, since punishment can best be inflicted by direct sentence of the court. And though strictly no injustice is chargeable to a government that takes away rights because of their violation, even when indirectly ill consequences fall on the innocent, yet, as justice can be as effectually administered in some other way, humanity demands that it be so done. Therefore the Constitution of the United States provides, that “no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.”<sup>2</sup> And, by an act of Congress, all forfeitures and corruptions of blood, whether for treason or felony, are, as to convictions under the United States laws, abolished.<sup>3</sup> In some of the older States, there are early traces of judicial recognitions of the common-law forfeitures, or early statutes creating like forfeitures;<sup>4</sup> and, in New York, there are judicial decisions acknowledging the incapacity of felons attainted, especially when imprisoned for life, to come as plaintiffs into the courts.<sup>5</sup> More recently the constitutions of some of the States

<sup>1</sup> Story Const. § 1300.

<sup>2</sup> Const. U. S. art. 3, § 3.

<sup>3</sup> 1 U. S. Stats. at Large, 117, act of April 30, 1790, c. 9, § 24; R. S. of U. S. § 5326; 2 Kent Com. 386; Story Const. § 1300.

<sup>4</sup> Dietrick v. Mateer, 10 S. & R. 151; Hinchman v. Clark, Coxe, 340; Dunham

v. Drake, Coxe, 315; Ash v. Ashton, 3 Watts & S. 510; Wells v. Martin, 2 Bay, 20; Boyd v. Banta, Coxe, 266; Commonwealth v. Pennock, 3 S. & R. 199.

<sup>5</sup> Graham v. Adams, 2 Johns. Cas. 408; Troup v. Wood, 4 Johns. Ch. 228; Planter v. Sherwood, 6 Johns. Ch. 118, which last case, particularly, see. As to Mississippi,

and the statutes of others have interposed to prevent these forfeitures, while in most of them the courts never followed the English doctrine. As resulting from all this, the proposition becomes now substantially if not universally true, that forfeitures and corruptions of blood, consequent upon attainder for treason and felony, and upon accidental homicide and the like, are unknown in this country.<sup>1</sup> Yet, —

§ 971. **Exceptional Forfeitures.** — Connected with this common-law doctrine of forfeitures, there may be provisions so differing in nature from the rest as not to deserve the disfavor with which the ordinary common-law forfeitures are in this country regarded, and so not to be rejected like them. Thus, —

**Forfeiture of Office — (Pardon).** — It was held in Virginia, that a conviction of a justice of the peace for felony operates, without the help of any statute, as a forfeiture of his office; of such a nature, too, as for ever after to incapacitate him for acting under his commission, notwithstanding he has the governor's pardon.<sup>2</sup> Now, this kind of forfeiture, so far from being repugnant to our institutions, is in complete accord with them; and our courts should allow it when not in conflict with any provision of the written law.

see *Beck v. Beck*, 86 Missis. 72. As to Delaware, see *Cannon v. Windsor*, 1 Hous-ton, 143. As to California, see *Nerac's Estate*, 35 Cal. 392.

<sup>1</sup> *White v. Fort*, 3 Hawks, 251; 5 Dane Abr. 3, 4, 11; 2 Kent Com. 386; 4 Ib. 426; ante, § 616.

<sup>2</sup> *Commonwealth v. Fugate*, 2 Leigh, 724. *Brockenbrough, J.*, in delivering the opinion of the court, said: "In 1 Plow. 881, a case is stated in which it was decided, that, where a grant had been made to two persons for the term of their lives, and for the life of the survivor of them, of the sheriffwick of Cheshire, and one of them was attainted of treason, the whole office was forfeited, because the office was entire, and could not be severed. This decision is founded on the postulate, that an attainder of treason produces a forfeiture of a freehold office which concerns the administration of justice. In another case it was decided, that a *cestui que trust* of a grant for years of the license of wines, who had com-

mitted felony, had forfeited said office. 13 Vin. Abr. Forfeiture, H. pl. 2, p. 445." And he goes on to say, that, in England, this question cannot often arise, since felonies are there generally punished capitally. But, what was very important in this case, the judge considered, that, even if there were no English authorities on the question, the forfeiture of judicial office must, on the ordinary principles of the jurisprudence of the State, follow a conviction for felony. For neither the people nor the legislature could be presumed to have intended, "that the bench of justice should be contaminated by the presence of a convicted and attainted felon." p. 725, 726. The doctrine of this case was affirmed and followed in *The State v. Carson*, 27 Ark. 469. In *The State v. Pritchard*, 7 Vroom, 101, it was held, following *Page v. Hardin*, 8 B. Monr. 648, that the removal of an officer for malfeasance is a judicial act, not competent to the governor.

§ 972. **Incapacity to be a Witness.** — Not particularly as flowing from attainder, which concerns merely treason and felony, but as a consequence of the final judgment for treason, or felony, or any misdemeanor of the sort known by the term *crimen falsi*, whereof all are commonly called infamous crimes, we have the doctrine, that persons convicted of any of these, are not permitted to testify, when objected to, as witnesses in our courts. They are supposed to be so regardless of truth that it would be unjust to compel litigants to suffer from what they might assert, even under oath.<sup>1</sup> Yet —

§ 973. **The Parties themselves.** — The parties themselves, if in this situation, are usually allowed to make the same affidavits in their causes as other men are;<sup>2</sup> for such affidavits are always against the general policy of the law, and are permitted only from necessity, or from considerations of convenience in the despatch of business, — reasons which apply as well when the party is infamous as when he is not.

§ 974. **What Crimes disqualify.** — Some embarrassment attends the attempt to particularize the crimes which are infamous, within this rule. Larceny is,<sup>3</sup> because it is a felony; so is the knowingly receiving of stolen goods;<sup>4</sup> and so, at the common law, is even petit larceny. But the rule as to petit larceny is, in some of our States, changed by the operation of statutes which render it no longer infamous.<sup>5</sup> So forgery,<sup>6</sup> perjury,<sup>7</sup> “subornation of perjury,”<sup>8</sup> suppression of testimony by bribery, or a conspiracy<sup>9</sup> to

<sup>1</sup> 1 Greenl. Ev. § 372, 373; *People v. Whipple*, 9 Cow. 707; *Commonwealth v. Green*, 17 Mass. 515, 542; *United States v. Brockius*, 3 Wash. C. C. 99; *Reg. v. Alternun*, 1 Gale & D. 261, 10 A. & E. 699; *Schuyllkill v. Copely*, 17 Smith, Pa. 386; *Reg. v. Webb*, 11 Cox C. C. 133. See *The State v. Harston*, 68 N. C. 294.

<sup>2</sup> 1 Greenl. Ev. § 374.

<sup>3</sup> *The State v. Gardner*, 1 Root, 485. But otherwise of horse-stealing in Tennessee, *Wilcox v. The State*, 3 Heisk. 110.

<sup>4</sup> *Commonwealth v. Rogers*, 7 Met. 500. But otherwise in Pennsylvania, where this offence is misdemeanor. *Commonwealth v. Murphy*, 3 Pa. Law Jour. Rep. 290.

<sup>5</sup> *Rex v. Davis*, 5 Mod. 75, in notes; *Pendock v. Mackinder*, Willes, 665; *Car-*

*penter v. Nixon*, 5 Hill, N. Y. 260; *Shay v. People*, 4 Parker, C. C. 353; *Pruitt v. Miller*, 3 Ind. 16. See ante, § 679. And see *Commonwealth v. Keith*, 8 Met. 531; *Uhl v. Commonwealth*, 6 Grat. 706. In New Hampshire, a person convicted of petit larceny cannot be a witness. *Lyford v. Farrar*, 11 Fost. N. H. 314.

<sup>6</sup> 2 East P. C. 1003; *Rex v. Davis*, 5 Mod. 74; *Poage v. The State*, 3 Ohio State, 229; *The State v. Candler*, 3 Hawks, 393.

<sup>7</sup> *Anonymous*, 3 Salk. 155; 1 Greenl. Ev. § 373. See *Rex v. Teal*, 11 East, 307; *Heward v. Shipley*, 4 East, 180.

<sup>8</sup> *In re Sawyer*, 2 Gale & D. 141; *Ex parte Hannen*, 6 Jur. 669.

<sup>9</sup> *Rex v. Priddle*, 1 Leach, 4th ed. 442; *Bushel v. Barrett*, 1 Ryan & Moody, N. P. 434.

procure the absence of a witness, or other conspiracy to accuse one of a crime, and barratry,"<sup>1</sup> — are offences which disqualify as being infamous. But it seems that the mere attempt, not amounting to a conspiracy, to procure the absence of a witness, is not infamous, though indictable.<sup>2</sup> Likewise the keeping of gaming-houses<sup>3</sup> and of bawdy-houses,<sup>4</sup> the commission of adultery,<sup>5</sup> common prostitution,<sup>6</sup> cutting wood contrary to the New Jersey timber act,<sup>7</sup> "deceits in the quality of provisions, deceits by false weights and measures, conspiracy<sup>8</sup> to defraud by spreading false news,"<sup>9</sup> and the like, do not disqualify.<sup>10</sup> And probably the test is to inquire, whether the crime shows such depravity in the perpetrator, or such a disposition to pervert public justice in the courts, as creates a violent presumption against his truthfulness under oath, — the difficulty being in the application of this test.<sup>11</sup>

§ 975. **Judgment necessary.** — Guilt is ascertainable only on a direct proceeding for its punishment. Therefore, unless the crime of the witness has been established in this way, it works no infamy; for practically the infamy, like the common-law forfeiture,<sup>12</sup> comes neither from the mere crime,<sup>13</sup> nor from the plea or verdict of guilty, nor from the punishment, nor from the infamous

<sup>1</sup> 1 Greenl. Ev. § 373; *Rex v. Priddle*, 1 Leach, 4th ed. 442.

<sup>2</sup> *The State v. Keyes*, 8 Vt. 57.

<sup>3</sup> *Rex v. Grant*, 1 Ryan & Moody, N. P. 270.

<sup>4</sup> *Deer v. The State*, 14 Misso. 348.

<sup>5</sup> *Little v. Gibson*, 39 N. H. 505.

<sup>6</sup> *The State v. Randolph*, 24 Conn. 363.

<sup>7</sup> *Holler v. Ffirth*, Penning, 2d ed. 531.

<sup>8</sup> *Crowther v. Hopwood*, 3 Stark, 21.

<sup>9</sup> 1 Greenl. Ev. § 373.

<sup>10</sup> And see *United States v. Brockius*, 3 Wash. C. C. 99; *Clarke v. Hall*, 2 Har. & McH. 378; *Cole v. Cole*, 1 Har. & J. 572.

<sup>11</sup> In Massachusetts, a judgment on conviction for maliciously obstructing cars on a railroad is held not to disqualify. Metcalf, J., observed: "It is said in the text-books, that persons convicted of treason, felony, or the *crimen falsi*, are incompetent to be witnesses. But the offence here was neither of these three; and we nowhere find, that a conviction for any other offence renders the

convict incompetent to testify." *Commonwealth v. Dame*, 8 Cush. 384. Likewise, in this State, the obtaining of goods by false pretences is not an offence which renders the party an incompetent witness; nor can the record of such conviction be given in evidence as affecting his credibility. The court deemed that the question had not been adjudicated, and Wilde, J., said: "On principle, we cannot think the offence of obtaining goods by false pretences is of so grave and aggravated a character as to render a witness unworthy of belief in a court of justice." *Utle v. Merrick*, 11 Met. 302, 303. In Pennsylvania, embezzlement is not infamous within this doctrine. *Schuylkill v. Copeley*, 17 Smith, Pa. 386. See, as to the New York law, *People v. Park*, 41 N. Y. 21, 1 Lans. 263.

<sup>12</sup> Ante, § 967; *Wells v. Martin*, 2 Bay, 20; *Foxley's Case*, 5 Co. 109 a.

<sup>13</sup> *Free v. The State*, 1 McMullan, 494. And see *United States v. Maurice*, 2 Brock. 96.

nature of the punishment,<sup>1</sup> but from the final judgment of the court.<sup>2</sup> Until judgment rendered, the person indicted, or even convicted, is competent to testify.<sup>3</sup> But, —

**Erroneous Judgment, where Jurisdiction.** — Though the judgment is erroneous, reversible on writ of error, still it is sufficient until vacated,<sup>4</sup> if pronounced by a tribunal having jurisdiction,<sup>5</sup> to exclude the defendant from being a witness.

§ 976. **Judgment of Foreign Court — Sister State.** — Whether the judgment of a foreign tribunal, the same as of a domestic one, disqualifies from being a witness, is a question on which opinions are conflicting. The view best sustained by reason, and probably by authority, is, that it does not;<sup>6</sup> for laws do not have extra-territorial force.<sup>7</sup> Perhaps, in the provisions of the United States Constitution concerning the effect of judgments as between the States, some ground may exist for treating our sister States as not foreign within this rule. Practically we have three variant doctrines, — first, to give a record of conviction in another State the same effect as one in our own;<sup>8</sup> secondly, to reject it altogether;<sup>9</sup> thirdly, to admit it to impair the credibility, not the competency, of the witness.<sup>10</sup> To determine whether the crime of which the witness was convicted abroad is to be deemed infamous, the court looks to the laws of its own State, and not to the

<sup>1</sup> *Rex v. Crosby*, 2 Salk. 689, 690; *Rex v. Warden of the Fleet*, 12 Mod. 837, 841; *People v. Whipple*, 9 Cow. 707; *Pendock v. Mackinder*, Willes, 655; s. c. nom. *Pendock v. Mackender*, 2 Wils. 18; *The State v. Kearney*, 1 Hawks, 53, 54; *Rex v. Jeffry*, 1 Leach, 4th ed. 443, note.

<sup>2</sup> *The State v. Valentine*, 7 Ire. 225; *Skinner v. Perot*, 1 Ashm. 57; *Fitch v. Smalbrook*, T. Raym. 32; *Lee v. Gansel*, Cowp. 1; s. c. nom. *Lee v. Gansell*, Loft. 874; *Rex v. Castell Careinion*, 8 East, 77. So the proof of the crime can only be by the record of conviction. *Commonwealth v. Quin*, 5 Gray, 478.

<sup>3</sup> *United States v. Dickinson*, 2 McLean, 325; *Gibbs v. Osborn*, 2 Wend. 555; *People v. Whipple*, 9 Cow. 707; *Barber v. Gingell*, 3 Esp. 60; *Dawley v. The State*, 4 Ind. 128.

<sup>4</sup> *Commonwealth v. Keith*, 8 Met. 531.

<sup>5</sup> *Cooke v. Maxwell*, 2 Stark. 183.

<sup>6</sup> 1 Greenl. Ev. § 376.

<sup>7</sup> Ante, § 109; *Wheaton International Law*, 6th ed. 181.

<sup>8</sup> *The State v. Candler*, 3 Hawks, 393; *Chase v. Blodgett*, 10 N. H. 22.

<sup>9</sup> *Uhl v. Commonwealth*, 6 Grat. 706; *Campbell v. The State*, 23 Ala. 44.

<sup>10</sup> *Commonwealth v. Knapp*, 9 Pick. 496; *Commonwealth v. Green*, 17 Mass. 515. A North Carolina case holds, that a witness may be asked, on cross-examination, whether he has not committed perjury in another State, the object being to discredit him. *Battle, J.*, observes: "Our courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them." *The State v. March*, 1 Jones, N. C. 526. And see, as to this State, *The State v. Harston*, 63 N. C. 294.

foreign laws, consequently the transcript of the record should set out the indictment.<sup>1</sup>

**Legislative Changes.** — Changes in the law, as to witnesses, have been made in some of our States. Thus, in some, infamy is no longer a ground of exclusion, but it may be shown to impair their credibility.<sup>2</sup>

§ 977. **Other Consequences.** — There are other indirect consequences of a judgment against the defendant, not of much importance. For example, —

**Juror.** — A person infamous, as before described,<sup>3</sup> cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses.<sup>4</sup> So, —

**Record as Admission.** — When a defendant has pleaded guilty to an indictment, the record may be produced against him in any civil suit wherein he is charged with the same act; because it contains his admission of what is thus alleged.<sup>5</sup> And —

**Statutory Incapacities.** — Statutes in some of our States have created still other incapacities, consequent on conviction either for crime generally, or for some particular crime.<sup>6</sup>

<sup>1</sup> *Kirschner v. The State*, 9 Wis. 140.

<sup>2</sup> And see *Commonwealth v. Hall*, 4 Allen, 305; *Johnson v. Commonwealth*, 2 Grat. 581; *Curtis v. Cochran*, 50 N. H. 242.

<sup>3</sup> Ante, § 972-974.

<sup>4</sup> 1 Co. Lit. 6 b; 2 Hale P. C. 115; 1

*Duncomb Trials per Pais*, 104; *Crim. Proced. I.* § 924.

<sup>5</sup> *Reg. v. Fontaine Moreau*, 11 Q. B. 1028, 12 Jur. 626, 17 Law J. N. S. Q. B. 187; 1 Greenl. Ev. § 527 a; 2 Bishop Mar. & Div. § 638, note.

<sup>6</sup> *Barker v. People*, 3 Cow. 686.

## CHAPTER LXIII.

NO SECOND PROSECUTION FOR THE SAME OFFENCE.<sup>1</sup>

§ 978, 979. Introduction.

980-994. General Propositions and Views.

995-1007. Waiver, by Defendants, of their Rights.

1008-1011. Sham Prosecutions procured by Defendants.

1012-1047. Rules to determine when there has been Jeopardy.

1048-1069. As to when the Two Offences are the Same.

1070. The Doctrine of *Autrefois Attaint*.

§ 978. **Doctrine and Scope of this Chapter.** — The purpose of this chapter is to explain and illustrate the doctrine, that, after one has been prosecuted for a particular offence, whether successfully or not, he is exempt from any fresh prosecution for the same offence. The practice, evidence, and pleading, by which the right to be thus exempt is made available, are for “Criminal Procedure.”

§ 979. **How the Chapter divided.** — We shall consider, I. Some General Propositions and Views; II. Waiver, by Defendants, of their Rights; III. Ineffectual and Sham Prosecutions procured by Defendants; IV. Rules to determine when there has been a Jeopardy; V. Rules to determine when the Two Offences are the Same; VI. The Doctrine of *Autrefois Attaint*.

### I. *Some General Propositions and Views.*

§ 980. **Not Twice adjudicate same Issue.** — It is a principle in probably every system of jurisprudence, certainly in ours, that a controversy once conducted to final judgment cannot be renewed in a fresh suit between the same parties;<sup>2</sup> though, in some circumstances, there may be a retrial of the issue in the original cause.

<sup>1</sup> For the procedure relating to the subject of this chapter, see *Crim. Proced.* I. § 805 et seq.

<sup>2</sup> *Broom Leg. Max.* 2d ed. 241 et seq.

**Not Twice in Jeopardy.** — In the criminal law, in England, this doctrine has received form in the maxim “that,” as Blackstone expresses it, “no man is to be brought into jeopardy of his life more than once for the same offence.”<sup>1</sup> Yet a comparison of the English adjudications, not speaking now of *dicta* of judges, with this maxim, will probably show that it is not quite supported by them.

§ 981. **How of Twice in Jeopardy with us — (Constitutional Provision).** — In this country, we have taken the maxim itself for our unbending rule, superseding thereby the common law as adjudged, if really differing from it. The Constitution of the United States provides, that “no person shall be . . . subject, for the same offence, to be twice put in jeopardy of life or limb.”<sup>2</sup> And though this provision binds only the United States, not extending to the States, — a question on which judicial opinions formerly differed,<sup>3</sup> — the constitutions of nearly all the States have the same provision; and the courts of all receive it as expressive of the true common-law rule.

§ 982. **Not in mere Affirmance of Common Law.** — Some of our judges appear to have assumed, without much consideration, that this provision merely affirms the common law; to which, therefore, they have looked to ascertain its interpretation and true application.<sup>4</sup> But, in England, the maxim is a mere deduction, made by some judge or text-writer, from the adjudications, which must govern if found in conflict with it. With us, the constitutional provision is supreme, and it must be the controlling power, though the result should be to overturn decisions.<sup>5</sup> In England, the maxim is, in the language of Cockburn, C. J., “Not one of those principles that lie at the foundation of our law, — such as the maxim that judges shall decide questions of law, and juries

<sup>1</sup> 4 Bl. Com. 335.

<sup>2</sup> Const. U. S. amendm. art. 5.

<sup>3</sup> That it does bind the States, see *The State v. Moor*, Walk. Missis. 134; *People v. Goodwin*, 18 Johns. 187, 201; *Commonwealth v. Purchase*, 2 Pick. 521. That it does not bind the States, see *United States v. Keen*, 1 McLean, 429, 437, 438; *United States v. Gibert*, 2 Sumner, 19, 48, 51, 52, 53; *Wood v. Wood*, 2 Cow. 819, 820, note; *Livingston v. New York*, 8 Wend. 85, 100; *Colt v. Eves*, 12 Conn. 243; *Barker v. People*, 3 Cow. 686, 701;

*Fox v. Ohio*, 5 How. U. S. 410. In *Hoffman v. The State*, 20 Md. 425, a case not well considered, the learned court seem to have assumed, without reflection, that it was the Constitution of the United States, not of Maryland, upon which they were passing.

<sup>4</sup> See *United States v. Gibert*, 2 Sumner 19, 38; *Commonwealth v. Cook*, 6 S. & R. 577; *Commonwealth v. Olds*, 5 Litt. 187.

<sup>5</sup> See *The State v. Norvell*, 2 Yerg. 24.



questions of fact, or that the verdict of the jury, in order to be binding, must be unanimous ;” but it is “a matter of practice, which has fluctuated at various times, and which, even at the present day, may perhaps not be considered as finally settled.”<sup>1</sup> Not thus is the constitutional provision regarded in the United States, where it is fundamental in our criminal jurisprudence. Nor is it within the rule,<sup>2</sup> that words of established legal meaning take, in a new law, the signification they bore in the old. And the reason is, that this maxim was never a law in England, or a thing which the English law interpreted ; being itself a mere interpretation of a judicial practice not entirely uniform. Still the American courts are not quite agreed as to the weight, on this subject, to be given the English decisions ; and, in various respects, our own adjudications are in a good deal of conflict. It is, therefore, over an uneven way that we are to travel in this chapter. Let it be in a direction indicating what, of the discordant doctrines, are to be preferred.

§ 983. *How as to Jeopardy in a Foreign Country, in another State, and between the United States and the States :—*

**In General of Foreign Jeopardy.** — It results from obvious principles,<sup>3</sup> that neither the common-law maxim nor our constitutional provision can span country and country, rendering a jeopardy in one country a bar to a trial in another. If such a rule prevails, it must proceed from international law, not from the written constitution of one country, or the practice of the courts of another.

§ 984. **Rule of International Law.** — Not often is the same act an offence against the criminal laws of two countries. Yet it may be ; as, for example, where the party in a foreign country is one of our citizens, and our law is extended over him,<sup>4</sup> while the law of the place contains the same inhibition with our own. Now, though such a case is not within the letter of our constitutions, yet, on general principles of international jurisprudence, as laid down by some writers, if a valid sentence of acquittal or conviction were “pronounced under the municipal law of the state where the supposed crime was committed, or to which the sup-

<sup>1</sup> Winsor v. Reg., Law Rep. 1 Q. B. 289, 303 ; s. c. more fully in all its stages, nom. Reg. v. Winsor, 10 Cox C. C. 276 ; s. c. Winsor v. Reg., 7 B. & S. 490.

<sup>2</sup> Stat. Crimes, § 242.

<sup>3</sup> Ante, § 99 et seq.

<sup>4</sup> Ante, § 109-123.

posed offender owed allegiance," it would, in the language of Wheaton, "be an effectual bar to a prosecution in any other state. If pronounced in any other foreign state than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity."<sup>1</sup> Thus, —

§ 985. **Offences equally against all Nations — (Piracy).** — "Robbery on the seas is considered as an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt, that the plea of *autrefois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state."<sup>2</sup> This proposition results from the same reason as the ordinary common-law doctrine of *autrefois convict* and *autrefois acquit*. If one judicial tribunal has brought a person into legal jeopardy for an alleged crime, no other will afterward entertain the accusation. And, since the courts of the several nations take cognizance, each of what the other does, in things which concern all, the case must be the same in whatever country the jeopardy arises; provided it is a real jeopardy, for the identical offence, viewed as the law views it, not merely as it might be viewed by an uninformed person. But, —

§ 986. **Same Act a Real Grievance to Two Nations.** — While the foregoing doctrine is in reason just in its application to the cases specified, where a citizen abroad has done something which in its essence offends merely the local jurisdiction, or where the crime is no more prejudicial to the peace of one nation than of every other, there are other cases in which, in reason, it is of doubtful applicability. If a man equally offends each of two governmental powers which bind him, and one punishes him for the wrong done to it, no substantial reason appears why the wrong to the other, which is a different thing, should not be redressed also. These are two distinct offences; and, though both should be committed by the one act, neither is included in the other. Still, though the strict rule would be so, yet, as a sort of merciful dispensation, the courts would undoubtedly exercise any discretion favorably to a

<sup>1</sup> Wheaton International Law, 6th ed. 184. See, as between our States, and as creating some doubt about this doctrine, *The State v. Adams*, 14 Ala. 486; *The State v. Brown*, 1 Hayw. 100; *The State*

*v. Seay*, 3 Stew. 123, 129; *People v. Burke*, 11 Wend. 129, ante, § 179.

<sup>2</sup> Johnson, J., in *United States v. Pirates*, 5 Wheat. 184, 197.

defendant who had been punished for the same wrongful volition in a foreign country. Accordingly,—

**As between the States.**— There is authority for the proposition, that a trial and conviction in one of our States, for an act violating its laws, does not prevent a prosecution in another State, for the same act, viewed as a violation of the laws of the latter.<sup>1</sup>

§ 987. **Acts violating both United States and State Laws.**— An act committed within the territorial limits of a State may be contrary to a statute of the United States; and, at the same time, contrary to the law, statutory or common, of the State. And the question arises, whether a prosecution under one of these governments will bar proceedings for the same act in the tribunals of the other. This question divides itself into two parts,—first, whether, if the laws so stand apparently, both are valid, or whether the power of the one government, which in the particular thing may be superior, supersedes that of the other. Secondly, assuming both laws to be valid, whether a prosecution in the courts of one of the governments bars a prosecution for the same act in those of the other.

§ 988. **Continued.**— The former branch of the inquiry is considered in other connections.<sup>2</sup> And it will be seen that ordinarily both laws may be valid. As to the latter,—

**In General — Obstructing Officer — Assault — Riot — Homicide — Uttering Counterfeits — Counterfeiting.**— Grier, J., sitting in the Supreme Court of the United States, observed: “Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State,—a riot, assault, or a murder,—and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred, that the offender has been twice punished for the same offence; but

<sup>1</sup> Phillips v. People, 55 Ill. 429, 483.  
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<sup>2</sup> Ante, § 178, 179.  
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only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar of a conviction by the other: consequently this court has decided,<sup>1</sup> that a State may punish the offence of uttering or passing false coin, as a cheat or fraud practised on its citizens; and<sup>2</sup> that Congress, in the proper exercise of its authority, may punish the same act, as an offence against the United States."<sup>3</sup> Yet,—

§ 989. **Giving Effect to Former Prosecution.**—While the law is plainly so, as to the right, the greater number of our tribunals have manifested a disposition, in the absence of any express command of the legislature, to accept a prosecution in one of these jurisdictions as a ground for declining to institute a prosecution for the same wrongful act in the other, or for suspending the prosecution if instituted, or for permitting the accused person to avail himself in some way of this matter.<sup>4</sup> At the same time, there is just weight in the consideration, that, if a man, though by one act, has violated the laws of two governmental powers, it is proper both should punish him.

§ 990. *To what Classes of Offences this Rule of Constitutional Law applies:—*

**Treason and Felony.**—The reader has observed the terms of this constitutional provision; namely, that there shall be no sec-

<sup>1</sup> Fox v. Ohio, 5 How. U. S. 410, 432.

<sup>2</sup> United States v. Marigold, 9 How. U. S. 560.

<sup>3</sup> Moore v. Illinois, 14 How. U. S. 13, 20.

<sup>4</sup> See Commonwealth v. Fuller, 8 Met. 313; Harlan v. People, 1 Dug. Mich. 207, 212; Houston v. Moore, 5 Wheat. 1, 31, 35; People v. Westchester, 1 Parker C. C. 659. But see The State v. Pitman, 1 Brev. 32; Hendrick v. Commonwealth, 5 Leigh, 707; Manley v. People, 3 Seld. 295, 302, 303; Fox v. Ohio, 5 How. U. S. 410, 430; ante, § 179. See also Commonwealth v. Barry, 116 Mass. 1. In a case on circuit, before the late Chief Justice Taney of the Supreme Court, where there was a conviction for robbing the United States mail, this learned judge said: "As these letters, with the money within them, were stolen in Virginia, the party might undoubtedly have been pun-

ished in the State tribunals, according to the laws of the State, without any reference to the Post-Office or the Act of Congress; because, from the nature of our government, the same act may be an offence against the laws of the United States, and also of a State, and be punishable in both. . . . And the punishment in one sovereignty is no bar to his punishment in the other. Yet in all civilized countries it is recognized as a fundamental principle of justice, that a man ought not to be punished twice for the same offence. And if this party had been punished for the larceny by a State tribunal, the court would have felt it to be its duty to suspend sentence, and to represent the facts to the President, to give him an opportunity of ordering a *nolle prosequi*, or granting a pardon." United States v. Amy, 14 Md. 149, note 152.

and jeopardy of "*life or limb*." The construction of which is, that properly the rule extends to treason and all felonies, not to misdemeanors.<sup>1</sup> Yet, —

**Misdemeanor — Penal Actions — Sureties of Peace.** — Practically and wisely, the courts by an equitable interpretation apply it to all indictable offences, including misdemeanors;<sup>2</sup> but not to actions for the recovery of penalties,<sup>3</sup> because these are not criminal proceedings,<sup>4</sup> nor to applications for sureties of the peace.<sup>5</sup>

**Interpretation varying with Offence.** — There is, however, an apparent tendency in some of the courts to hold the doctrine more strictly in the higher crimes, especially those punishable with death, than in ordinary misdemeanors.<sup>6</sup>

§ 991. **Liberal Interpretation — (Misdemeanor, again).** — We have seen elsewhere,<sup>7</sup> that, while statutes are to be strictly interpreted as against persons charged with crime, provisions introduced in their favor should be construed liberally; and the same distinction applies to a written constitution. Therefore the constitutional provision now under consideration should be liberally interpreted; extending to cases within its reason, though not within its words. On which principle, plainly the courts should, as we have seen they generally do, hold it applicable to misdemeanor,<sup>8</sup> the same as to treason and felony.

§ 992. *Defendants and the Government distinguished as respects this Constitutional Provision: —*

**Defendants waive, not Government.** — Under the next sub-title, we shall consider the right of defendants to waive this constitutional provision. But the government cannot waive it, or by any act escape its force. To illustrate, —

<sup>1</sup> *People v. Goodwin*, 18 Johns. 187, 201; *United States v. Gibert*, 2 Sumner, 19, 45. And see *The State v. Spear*, 6 Misso. 644.

<sup>2</sup> *Commonwealth v. Olds*, 5 Litt. 137; *McCauley v. The State*, 26 Ala. 135; *Day v. Commonwealth*, 23 Grat. 915; *The State v. Lee*, 10 R. I. 494; *Jones v. The State*, 15 Ark. 261; *The State v. Lavinia*, 25 Ga. 311; *Ex Parte Brown*, 2 Bailey, 323. See *Campbell v. The State*, 11 Ga. 353; *The State v. Weaver*, 13 Ire. 203; *The State v. Rankin*, 4 Coldw. 145.

<sup>3</sup> *Pruden v. Northrup*, 1 Root, 93; *Hylliard v. Nickols*, 2 Root, 176; *Hanna-*

*ball v. Spalding*, 1 Root, 86; *United States v. Halberstadt*, Gilpin, 262; *Lawyer v. Smith*, 1 Denio, 207.

<sup>4</sup> *Ante*, § 32.

<sup>5</sup> *The State v. Vankirk*, 27 Ind. 121.

<sup>6</sup> *People v. Olcott*, 2 Johns. Cas. 301; *Commonwealth v. Cook*, 6 S. & R. 577; *Williams v. Commonwealth*, 2 Grat. 567, compared with *Dye v. Commonwealth*, 7 Grat. 662; *United States v. Morris*, 1 Curt. C. C. 23. And see post, § 1034.

<sup>7</sup> *Stat. Crimes*, § 190, 226 et seq.

<sup>8</sup> And see *Winsor v. Reg.*, *Law Rep.* 1 Q. B. 289, 307; s. c. in all its stages, *nom. Reg. v. Winsor*, 10 Cox C. C. 276.

**New Trials.** — While, as we shall see,<sup>1</sup> a defendant, by waiving the protection of this constitutional guaranty, may in proper circumstances have a new trial in a cause, the government cannot. *After the jeopardy has attached to the party,*<sup>2</sup> it can take no step in the proceedings against him backward. If, through a misdirection of the judge on a question of law, or a mistake of the jury, or their refusal to obey the instructions of the court, or any other like cause, a verdict of acquittal is improperly rendered, the verdict can never afterward, on the application of the prosecutor, in any form of proceeding, be set aside and a new trial granted.<sup>3</sup>

§ 993. **Continued — (In Misdemeanor — Penal Action — Civil Right in Criminal).** — This doctrine applies as well in misdemeanor as in felony.<sup>4</sup> It does not apply strictly in penal actions, civil in form;<sup>5</sup> yet new trials are not commonly granted to plaintiffs in such actions.<sup>6</sup> But the English law seems to be, that a new trial may be given to the prosecutor in a criminal proceeding where a civil

<sup>1</sup> Post, § 1001-1004.

<sup>2</sup> Post, § 1012-1016.

<sup>3</sup> *Rex v. Praed*, 4 Bur. 2257; *Rex v. Silverton*, 1 Wils. 298; *Anonymous*, Lofft, 451; *Rex v. Fenwick*, 1 Sid. 153; *Rex v. Jackson*, 1 Lev. 124; *Rex v. Mann*, 4 M. & S. 337; *Rex v. Brice*, 1 Chit. 352; *People v. Mather*, 4 Wend. 229, 263, 266, in which case, as in one or two others, a query, shown in other cases to be without foundation, is raised, whether a new trial may not be granted the State where the acquittal is through misdirection of the judge in matter of law; *Slaughter v. The State*, 6 Humph. 410; *Commonwealth v. Cummings*, 3 Cush. 212; *The State v. Kittle*, 2 Tyler, 471; *The State v. Jones*, 7 Ga. 422; *The State v. Dark*, 8 Blackf. 526; *The State v. Johnson*, 8 Blackf. 533; *The State v. Davis*, 4 Blackf. 345; *The State v. Fields*, Mart. & Yerg. 137; *Esmond v. The State*, 1 Swan, Tenn. 14; *The State v. Taylor*, 1 Hawks, 462; *The State v. Martin*, 3 Hawks, 381; *The State v. Kanouse*, Spencer, 115; *The State v. Wright*, 3 Brev. 421, 2 Tread. 517; *The State v. Hand*, 1 Eng. 169; *The State v. Denton*, 1 Eng. 259; *The State v. Spear*, 6 Misso. 644; *Rex v. Jones*, 8 Mod. 201, 208; *Reg. v. Challi-*

*combe*, 6 Jur. 481; *Rex v. Cohen*, 1 Stark. 516; *Rex v. Sutton*, 5 B. & Ad. 52, 2 Nev. & M. 57; *Rex v. Wandsworth*, 1 B. & Ald. 63, 2 Chit. 282; *Anonymous*, Lofft, 451; *Rex v. Reynell*, 6 East, 315, 2 Smith, 406; *The State v. Reily*, 2 Brev. 444; *The State v. Burris*, 3 Texas, 118; *The State v. De Hart*, 2 Halst. 172; *The State v. McKee*, 1 Bailey, 651; *The State v. Brown*, 16 Conn. 54; *The State v. Anderson*, 3 Sm. & M. 751; *The State v. Reynolds*, 4 Hayw. 109; *People v. Webb*, 38 Cal. 467; *The State v. Phillips*, 66 N. C. 646; *The State v. Freeman*, 68 N. C. 647; *The State v. McGrorty*, 2 Minn. 224; *The State v. West*, 71 N. C. 263; *The State v. Credle*, 63 N. C. 506; *The State v. Nicholas*, 2 Strob. 278.

<sup>4</sup> *Rex v. Davis*, 12 Mod. 9; *Rex v. Bennett*, 1 Stra. 101; and cases cited in the last note. But see *The State v. Grider*, 18 Ark. 297; *The State v. Goff*, 20 Ark. 289.

<sup>5</sup> *United States v. Halberstadt*, Gilpin, 262; *Pruden v. Northrup*, 1 Root, 93; *Hannaball v. Spaulding*, 1 Root, 86; *Hylliard v. Nickols*, 2 Root, 176.

<sup>6</sup> *Lawyer v. Smith*, 1 Denio, 207; *Steel v. Roach*, 1 Bay, 63; *Rex v. Bear*, 2 Salk. 646 and note.

right is enforced.<sup>1</sup> In an ordinary criminal case, however, even where the issue which the prisoner tenders is that of a former acquittal; and, without evidence, against the direction of the court, this issue is found by the jury in his favor; the verdict must stand.<sup>2</sup>

§ 994. **No Fresh Indictment.** — *A fortiori*, after an acquittal<sup>3</sup> or a conviction<sup>4</sup> on the merits, or a plea of guilty,<sup>5</sup> no fresh indictment for the same offence can be maintained. But the views of these sections will be further unfolded in subsequent sub-titles.

## II. Waiver, by Defendants, of their Rights.

§ 995. **In General.** — It is a general doctrine governing judicial proceedings, that a party may waive any rights which the law provides for his advantage. If, for example, in civil jurisprudence, a statute directs in what county a man shall be sued, he may still, if sued in another county, answer in the latter to the action on its merits; whereby he relinquishes his opportunity to object.<sup>6</sup> And, both in civil jurisprudence and in criminal, one may waive the benefit of a constitutional provision.<sup>7</sup> Therefore he may waive his rights under the provision now being considered. The general doctrine of waiver, by persons proceeded against for crime, is, with its exceptions, made the subject of a chapter in "Criminal Procedure."<sup>8</sup>

§ 996. **Further of Waiver in General.** — This law of waiver comes from the principle of natural justice, that one is not entitled to complain of that to which he consented. Still, for the protection of the defendant, the court will under some circumstances refuse to allow him to make the waiver; or, if he makes it, will refuse to hold him to its consequences; though there is some apparent, and perhaps real, difference of judicial opinion on this proposition.<sup>9</sup> Anciently, persons on trial for treason or felony were

<sup>1</sup> Reg. v. Russell, 3 Ellis & B. 942, 23 Law J. N. S. M. C. 173, 18 Jur. 1022, 26 Eng. L. & Eq. 230; Rex v. Burbon, 5 M. & S. 392.

<sup>2</sup> Rex v. Lea, 2 Moody, 9.

<sup>3</sup> The State v. Spear, 6 Misso. 644; Campbell v. The State, 9 Yerg. 333.

<sup>4</sup> United States v. Keen, 1 McLean, 429; The State v. Benham, 7 Conn. 414;

Mount v. The State, 14 Ohio, 295; The State v. Norvell, 2 Yerg. 24.

<sup>5</sup> People v. Goldstein, 32 Cal. 432.

<sup>6</sup> Brown v. Webber, 6 Cush. 560.

<sup>7</sup> 1 Bishop Mar. & Div. § 677; The State v. Gurney, 37 Maine, 156.

<sup>8</sup> Crim. Proced. I. § 117 et seq.

<sup>9</sup> "In capital cases, I think the court is so far of counsel with the prisoner

denied counsel before the jury; and then the judges counselled them to the extent of preventing their doing things prejudicial, except to plead guilty. When counsel became allowable, it was decided, not without some differences of opinion, that, even in capital trials, defendants, acting by legal advice, under the supervision of the tribunals, might so consent to an arrangement manifestly for their benefit as to be afterward bound by it.<sup>1</sup> And thus far the better doctrine now goes; probably, further. To illustrate, —

§ 997. **Waiver as to Jury (Grand and Petit).** — The courts will refuse to hear objections to the persons composing the grand jury, or to the manner in which it is empanelled, after the case has been tried by the petit jury; or, indeed, after proceedings earlier than the trial.<sup>2</sup> And, if, while the petit jury is being empanelled, the prisoner knows of a cause of challenge against one of them, or the whole, but declines to interfere then, he cannot afterward bring forward the objection.<sup>3</sup> According to the doctrine of some courts, though the contrary is also maintained, if he consents to a separation of the jury before the verdict is reached, he cannot object to it on the ground of the separation.<sup>4</sup> So, —

**Waiver of Copy of Indictment.** — If a defendant suffers himself to go to trial without having received a copy of the indictment, even where the law expressly directs such copy to be furnished him, he cannot afterward take the objection that it was not furnished.<sup>5</sup> Likewise, —

**Inadmissible Evidence.** — One who permits illegal testimony to

that it should not suffer him to consent to any thing manifestly wrong, and to his own prejudice." Foster, 81.

<sup>1</sup> Kinloch's Case, Foster, 16, 27, 31. And see *The State v. Slack*, 6 Ala. 676; *Commonwealth v. Cook*, 6 S. & R. 577.

<sup>2</sup> *The State v. Ward*, 2 Hawks, 443; *The State v. Martin*, 2 Ire. 101; *The State v. Lamon*, 3 Hawks, 175; *People v. Griffin*, 2 Barb. 427; *The State v. Seaborn*, 4 Dev. 305. See, for a fuller statement of doctrines, *Crim. Proced. I.* § 871-889.

<sup>3</sup> *Lisle v. The State*, 6 Misso. 426; *The State v. Underwood*, 6 Ire. 96; *The State v. Duncan*, 6 Ire. 98; *Brown v. The State*, 7 Eng. 623; *Hallock v. Franklin*, 2 Met. 558; *Barlow v. The State*, 2 Blackf. 114;

*Glover v. Woolsey*, Dudley, Ga. 85; *Billis v. The State*, 2 McCord, 12; *Anonymous*, cited 1 Pick. 41; *Guykowskie v. People*, 1 Scam. 476; *Crim. Proced. I.* § 946.

<sup>4</sup> *The State v. Mix*, 15 Misso. 153; *Wesley v. The State*, 11 Humph. 502; *Crim. Proced. I.* § 998.

<sup>5</sup> *Smith v. The State*, 8 Ohio, 294, 296; *Lisle v. The State*, 6 Misso. 426; *The State v. Johnson*, Walk. Missis. 392; *Loper v. The State*, 3 How. Missis. 429. **Names of Witnesses.** — So where, under a statute, the names of the witnesses are to be noted on the indictment, one who suffers the case to be tried without making the objection, is too late afterward *Ray v. The State*, 1 Greene, Iowa, 316.



be given to the jury, as shown by his making no objection to it, cannot afterward claim any privilege on account of its admission.<sup>1</sup> And, —

**Matter in Abatement.** — As a general proposition, whatever is pleadable in abatement is waived by the plea in bar of not guilty.<sup>2</sup>

**Other Illustrations.** — There are other illustrations,<sup>3</sup> but these will sufficiently explain the general doctrine. And thus we are prepared to consider, through the remainder of this sub-title, the law of the —

### § 998. *Waiver of the Objection to a Second Jeopardy* : —

**Express or Implied.** — The foregoing explanations show, that a waiver may be either express or implied. But, in practice, the waiver of the right to object to a second jeopardy is nearly always implied; though it may be expressly made,<sup>4</sup> it seldom is. To illustrate, —

**Discharge of Jury.** — If, during a trial, the jury is discharged with the prisoner's concurrence, this consent to the discharge is, by implication, a waiver of any objection to being tried anew, and he may be so tried.<sup>5</sup> Even the consent to the discharge may

<sup>1</sup> Bishop v. The State, 9 Ga. 121.

<sup>2</sup> McQuillin v. The State, 8 Sm. & M. 587. See Crim. Proced. I. § 744 et seq.

<sup>3</sup> See Commonwealth v. Battis, 1 Mass. 95; The State v. Cross, 34 Maine, 594; Commonwealth v. Andrews, 3 Mass. 126; People v. Scates, 3 Scam. 351; Armstrong v. The State, Minor, 160; Cravens v. Grant, 2 T. B. Monr. 117; s. c. nom. Cravins v. Gant, 4 T. B. Monr. 126; People v. Rathbun, 21 Wend. 509, 542; Hazen v. Commonwealth, 11 Harris, Pa. 355; Brooks v. Davis, 17 Pick. 148; Brooks v. Daniels, 22 Pick. 498; Gracie v. Palmer, 8 Wheat. 699; Prine v. Commonwealth, 6 Harris, Pa. 103. **Promise of Continuance.** — In one case, the State, before going to trial, asked for a continuance; but the prisoner consented to proceed, and let the case be withdrawn from the jury on the happening of a certain contingency. The contingency occurred, and the court held that he was bound by his undertaking; so that, though he objected to fulfilling it, he was liable to be convicted on a second trial. Hughes v. The State, 35 Ala. 351.

<sup>4</sup> Commonwealth v. Andrews, 3 Mass. 126.

<sup>5</sup> Elijah v. The State, 1 Humph. 102; Williams v. Commonwealth, 2 Grat. 567; Dye v. Commonwealth, 7 Grat. 662; Ferrars's Case, T. Raym. 84; Kinloch's Case, Foster, 16, 27; s. c. nom. Rex v. Kinlock, 1 Wils. 157; Rex v. Stokes, 6 Car. & P. 151; Reg. v. Deane, 5 Cox C. C. 501; The State v. McKee, 1 Bailey, 651, 654; Spencer v. The State, 15 Ga. 562; Commonwealth v. Sholes, 13 Allen, 554. And see Commonwealth v. Nix, 11 Leigh, 636. Where a juror, after the panel was full, rose, and stated a fact showing his own incompetency, and the prisoner objected to proceeding to trial with the jury thus constituted, but said he would not waive any of his legal rights, and the court discharged the jury and impanelled a new one, this was held to be an act done at the instance of the defendant, of which he could not afterward take advantage. Stewart v. The State, 15 Ohio State, 155. Contra, Rex v. Perkins, Holt, 403, where Holt, C. J., said: "It was the opinion of all the judges of England, upon debate

appear by implication from the circumstances, as well as by express words.<sup>1</sup> Again, —

**Verdict Incomplete.** — Should the verdict be so imperfect in form that no judgment can be entered upon it, the consent of both parties to this will be presumed; because either was entitled to have it perfected when rendered.<sup>2</sup> Therefore the prisoner may be tried anew.<sup>3</sup> But if the indictment will sustain a sentence, the court must pronounce it instead of ordering a new trial.<sup>4</sup> And, —

**Absent at Verdict.** — Where a person on trial absents himself from court when he should be present at the rendition of the verdict,<sup>5</sup> it is competent for the judge to order the cause to stand for another jury; what has been done amounting only to a mistrial.<sup>6</sup> He waives, by his absence when his presence is required by law, his right to treat the transaction as a jeopardy. Finally, —

**Procuring Verdict or Judgment vacated.** — Whenever a verdict, whether valid in form or not, has been rendered on an indictment either good or bad, and the defendant moves in arrest of judgment, or applies to the court to vacate a judgment already entered, for any cause, as for many causes he may, he will be presumed to

between them, that, in all capital cases, a juror cannot be withdrawn, though the parties consent to it; that, in criminal cases not capital, a juror may be withdrawn, if both parties consent, but not otherwise." And see *Rex v. Kell*, 1 *Crawf. & Dix C. C.* 151.

<sup>1</sup> *Stewart v. The State*, 15 *Ohio State*, 155; *Morgan v. The State*, 3 *Sneed*, 475. And see *Lancton v. The State*, 14 *Ga.* 426; *Moore v. The State*, 3 *Heisk.* 493; and the cases in the last note; *Crim. Proced. I.* § 946.

<sup>2</sup> *Crim. Proced. I.* § 1004; *Sargent v. The State*, 11 *Ohio*, 472; *The State v. Underwood*, 2 *Ala.* 744; *The State v. Sutton*, 4 *Gill*, 494.

<sup>3</sup> *Wright v. The State*, 5 *Ind.* 527; *Reg. v. Woodfall*, 5 *Bur.* 2661; *Rex v. Hayes*, 2 *Ld. Raym.* 1518; *Rex v. Simons*, *Say.* 34, 36; *Wilson v. The State*, 20 *Ohio*, 26; *Gibson v. Commonwealth*, 2 *Va. Cas.* 111; *Commonwealth v. Smith*, 2 *Va. Cas.* 327; *The State v. Sutton*, 4 *Gill*, 494; *Webber v. The State*, 10 *Misso.*

4; *The State v. Valentine*, 6 *Yerg.* 533; *The State v. Town, Wright*, 75; *Campbell v. Reg.*, 11 *Q. B.* 799; *The State v. Spurgin*, 1 *McCord*, 252; *Marshall v. Commonwealth*, 5 *Grat.* 663; *Commonwealth v. Hatton*, 3 *Grat.* 623; *The State v. Redman*, 17 *Iowa*, 329; *Turner v. The State*, 40 *Ala.* 21; *Waller v. The State*, 40 *Ala.* 325; *Commonwealth v. Gibson*, 2 *Va. Cas.* 70; *The State v. Walters*, 16 *La. An.* 400; *Murphy v. The State*, 7 *Coldw.* 516. And see *United States v. Bird*, 2 *Brev.* 85.

<sup>4</sup> *Page v. Commonwealth*, 9 *Leigh*, 683; *Commonwealth v. Fischblatt*, 4 *Met.* 354; *The State v. Arrington*, 3 *Murph.* 571. See *Morman v. The State*, 24 *Missis.* 54.

<sup>5</sup> *Crim. Proced. I.* § 271-274.

<sup>6</sup> *The State v. Battle*, 7 *Ala.* 259; *The State v. Hughes*, 2 *Ala.* 102. See, for other views on this point, *Crim. Proced. I.* § 272.

waive any objection to being put a second time in jeopardy; and so he may ordinarily be tried anew.<sup>1</sup>

§ 999. **Wrong Verdict produced by Error of Court.** — If the verdict against a prisoner is wrong, and it was produced by some error of the court to which he objected, a just view of the constitutional guaranty would permit him to have the error corrected without waiving his right to object to a second jeopardy.<sup>2</sup> Still the practice in most cases has been otherwise.

§ 1000. **Judgment wrongly arrested on Good Indictment.** — When the indictment is good, yet the court, supposing it not good, erroneously arrests judgment on the defendant's application; if the prosecutor may have this judgment of arrest reversed for the error, he cannot maintain a new indictment; because the prisoner is still in jeopardy under the old, which is liable to be revived by a reversal of the judgment of arrest.<sup>3</sup> But in States where the erroneous judgment of arrest cannot be called in question, the prisoner's jeopardy has ceased, at his own request, and for his own benefit, therefore he may be proceeded against anew.<sup>4</sup>

§ 1001. **New Trial on Prayer of Convicted Person.** — We have seen,<sup>5</sup> that, after the jeopardy of the constitution has attached to the defendant, the government is not permitted to take any step backward; in consequence of which, a new trial cannot be granted it, should a verdict of acquittal be improperly rendered. But, though the prosecuting power cannot waive this provision, which is for the benefit of defendants, the latter can; so that new trials may be granted on their prayer. To explain, —

**English Practice in Felony.** — In felony, not in misdemeanor, the practice of the English courts from the earliest times has been

<sup>1</sup> *Reg. v. Reid*, 1 Eng. L. & Eq. 595; *Campbell v. Reg.*, 11 Q. B. 799; *Monroe v. The State*, 5 Ga. 85; *Sutcliffe v. The State*, 18 Ohio, 469; *Reg. v. Drury*, 3 Car. & K. 193, 18 Law J. n. s. M. C. 189; *Sellers v. The State*, 1 Gilman, 183; *Hines v. The State*, 8 Humph. 597; *Lane v. People*, 5 Gilman, 305, 308; *Allen v. Commonwealth*, 2 Leigh, 727; *The State v. Hughes*, 2 Ala. 102; *The State v. Thompson*, R. M. Charl. 80; *The State v. Battle*, 7 Ala. 259; *The State v. Abram*, 4 Ala. 272; *Clark v. The State*, 4 Humph. 254; *The State v. Phil*, 1 Stew. 31; *Cobia v. The State*, 16 Ala. 781; *People v.*

*McKay*, 18 Johns. 212; *Epes's Case*, 5 Grat. 676; *Lane v. People*, 5 Gilman, 305; *Joy v. The State*, 14 Ind. 189; *Cochrane v. The State*, 6 Md. 400; *Younger v. The State*, 2 W. Va. 579; *The State v. Knouse*, 33 Iowa, 365; *People v. Barrie*, 49 Cal. 342.

<sup>2</sup> *Post*, § 1041.

<sup>3</sup> *The State v. Norvell*, 2 Yerg. 24.

<sup>4</sup> *People v. Casborus*, 18 Johns. 351; *Gerard v. People*, 3 Scam. 362; *Commonwealth v. Gould*, 12 Gray, 171. See *Black v. The State*, 36 Ga. 447.

<sup>5</sup> *Ante*, § 992, 993.

to recommend the prisoner to a pardon — granted as of course — whenever it appeared that the judge at the trial had committed an error to his prejudice. And concurrently with this practice the doctrine has become established, that a new trial will never be given to one convicted of felony; the recommendation of pardon being, in all cases of felony, ordered instead.<sup>1</sup> But a *venire de novo* may be awarded for an irregularity in the proceedings, as well in felony as in misdemeanor.<sup>2</sup>

§ 1002. **English Practice in Misdemeanor.** — In misdemeanor, the English rule has always been to grant to the defendant a new trial, instead of recommending a pardon.<sup>3</sup>

§ 1003. **New Trials to Defendants in United States.** — One would suppose that, after the constitutional provision now under consid-

<sup>1</sup> Reg. v. Frost, 2 Moody, 140, 171; United States v. Gibert, 2 Sumner, 19, 44-46; United States v. Keen, 1 McLean, 429, 432; Rex v. Mawbey, 6 T. R. 619, 638; Tinkler's Case, 13 East, 416, note; Archb. New Crim. Proced. 177. While this doctrine was generally accepted as undoubted law, a case was decided in the Court of Queen's Bench, which seemed to establish the practice of granting a new trial to the defendant, instead of a recommendation of pardon, when evidence had been improperly admitted to the jury. Reg. v. Scaife, 2 Den. C. C. 281, 17 Q. B. 238; Archb. Crim. Plead. & Ev. 13th London ed. 154. But in a later case before the Privy Council, on a Colonial Appeal, this Queen's Bench decision was shown not to be really an authority for the new doctrine, which was thereupon discarded, and the immemorial usage of the courts was confirmed as law. Reg. v. Bertrand, Law Rep. 1 P. C. 520, 10 Cox C. C. 618. In the subsequent case of Reg. v. Murphy, Law Rep. 2 P. C. 535, the Privy Council followed, without question, this case of Reg. v. Bertrand.

<sup>2</sup> Archb. Crim. Plead. & Ev. 18th ed. 188 et seq.; 1 Chit. Crim. Law, 654. In a New York case, Sutherland, J., observed as follows: "By the common law, a new trial could be granted in a case of felony, when there had been a mistrial relating to the regularity of the organization of the court, or of the impanelling of the jury, or, perhaps, conduct of the jury.

Thus, in Arundel's Case, 6 Co. 14, when the defendant had been tried by a jury returned from a certain city instead of a certain parish, and had been convicted, and moved in arrest of judgment on that ground, it was adjudged that the jury ought to have come from the parish, and not the city, and that the trial was insufficient, and a new venire was awarded to try the issue again. So, in the case of The People v. McKay, 18 Johns. 212, where the defendant was indicted, tried, and convicted of murder, and moved in arrest of judgment on the ground that the venire which had been issued was a nullity, and the court adjudged that it was a nullity, and a new trial was ordered." Shepherd v. People, 25 N. Y. 406, 417.

<sup>3</sup> Rex v. Curriel, Lofft, 156; Rex v. Simmons, 1 Wils. 329; Rex v. Smith, 2 Show. 165; Rex v. Read, 1 Lev. 9; Rex v. Bear, 2 Salk. 646; Rex v. Mawbey, 6 T. R. 619, 638; Rex v. Simons, Say, 84; Rex v. Tremaine, 7 D. & R. 684; s. o. nom. Rex v. Tremearne, 5 B. & C. 254; Rex v. Gough, 2 Doug. 791; Rex v. Askew, 3 M. & S. 9. But see Read v. Dawson, 1 Sid. 49. "A court of oyer and terminer or general jail delivery, however, or the court of quarter-sessions, have no power to grant a new trial; at least such is generally understood to be the case." Archb. New Crim. Proced. 177. And see Rex v. Fowler, 4 B. & Ald. 273.

eration had become universal in this country, our courts would, at least, have made no departures in retrograde from the English practice in protecting defendants from a second jeopardy, and, therefore, when a prisoner was convicted of felony through an erroneous ruling at his trial, they would either have discharged him, or recommended a pardon as in England. But neither practice was ever adopted with us; and, on the other hand, there was a time when some American judges denied that, in felony, an erroneously convicted person could even have a new trial, by applying for which he waives the protection of the Constitution. Yet it is now, and for a long time has been, settled by universal consent, that with us, new trials may be allowed alike in treason, felony, and misdemeanor.<sup>1</sup> As just said, —

**Waiving Protection of Constitution.** — The erroneously convicted applicant for a new trial waives, in point of law, his constitutional protection against a second jeopardy, by the act of asking to have his wrongs redressed. And while the imposing of this condition upon him is, in principle, not justifiable where he suffered from a positive violation of law by the judge at his trial, against which he protested; still, even on principle, there are cases in which a discretionary power might be exercised in favor of defendants, where they could not strictly claim rights; and, in such cases, the remedy should be a new trial instead of a discharge.<sup>2</sup>

§ 1004. **Extent of Waiver implied in New Trial.** — The waiver of the constitutional right, implied in an application for a new trial, is construed to extend only to the precise thing concerning which relief is sought. Thus, —

<sup>1</sup> *United States v. Conner*, 3 McLean, 573; *United States v. Keen*, 1 McLean, 429; *Grayson v. Commonwealth*, 6 Grat. 712; *Weinzorfflin v. The State*, 7 Blackf. 186; *United States v. Fries*, 3 Dall. 515; *The State v. Prescott*, 7 N. H. 287; *The State v. Slack*, 6 Ala. 676; *Lane v. People*, 5 Gilman, 305, 308; *The State v. Wood*, 1 Mill, 29; *The State v. Sims*, Dudley, Ga. 213; *Allen v. Commonwealth*, 2 Leigh, 727; *The State v. Larumbo*, Harper, 183; *The State v. Merrill*, 2 Dev. 269; *Commonwealth v. Green*, 17 Mass. 515; *Commonwealth v. Roby*, 12 Pick. 496; *United States v. Halberstadt*, Gilpin, 262; *People v. Morrison*, 1 Parker

C. C. 625; *United States v. Maccomb*, 5 McLean, 286; *Ball v. Commonwealth*, 8 Leigh, 726; *United States v. Harding*, 1 Wal. Jr. 127. Contra, *United States v. Gibert*, 2 Sumner, 19; *People v. Comstock*, 8 Wend. 549; *The State v. Douglass*, 63 N. C. 500; *United States v. Williams*, 1 Clif. 5. The right to grant a new trial, however, is not everywhere held to attach to every inferior court. And see *People v. Judges of Dutchess Oyer and Terminer*, 2 Barb. 282; *People v. Stone*, 5 Wend. 39; *McDaniel v. Coleman*, 14 Ark. 545.

<sup>2</sup> *Commonwealth v. Green*, 17 Mass. 515.

**Guilty of Part and not guilty of Residue.** — If the verdict is, that the prisoner is guilty of a part of what is charged in the indictment, and not guilty of another part,<sup>1</sup> — as, guilty on one count, and not guilty on another;<sup>2</sup> or, there being but one count, guilty of manslaughter, and not guilty of murder;<sup>3</sup> and a new trial is granted him, — he cannot be convicted, on the second trial, of the matter of which he was acquitted on the first.<sup>4</sup> But there is some authority contrary, at least in a degree, to this doctrine. For example, —

§ 1005. **Continued.** — In Ohio it is held, that, where one offence is in different forms charged in separate counts, and there is a verdict of guilty on a part of the counts and not guilty on the others, then, if a new trial is granted, the entire indictment is opened.<sup>5</sup> And, in a later and much considered case in the same State, the indictment being in a single count for murder in the first degree, and the finding of the jury being that the defendant is not guilty of murder in the first degree, but is guilty of murder in the second degree, it was held that the effect of an order for a new trial, granted upon his motion, was to set aside the entire verdict, and the cause should be retried on the same issues as before. “If,” said White, J., “the finding as to the main fact be set aside, the finding as to the circumstances necessarily goes with it.” Again: “The principle [that only the part of the verdict which was against the defendant was set aside, while the rest remained undisturbed] contended for on behalf of the defendant, would equally apply to the setting aside of a verdict finding a defendant guilty of petit larceny, where the indictment is for grand larceny. The effect of the principle would be,

<sup>1</sup> Crim. Proced. I. § 1009, 1010.

<sup>2</sup> *Campbell v. The State*, 9 Yerg. 333; *The State v. Kittle*, 2 Tyler, 471; *Esmon v. The State*, 1 Swan, 1 Tenn. 14; *The State v. Kattlemann*, 85 Misso. 105. And see *The State v. Dark*, 8 Blackf. 526.

<sup>3</sup> *Slaughter v. The State*, 6 Humph. 410. See *Livingston v. Commonwealth*, 14 Grat. 592; *The State v. Flannigan*, 6 Md. 167; *The State v. Tweedy*, 11 Iowa, 350.

<sup>4</sup> *Lithgow v. Commonwealth*, 2 Va. Cas. 297; *The State v. Martin*, 30 Wis. 216; *The State v. Belden*, 33 Wis. 120; *The State v. Hill*, 30 Wis. 416; *People v.*

*Gilmore*, 4 Cal. 376; *The State v. Smith*, 53 Misso. 139; *The State v. Malling*, 11 Iowa, 239; *The State v. Ross*, 29 Misso. 32; *Major v. The State*, 4 Sneed, 597.

<sup>5</sup> *Jarvis v. The State*, 19 Ohio State, 585; *Lesslie v. The State*, 18 Ohio State, 390. And there are cases in other States which hold, that, where a defendant is acquitted upon one count in an indictment and convicted on another, at least where the verdict is silent as to the other, if on his motion a *venire de novo* is awarded, it should be to retry the whole case. *The State v. Stanton*, 1 Ire. 424; *The State v. The Commissioners*, 3 Hill, S. C. 239.

that, while the fact as to the body of the offence would be open to investigation on the second trial, yet the circumstance as to the value of the property would be *res judicata*, and conclusively settled by the first verdict." The result was stated as follows: "Upon mature consideration we are of opinion, that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct offences, or where there are several defendants; but that, where there is but one defendant, and, in fact, but one offence, the verdict is entire."<sup>1</sup> In a carefully considered case in Wisconsin, on facts in substance identical with these, the court refused to follow this Ohio decision; holding, that, on the second trial, there could not be a conviction for murder in the first degree.<sup>2</sup>

§ 1006. **Guilty of Part and Silent as to Residue.**—Where the verdict is, that the defendant is guilty of a part of the charge, which it specifies, making no mention of the rest, the courts are not agreed as to its effect.<sup>3</sup> There is authority for holding, that it is too incomplete to sustain any judgment;<sup>4</sup> there is authority for treating it as an acquittal of the part on which it is silent;<sup>5</sup> authority for allowing the prosecuting officer to *nol. pros.* the part not responded to;<sup>6</sup> and still other authority for disregarding such part altogether, and proceeding to judgment for that on which the voice of the jury is distinct.<sup>7</sup> There seems to be no objection, in principle, to permitting the prosecuting officer to claim judgment on so much of the verdict as is distinct; and, when he does, the defendant, who has been in jeopardy on the whole, is

<sup>1</sup> The State *v.* Behimer, 20 Ohio State, 572, 578–580. To the like effect are Bailey *v.* The State, 26 Ga. 579; and Mitchell *v.* The State, 8 Yerg. 514.

<sup>2</sup> The State *v.* Belden, 33 Wis. 120; following The State *v.* Martin, 30 Wis. 216. To the like effect are The State *v.* Smith, 53 Misso. 139; and The State *v.* Ross, 29 Misso. 32.

<sup>3</sup> See Crim. Proced. I. § 1011; 1 Stark. Crim. Plead. 2d ed. 346–350.

<sup>4</sup> The State *v.* Sutton, 4 Gill, 494. Contra, Brooks *v.* The State, 3 Humph. 25; Stoltz *v.* People, 4 Scam. 168.

<sup>5</sup> Kirk *v.* Commonwealth, 9 Leigh, 627; Weinzorpfli *v.* The State, 7 Blackf. 186; Brooks *v.* The State, 3 Humph. 25; Morris *v.* The State, 8 Sm. & M. 762;

Chambers *v.* People, 4 Scam. 351; Stoltz *v.* People, 4 Scam. 168; Brennan *v.* People 15 Ill. 511, 517; The State *v.* Tweedy, 11 Iowa, 350; The State *v.* Lessing, 16 Minn. 75; Commonwealth *v.* Bennet, 2 Va. Cas. 235; The State *v.* Payson, 37 Maine, 361; The State *v.* Hill, 30 Wis. 416; The State *v.* Belden, 33 Wis. 120. Contra, United States *v.* Keen, 1 McLean, 429. See also Jones *v.* The State, 13 Texas, 168; The State *v.* Smith, 5 Day, 175.

<sup>6</sup> United States *v.* Keen, *supra*; Commonwealth *v.* Stedman, 12 Met. 444.

<sup>7</sup> The State *v.* Coleman, 3 Ala. 14; Nabors *v.* The State, 6 Ala. 200; Swinney *v.* The State, 8 Sm. & M. 576; Wein-zorpfli *v.* The State, 7 Blackf. 186.

protected by the constitution from any further prosecution for the rest of the charge. But this is where there is no waiver of the constitutional provision by a proceeding for a new trial. If the defendant has a new trial after the imperfect finding and without the *nol. pros.*, he seems in principle to stand, in respect to those parts of the allegation on which the jury were silent, in the same position as if the verdict were too defective in form to sustain any judgment,<sup>1</sup> liable to be retried on the whole.<sup>2</sup> But the authorities are not uniform to the latter effect: the greater number of cases seem to favor the extending of the new trial only to those parts of the indictment found expressly against the defendant.<sup>3</sup>

§ 1007. **How it should be.** — In practice, the court and the parties ought to require the jury to pass distinctly on the whole indictment where it is possible for them to agree on the whole. But, if this is not done, and even if it is, plainly it is competent for the court which grants a new trial to require the waiver to be express and specific, extending as far as justice in the particular case demands, and then to specify in its order what part of the verdict is set aside, and what stands. Then no question can afterward arise. And, to the writer, it appears always best that the judge who bestows the favor of a new trial should do it in this way. There may be circumstances in which it would be so much a matter of right that terms could not properly be imposed.

### III. *Ineffectual and Sham Prosecutions procured by Defendants.*

§ 1008. **Fraud in Judicial Proceedings in General.** — The common-law doctrine is familiar, that fraud vitiates every transaction into which it enters.<sup>4</sup> It renders null or voidable judicial proceedings; yet, to set them aside for fraud, one must take the steps required by established rules. Therefore, —

**False Testimony — Rehearing.** — On general principles, without resorting to the doctrine of the criminal law that a man shall not be twice put in jeopardy for the same offence, — if proceedings in a civil suit, for instance, are fair and good up to the time of the

<sup>1</sup> Ante, § 998, 1004.

<sup>2</sup> The majority of the court so held, *State v. Belden*, 33 Wis. 120; *The State v. Hill*, 30 Wis. 416.

278, 3 Hill, S. C. 239.

<sup>3</sup> See *Crim. Proc.* I. § 1011; *The State v. Belden*, 33 Wis. 120; *The State v. Hill*, 30 Wis. 416.

<sup>4</sup> *Bishop First Book*, § 66-69, 124, 125.



hearing, the party beaten cannot, in any other case, have the judgment held void as obtained by false testimony, or other fraud practised upon him at the trial. His only remedy is to apply for a rehearing, and within the time and according to the rules prescribed by law; for that will give him relief in respect to every part of the transaction into which the fraud has entered.<sup>1</sup>

§ 1009. **Fraud at Trial of Criminal Cause — (New Trial).** — In criminal cases, it is plain, that, if fraud is practised at the trial by the prosecutor, producing a conviction, a new trial will be granted on the defendant's prayer. And there is even direct English authority,<sup>2</sup> and there are numerous judicial *dicta*, English and American,<sup>3</sup> that, if the defendant's fraud at the hearing brings about his acquittal, the prosecutor may have a new trial. This latter proposition is perhaps not beyond controversy; but, on principle, it would seem, that, if the defendant's fraud was of such nature or extent as necessarily to prevent a conviction, whatever the evidence at the prosecutor's command, there was no jeopardy, and so the new trial should be granted to the prosecutor; while, on the other hand, if it did not go so far, there was jeopardy. And, since the proceeding which worked the jeopardy was the act of the law, not of the defendant, the rule forbidding a man to rely on his own wrong would not estop him to set up this jeopardy. In other words, looking at this question as one of principle, if the fraud prevented any jeopardy, then the rule forbidding a second jeopardy would not prevent the court from granting to the State a new trial, the same as new trials are granted to plaintiffs in civil causes. But if, notwithstanding the fraud, there was legal danger of a valid conviction, then, as the defendant on being convicted could not rely on his own fraud as ground for a new trial, the jeopardy of the law attached, notwithstanding the fraud; and he should be protected from a second jeopardy.

§ 1010. **One procuring own Prosecution.** — If one procures him-

<sup>1</sup> *Greene v. Greene*, 2 Gray, 361, 4 Am. Law Reg. 42; *Homer v. Fish*, 1 Pick. 485. And see the article in 4 Am. Law Reg. 1.

<sup>2</sup> *Rex v. Furser*, Say. 90. And it has been held in Connecticut, that in such cases a new trial will be granted the prosecutor on a penal statute. *Pruden v. Northrup*, 1 Root, 93; *Hylliard v. Nick-*

*ols*, 2 Root, 176; *Hannaball v. Spaulding*, 1 Root, 86.

<sup>3</sup> *Rex v. Davis*, 12 Mod. 9; *Rex v. Bear*, 2 Salk. 646; *The State v. Jones*, 7 Ga. 422; *The State v. Wright*, 2 Tread. 517; *The State v. Brown*, 16 Conn. 54; *The State v. Davis*, 4 Blackf. 345; 1 Chit. Crim. Law, 657.

self to be prosecuted for an offence which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith,—if the proceeding is really managed by himself, either directly or through the agency of another,—he is, while thus holding his fate in his own hand, in no jeopardy. The plaintiff State is no party in fact, but only such in name; the judge is imposed upon indeed, yet in point of law adjudicates nothing; “all is a mere puppet-show, and every wire moved by the defendant himself.”<sup>1</sup> The judgment therefore is a nullity, and is no bar to a real prosecution.<sup>2</sup> But—

**Full Penalty inflicted.**—It would seem that here,<sup>3</sup> if the legal penalty was an exact one, and the person thus carrying on the cause against himself had borne it in full, not merely in part, the State would have suffered nothing, therefore the judgment would not be deemed in law fraudulent.<sup>4</sup>

§ 1011. **Suggestions.**—The law of fraud in judicial proceedings, civil and criminal, is not well defined; and, when it is complicated with the constitutional rule discussed in this chapter, it presents peculiar difficulties. But,—

**Part or all Unsound.**—In principle, when a proceeding is en-

<sup>1</sup> Woodbury, J., in *The State v. Little*, 1 N. H. 257.

<sup>2</sup> *The State v. Little*, supra; *Commonwealth v. Jackson*, 2 Va. Cas. 501; *The State v. Atkinson*, 9 Humph. 677; *The State v. Lowry*, 1 Swan, Tenn. 34; *The State v. Clenny*, 1 Head, 270; *Commonwealth v. Alderman*, 4 Mass. 477; *The State v. Colvin*, 11 Humph. 599; *The State v. Yarborough*, 1 Hawks, 78; *The State v. Green*, 16 Iowa, 239; *The State v. Cole*, 48 Misso. 70; *Commonwealth v. Dascom*, 111 Mass. 404; *The State v. Reed*, 26 Conn. 202. And see 4 Am. Law Reg. 1; 2 Bishop, Mar. & Div. § 761. **Bail through Fraud.**—Where a person accused of a criminal offence has, by collusion and contrivance of the witnesses, the complainant, and justice of the peace, been arrested and discharged on bail, he may be again arrested by a warrant issued by another justice, and required to give bail in a larger amount for the same offence. *Bulson v. People*, 81 Ill. 400.

<sup>3</sup> *Watkins v. The State*, 68 Ind. 427.

<sup>4</sup> *Hamilton v. Williams*, 1 Tyler, 15;

*The State v. Little*, 1 N. H. 257; *Commonwealth v. Alderman*, 4 Mass. 477; *The State v. Atkinson*, 9 Humph. 677. See *Raynham v. Rounseville*, 9 Pick. 44; *Commonwealth v. Loud*, 3 Met. 328; post, § 1023. In North Carolina, after one was indicted for assault and battery in the Superior Court, he, knowing of the indictment, yet not being arrested, procured himself to be indicted for the same offence in the County Court, and there made his submission and paid the fine; and this proceeding was held to bar the earlier. “Certainly,” said Battle, J., “it is no fraud on the law for a man who has violated it, to come forward and voluntarily submit to the judgment of a court having full jurisdiction of the offence.” *The State v. Casey*, Busbøe, 209. In Texas, however, where a like proceeding, pending a prior indictment, was had before a justice of the peace, the pendency of the indictment was held to take away the justice’s jurisdiction, so that what was done before him was a nullity. *Burdett v. The State*, 9 Texas, 43.

tirely fraudulent, having no sound part whatever, there is no collateral or direct effect to be given it; it is as though it had not been; except that a party to the fraud is not permitted to rely on this imperfection. But practically most frauds relate only to some particular in the proceeding, — not vitiating, therefore, the whole. And when a question of this sort comes before us, we are to inquire how broad and deep the fraud was, and in what way it must be taken advantage of. This suggestion points simply to the path of inquiry, which every investigator is to pursue for himself.

#### IV. *Rules to determine when there has been a Jeopardy.*

§ 1012. **Subject Difficult.** — The subject of this sub-title is, in its nature, difficult and intricate. It is rendered more so by many conflicts of judicial opinion appearing in the reports. But —

**Constitution superior to Decisions.** — It will be helpful to bear in mind, that this investigation relates to constitutional law, in the American sense; and that, though the courts should have wandered, still the ever present power of the Constitution has remained over them. Our guide, therefore, is the Constitution; and the decisions occupy the subordinate place of giving light to what leads us, instead of leading us themselves. True, it is the habit to look at decisions upon constitutional law much as at those on other subjects. But, reflecting, we see that our constitutions provide the way in which they may be amended, and it does *not* consist of judicial decision. Doubtless no court, however enlightened, will overrule a prior adjudication on constitutional law without perceiving very clearly that it was wrong. But in a plain case, where there is neither doubt nor room for doubt, a bench of judges to-day is not justified in violating the Constitution because a bench of judges yesterday did the same thing. Let us, then, begin our investigations under this sub-title with the inquiry —

§ 1013. *At what Stage, in a Criminal Cause, does the Jeopardy of the Constitution first Attach?* —

**Effect of Jeopardy Attaching.** — If, in a particular case, the jeopardy has attached, though for an instant only, and there is afterward such a lapse in the proceedings as requires a new jeopardy, in distinction from a continuation of the old, to produce a con-

viction, the defendant has thereby obtained the right to demand his discharge; and neither can the proceedings be carried on against him further, nor new proceedings be instituted; because he cannot be brought into jeopardy twice.<sup>1</sup>

§ 1014. **Proceedings which do not amount to Jeopardy.** — There is a sense in which a person is in jeopardy from the moment when he incurs legal guilt; since he is then liable to be indicted. Clearly, however, the constitutional guaranty does not refer to the jeopardy created by the crime, which the defendant commits himself; but by the prosecution, which is carried on by another power. And the mere commencing of the proceedings does not put him in jeopardy, while there is no jury, who alone can decide the question of guilt. Therefore, —

**Discharge by Magistrate — By Grand Jury — Proceedings before Trial.** — After a man is arrested, and by the committing magistrate discharged;<sup>2</sup> or after the grand jury has refused to find an indictment against him;<sup>3</sup> or after he is indicted and has even pleaded to the indictment, which is still pending;<sup>4</sup> or after any other proceedings, pending or not, down to the time of the trial;<sup>5</sup> he is still, for the same offence, liable to a new indictment, to which what has been done is no bar. Consequently, —

**Two or more Indictments together.** — A man may be held on two or more indictments at the same time for one offence, and the pendency of one will be no bar to proceedings on another;<sup>6</sup>

<sup>1</sup> *O'Brian v. Commonwealth*, 9 Bush, 333; *King v. People*, 5 Hun, 297; *Hines v. The State*, 24 Ohio State, 134; *People v. Cage*, 48 Cal. 323; *People v. Webb*, 38 Cal. 467; *Gruber v. The State*, 3 W. Va. 699; *The State v. Leunig*, 42 Ind. 541; *Lee v. The State*, 26 Ark. 260; *Bell v. The State*, 44 Ala. 393; *The State v. Calendine*, 8 Iowa, 288.

<sup>2</sup> *Marston v. Jenness*, 11 N. H. 156; *Commonwealth v. Myers*, 1 Va. Cas. 188, 248; *McCann v. Commonwealth*, 14 Grat. 570; *Reg. v. Waters*, 12 Cox C. C. 390, 5 Eng. Rep. 469. See *Sorrell's Case*, 1 Va. Cas. 253; *Bailey's Case*, 1 Va. Cas. 258.

<sup>3</sup> *Commonwealth v. Miller*, 2 Ashm. 61; *Reg. v. Newton*, 2 Moody & R. 503; *The State v. Ross*, 14 La. An. 364; *Rex v. Walbourne*, W. Kel. 63.

<sup>4</sup> *Commonwealth v. Dunham*, Thacher

*Crim. Cas.* 513; *Commonwealth v. Drew*, 3 Cush. 279; *People v. Fisher*, 14 Wend. 9.

<sup>5</sup> And see *Brown v. The State*, 5 Eng. 607; *Commonwealth v. Thompson*, 3 Litt. 284; *The State v. Fley*, 2 Brev. 388, 348; *Harriman v. The State*, 2 Greene, Iowa, 270; *The State v. Barbour*, 17 Ind. 526.

<sup>6</sup> *O'Meara v. The State*, 17 Ohio State, 515; *The State v. Lambert*, 9 Nev. 321; *Miazza v. The State*, 36 Missis. 613; *Commonwealth v. Golding*, 14 Gray, 49; *Commonwealth v. Berry*, 5 Gray, 93; *People v. Monroe Oyer and Terminer*, 20 Wend. 108. But the doctrine seems to be, that, where two tribunals have concurrent jurisdiction of the cause, the one first taking it is entitled to retain it (1 *Bishop Mar. Women*, § 634); so that, if there is an indictment pending in one of them, and then an indictment is found in the

though, if justice to him requires, the court in its discretion will quash one or more of them.<sup>1</sup> Again, —

**Nolle Prosequi before Trial.** — Without prejudice to any fresh prosecution, the attorney for the State may *nol. pros.* — that is, discontinue — an indictment, at any time after it is found, previous to the moment when, the defendant having pleaded — that is, made answer — to it, a traverse jury is impanelled and sworn to try the cause.<sup>2</sup>

**When Jeopardy begins.** — Then, on the completing and swearing of the panel, the jeopardy of the accused begins;<sup>3</sup> and it begins only when the panel is full. Until full, the jeopardy is not perfect.<sup>4</sup> In other words, —

§ 1015. **Continued.** — Without a jury, set apart and sworn for the particular case, the individual defendant has not been conducted to his period of jeopardy. But when, according to the better opinion, the jury, being full, is sworn, and added to the other branch of the court, and all the preliminary things of record are ready for the trial, the prisoner has reached the jeopardy from the repetition of which our constitutional rule protects him.<sup>5</sup>

§ 1016. **Nolle Prosequi during Trial — Or withdrawing Juror.** —

other, for the same offence, the latter may be abated by plea. *The State v. Yarbrough*, 1 Hawks, 78. See also *Burdett v. State*, 9 Texas, 43; *The State v. Casey*, Busbee, 209; *Commonwealth v. Harris*, 8 Gray, 470; *Commonwealth v. Golding*, supra; *Mize v. The State*, 49 Ga. 375.

<sup>1</sup> *Crim. Proced. I.* § 770; *People v. Monroe Oyer and Terminer*, supra; *Rex v. Chamberlain*, 6 Car. & P. 93. See, as to Arkansas, *The State v. Barkman*, 2 Eng. 387.

<sup>2</sup> *Commonwealth v. Tuck*, 20 Pick. 356, 364; *Clarke v. The State*, 23 Missis. 261; *The State v. McKee*, 1 Bailey, 651; *The State v. Blackwell*, 9 Ala. 79; *Lindsay v. Commonwealth*, 2 Va. Cas. 345; *Wortham v. Commonwealth*, 5 Rand. 669; *Commonwealth v. Wheeler*, 2 Mass. 172; *United States v. Stowell*, 2 Curt. C. C. 153, 170; *The State v. Thornton*, 13 Ire. 256; *The State v. Thompson*, 3 Hawks, 618. And see *Rex v. Roper*, 1 Crawford & Dix C. C. 185; *Rex v. Wade*, 1 Moody, 86. The cases of *Newsom v. The State*, 2 Kelly, 60, *Reynolds v. The State*, 3

*Kelly*, 53, and *Durham v. The State*, 9 Ga. 306, were decided under a Georgia statute.

<sup>3</sup> *Commonwealth v. Cook*, 6 S. & R. 577; *The State v. McKee*, 1 Bailey, 651; *Weinzorpfm v. The State*, 7 Blackf. 186; *Cobia v. The State*, 16 Ala. 781, 784; *In re Spier*, 1 Dev. 491; *Wright v. The State*, 5 Ind. 290; *McFadden v. Commonwealth*, 11 Harris, Pa. 12; *Morgan v. The State*, 13 Ind. 215; *The State v. Redman*, 17 Iowa, 329, 333; *The State v. Walker*, 26 Ind. 346; *People v. Webb*, 38 Cal. 467; *Grogan v. The State*, 44 Ala. 9, 14; *Bell v. The State*, 44 Ala. 393.

<sup>4</sup> *The State v. Burket*, 2 Mill, 155; *People v. Damon*, 13 Wend. 351.

<sup>5</sup> *McKenzie v. The State*, 26 Ark. 334; *Bell v. The State*, 44 Ala. 393; *Lee v. The State*, 26 Ark. 260; *Gruber v. The State*, 3 W. Va. 699; *People v. Webb*, 38 Cal. 467; *People v. Cage*, 48 Cal. 323; *Hines v. The State*, 24 Ohio State, 134; *King v. People*, 5 Hun, 297; *O'Brian v. Commonwealth*, 9 Bush, 333; *Joy v. The State*, 14 Ind. 139.

The jeopardy having thus attached, the prosecuting officer is not entitled during the trial to enter a *nol. pros.*<sup>1</sup> or if he enters it even with the consent of the judge, or if he withdraws a juror and so stops the hearing, the legal effect is an acquittal.<sup>2</sup> The defendant is entitled to have a verdict of not guilty returned by the jury; but, if this is not done, he may still claim his discharge, and he is not to be brought again in jeopardy for the same offence.<sup>3</sup>

§ 1017. **Nolle Prosequi after Verdict.** — After a conviction, and before judgment, the officer may *nol. pros.* a part<sup>4</sup> or even the whole<sup>5</sup> of the indictment; <sup>6</sup> but there is no doubt, that, in such a case, the prisoner cannot be prosecuted for the same matter anew.

"Submitted to Jury." — By a statute in Georgia, "no *nolle prosequi* shall be entered on any bill of indictment after the case has been submitted to a jury, except by the consent of the defendant." And it was held, that a case is submitted to the jury when the prisoner is arraigned, the plea of not guilty filed, and the jury impanelled and sworn.<sup>7</sup>

§ 1018. **Another View as to when Jeopardy begins.** — While the vastly greater number of the decisions clearly sustain the propositions of the last few paragraphs, there are a few cases in which it is laid down, at least in *dicta*, that the jeopardy begins only after verdict rendered. The meaning of the Constitution, it is

<sup>1</sup> The State *v.* Kreps, 8 Ala. 951; The State *v.* I. S. S., 1 Tyler, 178; The State *v.* Roe, 12 Vt. 93, 109. See The State *v.* Davis, 4 Blackf. 345; Commonwealth *v.* Goodenough, Thacher Crim. Cas. 132. If, after the evidence is in, and before verdict, the prosecuting officer enters, by leave of court, a *nol. pros.* as to a part of the charge only, the jury may pass upon what remains. Baker *v.* The State, 12 Ohio State, 214. See Commonwealth *v.* Kimball, 7 Gray, 328.

<sup>2</sup> And see cases cited ante, § 1014. And see Klock *v.* People, 2 Parker C. C. 676. But see Swindel *v.* The State, 32 Texas, 102; Taylor *v.* The State, 35 Texas, 97.

<sup>3</sup> United States *v.* Shoemaker, 2 McLean, 114; Mount *v.* The State, 14 Ohio, 295, 305; Reynolds *v.* The State, 8 Kelly, 53; Harker *v.* The State, 8 Blackf. 540;

People *v.* Barrett, 2 Caines, 304; Commonwealth *v.* Tuck, 20 Pick. 356; Reg. *v.* Oulaghan, Jebb, 270; Wright *v.* The State, 5 Ind. 290; Ward *v.* The State, 1 Humph. 253; Gruber *v.* The State, 3 W. Va. 699; Lee *v.* The State, 26 Ark. 260; Bell *v.* The State, 44 Ala. 393. And see Grable *v.* The State, 2 Greene, Iowa, 559.

<sup>4</sup> Anonymous, 31 Maine, 592; Commonwealth *v.* Briggs, 7 Pick. 177; Commonwealth *v.* Tuck, 20 Pick. 356; The State *v.* Roe, 12 Vt. 93; The State *v.* Whittier, 21 Maine, 341; The State *v.* Bruce, 24 Maine, 71; Commonwealth *v.* Jenks, 1 Gray, 490; The State *v.* Burke, 38 Maine, 574. See Flanagan *v.* The State, 19 Ala. 546.

<sup>5</sup> The State *v.* Fleming, 7 Humph. 152.

<sup>6</sup> But see Weinzorpfli *v.* The State, 7 Blackf. 186.

<sup>7</sup> Newsom *v.* The State, 2 Kelly, 60.

said, is, "that no man shall be twice *tried* for the same offence."<sup>1</sup> But the adjudications, even of these judges, hardly sustain this proposition; and the plain difference between the danger, or jeopardy, of a thing, and the thing itself,<sup>2</sup> indicates the error on which these observations proceed. Indeed, thus to substitute a word not in the Constitution for the word in it, is to take with it great liberties. And still other considerations are of the like tendency. Thus,—

§ 1019. **How in Principle.**—If the jeopardy began only on the rendition of the verdict, the constitutional provision could have no force against a statute enacted to override it. Should the legislature direct (what the court might as well do without the direction), that, whenever the evidence appeared to the judge to be insufficient to convict, he should discharge the jury without taking a verdict, and hold the defendant to answer before another jury, no protection against any number of trials and any amount of harassment would be afforded to defendants, so long as this interpretation of the Constitution prevailed.

§ 1020. *Preliminary Things of Record*:—

**Essential to Jeopardy.**—As already intimated,<sup>3</sup> for the swearing in of the jury in a cause to create a jeopardy, the preliminary things of record, as we have termed them, must be complete. Let us look at some imperfections in them.

§ 1021. **Insufficient Indictment.**—When the indictment is in form so defective that the defendant, if found guilty, will be entitled to have any judgment entered thereon against him reversed for error, he is not in jeopardy; and, should he be acquitted, he will be liable to be tried on a new and valid indictment.<sup>4</sup> And it is the same where the indictment, though in form

<sup>1</sup> *People v. Goodwin*, 18 Johns. 187, 202, 206; *Commonwealth v. Olds*, 5 Litt. 137; *The State v. Moor*, Walk. Missis. 134; *United States v. Gibert*, 2 Sumner, 19, 60; *United States v. Perez*, 9 Wheat. 579; *People v. Westchester*, 1 Parker C. C. 659; *Swindel v. The State*, 32 Texas, 102, 104; *Taylor v. The State*, 35 Texas, 97; *O'Brian v. Commonwealth*, 6 Bush, 563; *Wilson v. Commonwealth*, 3 Bush, 105. Contra, *O'Brian v. Commonwealth*, 9 Bush, 333, disapproving *Commonwealth v. Olds*, and *O'Brian v. Commonwealth*, supra

<sup>2</sup> "There is a wide difference," said Duncan, J., "between a verdict given and the jeopardy of a verdict. Hazard, peril, danger, jeopardy of a verdict, cannot mean a verdict given." *Commonwealth v. Cook*, 6 S. & R. 577, 596.

<sup>3</sup> Ante, § 1015.

<sup>4</sup> 2 Hale P. C. 248; *People v. Barrett*, 1 Johns. 66; *Vaux's Case*, 4 Co. 44 a, 3 Inst. 214; *Reg. v. Richmond*, 1 Car. & K. 240; *The State v. Ray*, Rice, 1; *Rex v. Wildey*, 1 M. & S. 183; *Commonwealth v. Loud*, 3 Met. 328; *Commonwealth v. Keith*, 8 Met. 581; *The State v. Williams*, 613

correct, is void because of the illegal organization of the grand jury.<sup>1</sup> But, —

**Voidable Judgment on Insufficient Indictment.** — If there is a verdict of guilty on such an indictment, and the court enters judgment upon it, the defendant will be protected while the judgment remains unreversed; <sup>2</sup> not because he has been in jeopardy, but because an erroneous final judgment, rendered by a competent tribunal having jurisdiction over the subject-matter, is voidable only, and, while it stands, is of the same effect as a valid one.<sup>3</sup> It must, let us repeat, be a final judgment: a mere verdict of guilty will not do; and, therefore, in localities where the benefit of clergy is allowed,<sup>4</sup> such verdict, and the prisoner's discharge on prayer of clergy, where the indictment is insufficient, furnish no protection against a fresh prosecution.<sup>5</sup> Whence it follows, though we have few adjudications on the point, that, —

**Nolle Prosequi of Insufficient Indictment.** — In our practice, if, on the verdict coming in, the prosecuting officer discovers a defect in the indictment, he may, instead of moving for sentence, enter a *nol. pros.*<sup>6</sup> and indict anew. The Tennessee court, without passing upon this exact proposition, held, “that a *nol. pros.* entered with the assent of the court, even after the jury is impanelled and proof heard, where the indictment is bad, does not operate as an acquittal, as there was no *legal* jeopardy.”<sup>7</sup> Indeed, it is plain, that, since there is no jeopardy on an invalid indictment, a discontinuance of it, at any time when there is no subsisting final judgment upon it against the defendant, is no bar to a subsequent prosecution for the same offence.<sup>8</sup> And, —

§ 1022. **Judgment arrested on Prayer of State.** — Even where the

5 Md. 82; Pritchett v. The State, 2 Sneed, 285; Black v. The State, 36 Ga. 447; Calvin v. The State, 25 Texas, 789; White v. The State, 49 Ala. 344. And see Burgess v. Sugg, 2 Stew. & P. 341; Commonwealth v. Chichester, 1 Va. Cas. 312; People v. March, 6 Cal. 543. By the present New York statutes, if a party is tried and *acquitted upon the merits*, it will be a bar. Burns v. People, 1 Parker C. C. 182, 184. **Quashed on Demurrer.** — When a prisoner demurs to an invalid indictment, and is discharged on judgment being rendered in his favor, a second and valid proceeding may be insti-

tuted against him. Cochrane v. The State, 6 Md. 400, 406.

<sup>1</sup> Kohlheimer v. The State, 89 Missis. 548.

<sup>2</sup> Vaux's Case, 4 Co. 44 a; 2 Hale P. C. 248.

<sup>3</sup> And see ante, § 930, 975.

<sup>4</sup> Ante, § 937, 938.

<sup>5</sup> 2 Hawk. P. C. Curw. ed. p. 528, § 15.

<sup>6</sup> Ante, § 1014–1017.

<sup>7</sup> Walton v. The State, 3 Sneed, 687.

<sup>8</sup> White v. The State, 49 Ala. 344. And see People v. March, 6 Cal. 543; Cochrane v. The State, 6 Md. 400.



case, on an erroneous indictment, has proceeded to final judgment against the defendant, there is no constitutional objection to the prosecutor's procuring its reversal, should he choose, as generally he will not, and bringing forward a fresh indictment.<sup>1</sup>

§ 1023. **Punishment suffered on Erroneous Judgment.**—If the defendant has suffered the full punishment of the law, a different principle will indicate that future proceedings cannot be carried on against him; though probably they would not be an infringement of this constitutional guaranty. Such proceedings would resemble a civil suit to recover a debt already paid.<sup>2</sup> Still it is held, that one cannot plead *autrefois convict* if his former conviction was reversed on his own prayer, notwithstanding he had, before the reversal, served out a part of his term of imprisonment.<sup>3</sup>

§ 1024. **Rights of State to have Proceedings reversed.**—In England, writs of error, the practical object of which is generally to bring whatever appears of record under the review of a higher tribunal, seem to be allowable to the Crown in criminal causes;<sup>4</sup> but the courts of most of our States refuse them, and refuse the right of appeal, to the State or Commonwealth,<sup>5</sup> except where expressly authorized by statute, as in some States they are.<sup>6</sup> In Maryland, the State may have a writ of error at common law, to reverse a judgment given on demurrer in favor of a defendant.<sup>7</sup>

<sup>1</sup> Reg. v. Houston, 2 Crawf. & Dix C. C. 310; People v. Corning, 2 Comst. 9; People v. March, 6 Cal. 543. And see Jones v. The State, 15 Ark. 261.

<sup>2</sup> See Commonwealth v. Loud, 3 Met. 328; ante, § 1010.

<sup>3</sup> Jeffries v. The State, 40 Ala. 381; Cochrane v. The State, 6 Md. 400.

<sup>4</sup> Reg. v. Chadwick, 11 Q. B. 205; Reg. v. Houston, 2 Crawf. & Dix C. C. 310; Reg. v. Millis, 10 Cl. & F. 534. See Reg. v. Russell, 3 Ellis & B. 942.

<sup>5</sup> The State v. Jones, 7 Ga. 422; Commonwealth v. Cummings, 3 Cush. 212; The State v. Daugherty, 5 Texas, 1; People v. Corning, 2 Comst. 9; United States v. More, 3 Cranch, 159; Commonwealth v. Harrison, 2 Va. Cas. 202; The State v. Reynolds, 4 Hayw. 109; People v. Royal, 1 Scam. 557; People v. Dill, 1 Scam. 257; Martin v. People, 13 Ill. 341; The State v. Jones, 1 Murph. 257; Commonwealth v. Sanford, 5 Litt. 289; The State v. Sol-

omons, 6 Yerg. 360; The State v. Kemp, 17 Wis. 669; The State v. Phillips, 66 N. C. 646; The State v. Freeman, 66 N. C. 647; The State v. West, 71 N. C. 263. And see The State v. Spear, 6 Misso. 644; Commonwealth v. Jefferson, 6 B. Monr. 313; The State v. Davis, 4 Blackf. 345; The State v. Heatherley, 4 Misso. 478.

<sup>6</sup> The State v. Douglass, 1 Greene, Iowa, 550; The State v. Hicklin, 5 Pike, 190; Jones v. The State, 15 Ark. 261; The State v. Fields, Mart. & Yerg. 137; The State v. Norvell, 2 Yerg. 24; The State v. Dark, 8 Blackf. 526; Commonwealth v. Jefferson, 6 B. Monr. 313; Commonwealth v. Scott, 10 Grat. 749, 754; The State v. Manning, 14 Texas, 402; Commonwealth v. Anthony, 2 Met. Ky. 399; Commonwealth v. Van Tuyl, 1 Met. Ky. 1, 3. See Commonwealth v. Thompson, 13 B. Monr. 159.

<sup>7</sup> The State v. Buchanan, 5 Har. & J. 317. See The State v. Graham, 1 Pike,

And in some other States questions of law may, without specific statutory direction, be reviewed by this proceeding, or by appeal, on prayer of the State.<sup>1</sup> The question is not free from difficulty; but probably some judges have refused the writ to the State, from not distinguishing sufficiently between cases in which the rehearing would violate the Constitution, and cases in which the prosecuting power has the same inherent right to a rehearing as a plaintiff has in a civil suit.

§ 1025. **Common-law Impediments to Rehearing.**—It should be borne in mind, that the constitutional provision under consideration is not the only impediment to the rehearing of a criminal cause.<sup>2</sup> It is the only one not removable by legislation; but, when legislation has not interfered, and the question depends on common-law principles, there may be various other absolute bars to a further trial.

§ 1026. **Validity of Statute authorizing Rehearings.**—Whatever the terms of a statute providing for the retrial of criminal causes, or a re-examination of the proceedings, it will not ordinarily be interpreted,<sup>3</sup> and will never have force, to violate the constitutional provision under consideration. If the jeopardy has once attached, there can be no second jeopardy without the consent of the defendant,<sup>4</sup> whatever the statute may direct. It will apply only where it constitutionally may.<sup>5</sup> Thus, —

**Reversal by State after Trial.**—A statute which undertakes to give to the State the right of appeal, to retry the party after acquittal on a valid indictment, is void.<sup>6</sup> And no writ of error, or other proceeding, allowed to the State, can constitutionally open anew the question of guilt, after the jeopardy has attached. Even though an acquittal has been produced by an erroneous direction of the judge at the trial, the result is the same.<sup>7</sup> But, —

428; *The State v. Hadcock*, 2 Hayw. 162; *Crim. Proced. I.* § 1363.

<sup>1</sup> This question is, in all the States, more or less affected by the terms of the statutes. Consult *The State v. Tait*, 22 Iowa, 140; *The State v. Ellis*, 12 La. An. 390; *The State v. Ross*, 14 La. An. 364, 366 (Cole, J., observed: "There does not appear to be any reason why the State should not be entitled, as a private individual, to an appeal from one of her inferior courts to a superior tribunal");

*The State v. Dorman*, 11 Misso. 635; *The State v. Thompson*, 41 Texas, 523.

<sup>2</sup> See ante, § 988, 1021.

<sup>3</sup> *Stat. Crimes*, § 89, 90.

<sup>4</sup> Ante, § 992-994, 1015, 1016.

<sup>5</sup> *People v. Webb*, 38 Cal. 467.

<sup>6</sup> *The State v. Van Horton*, 26 Iowa, 402. And see *The State v. West*, 71 N. C. 263; *The State v. Phillips*, 66 N. C. 646; *The State v. Freeman*, 66 N. C. 647.

<sup>7</sup> *Black v. The State*, 36 Ga. 447; *O'Brian v. Commonwealth*, 9 Bush, 333;

§ 1027. **Reversal before Jeopardy.** — Before jeopardy, any reversal of proceedings, whether on prayer of the State or of the defendant, may be had without prejudice to a fresh prosecution. Thus, —

**Valid Indictment Quashed — Judgment on Invalid.** — If, without a trial, the court quashes a valid indictment, or enters judgment for the defendant on his demurrer, believing it invalid, a trial may be had after the prosecutor has procured the reversal of these proceedings; <sup>1</sup> because, as we have seen, the prisoner is not in jeopardy until the jury is impanelled and sworn. And the same consequence follows where a judgment of conviction has been rendered on an invalid indictment.<sup>2</sup> But —

**Proceedings Regular down to Trial.** — Where the indictment is sufficient, and the proceedings are regular, before a tribunal having jurisdiction, down to the time when the jeopardy attaches, there can be no second jeopardy allowed in favor of the State, on account of any lapse or error at a later stage.<sup>3</sup> This doctrine should be considered in connection with what was said under our last sub-title; else it may be misapplied. For example, —

**Quashed at Defendant's Prayer.** — If, at any stage of the proceedings, a defendant procures an indictment to be quashed, he cannot be heard to assert, in bar to a new one, that the first was good, and he was in jeopardy under it.<sup>4</sup>

§ 1028. **Court without Authority.** — If the court has no jurisdiction over the offence,<sup>5</sup> or derives its existence from an unconstitutional statute,<sup>6</sup> or is holding a term not authorized,<sup>7</sup> or is otherwise without authority in the premises,<sup>8</sup> the defendant is not in jeopardy.

The State v. Leunig, 42 Ind. 541; Hines v. The State, 24 Ohio State, 134.

<sup>1</sup> Reg. v. Houston, 2 Crawf. & Dix C. C. 210.

<sup>2</sup> Ante, § 1021, 1022; Mount v. Commonwealth, 2 Duvall, 93.

<sup>3</sup> Ante, § 992; The State v. Fields, Mart. & Yerg. 137; The State v. Hand, 1 Eng. 169; The State v. Denton, 1 Eng. 259; The State v. Dark, 8 Blackf. 526; The State v. Davis, 4 Blackf. 345.

<sup>4</sup> Joy v. The State, 14 Ind. 139.

<sup>5</sup> The State v. Odell, 4 Blackf. 156; Commonwealth v. Hyde, Thacher Crim. Cas. 112; Commonwealth v. Peters, 12 Met. 387; Commonwealth v. Goddard, 13 Mass. 455, 457; The State v. Payne, 4

Misso. 376; The State v. McCorry, 2 Blackf. 5; Marston v. Jenness, 11 N. H. 156; Commonwealth v. Myers, 1 Va. Cas. 188, 248; Flournoy v. The State, 16 Texas, 30; Norton v. The State, 14 Texas, 387; Wilson v. The State, 16 Texas, 246; O'Brian v. The State, 12 Ind. 369; The State v. Hodgkins, 42 N. H. 474; Hodges v. The State, 5 Coldw. 7, overruled in Mikels v. The State, 3 Heisk. 321.

<sup>6</sup> Rector v. The State, 1 Eng. 187. See McGinnis v. The State, 9 Humph. 43.

<sup>7</sup> Dunn v. The State, 2 Pike, 229; Rex v. Bowman, 6 Car. & P. 337.

<sup>8</sup> The State v. Atkinson, 9 Humph. 677; Commonwealth v. Alderman, 4

ard, however far the tribunal proceeds. In most or all of these circumstances, the final judgment is not voidable, as mentioned in a previous section,<sup>1</sup> but void; so that his unreversed conviction<sup>2</sup> is no more a bar to another prosecution than his acquittal.

§ 1029. *Concurrent Jurisdiction* — (*Magistrate's — Court-Martial*).

— But if the tribunal has authority, concurrent with another, or exclusive, — whether it is an inferior one, as a justice's court, a court-martial, or the court of a municipal corporation, or is a superior one, — a conviction or acquittal in it will be a bar to subsequent proceedings in whatever court undertaken.<sup>3</sup>

§ 1029 *a*. *The Plea*. — The plea, usually put in at the arraignment, is an essential part of the proceedings.<sup>4</sup> And, until an indicted person has pleaded, he is not in jeopardy, though a jury has been sworn to try him, or even though there has been an actual trial.<sup>5</sup> But the *similiter* appears not to be essential.<sup>6</sup>

§ 1030. *Impossibilities not of Record*: —

*Foregoing Defects and these compared*. — The foregoing may be termed “defects of record.” In their nature, they are such as may be known before trial; but, in fact, they are generally not known to the prosecuting officer, because of his oversight, or mistaking the law. If the defendant discovers them, he may choose not to take the objection till after trial. But we come now to

Mass. 477; Reg. *v*. Sullivan, 15 U. C. Q. B. 198.

<sup>1</sup> Ante, § 1021.

<sup>2</sup> Commonwealth *v*. Hyde, Thacher Crim. Cas. 112; Commonwealth *v*. Goddard, 13 Mass. 455; The State *v*. Payne, 4 Misso. 376; The State *v*. McCorry, 2 Blackf. 5; Rex *v*. Bowman, 6 Car. & P. 337. But see McGinnis *v*. The State, 9 Humph. 43.

<sup>3</sup> Commonwealth *v*. Cunningham, 13 Mass. 245; The State *v*. McCorry, 2 Blackf. 5; Stevens *v*. Fassett, 27 Maine, 286; The State *v*. Plunkett, 3 Harrison, 5; Commonwealth *v*. Miller, 5 Dana, 320; The State *v*. Simonds, 3 Misso. 414; Wilkes *v*. Dinsman, 7 How. U. S. 89, 123; The State *v*. Davis, 1 Southard, 311; Commonwealth *v*. Goddard, 13 Mass. 455; Trittipio *v*. The State, 13 Ind. 360; Bruce *v*. The State, 9 Ind. 206; Trittipio *v*. The State, 10 Ind. 343. *Court-martial*. —

There is an opinion by Attorney-General Cushing, that the military offence and the civil so differ as to allow of a prosecution in the military tribunal, after the case has been disposed of in the civil. Steiner's Case, 6 Opin. Att. Gen. 413. *s. p.* by Att. Gen. Legare, 3 Opin. Att. Gen. 749. And see post, § 1067. See also, as to courts-martial, Brown *v*. Wadsworth, 15 Vt. 170. It was held in Tennessee, that an acquittal by a court-martial established under the Act of Congress of March 2, 1863, for punishing offences committed by persons in the service of the United States, is no bar to an indictment for murder under the laws of the State. The State *v*. Rankin, 4 Coldw. 145.

<sup>4</sup> Crim. Proc. I. § 796, 797, 801.

<sup>5</sup> Link *v*. The State, 3 Heisk. 252; United States *v*. Riley, 6 Blatch. 204.

<sup>6</sup> Crim. Proc. I. § 796, 1364.

other defects, which, though no man can discover them in advance, and only the evolutions of time bring them to light, as truly adhere to the cause as those; rendering a valid verdict impossible, and therefore preventing the jeopardy from attaching. Let us call to mind some of them.

§ 1031. **Term of Court ending before Verdict.** — It is in the nature of things certain how much time a trial will consume; while yet the time is ascertainable only by the development of the event. If, therefore, before the cause is finished by the bringing in of the verdict, the term of the court closes, this result shows that the prisoner was never in jeopardy; though he believed himself, and others believed him, to be. Consequently he may be tried again.<sup>1</sup>

§ 1032. **Sickness — (Judge — Juror — Prisoner).** — Sickness may come, unknown till it arrives. And if, while the cause is on trial, it falls on the judge<sup>2</sup> or a juror<sup>3</sup> or the prisoner,<sup>4</sup> to interrupt the proceeding before verdict, this result shows that no jeopardy existed in fact, though believed to exist; and the prisoner may be required to answer anew.

<sup>1</sup> The State *v.* McLemore, 2 Hill, S. C. 680; The State *v.* Battle, 7 Ala. 259; Lore *v.* The State, 4 Ala. 173; Ned *v.* The State, 7 Port. 187; Wright *v.* The State, 5 Ind. 290; The State *v.* Moore, Walk. Missis. 134; Commonwealth *v.* Thompson, 1 Va. Cas. 319; The State *v.* Brooks, 3 Humph. 70; Powell *v.* The State, 19 Ala. 577; Reg. *v.* Davison, 2 Fost. & F. 250; People *v.* Cage, 48 Cal. 323; Josephine *v.* The State, 39 Missis. 613. Contra, In re Spier, 1 Dev. 491. And see United States *v.* Shoemaker, 2 McLean, 114; Commonwealth *v.* Olds, 5 Litt. 137. **Defendant left at Large.** — Where one was put upon trial for larceny, and the term expired before the jury could agree on a verdict, and they left their room and dispersed without agreeing, and the defendant was suffered to go at large, it was held that the solicitor might, without leave of court, cause a *capias* to issue against him, and bring him again to trial. The State *v.* Tilletson, 7 Jones, N. C. 114.

<sup>2</sup> Nugent *v.* The State, 4 Stew. & P.

<sup>3</sup> Fletcher *v.* The State, 6 Humph. 249; Commonwealth *v.* Merrill, Thacher Crim. Cas. 1; The State *v.* Curtis, 5 Humph. 601; Rex *v.* Barrett, Jebb, 103; Rex *v.* Delany, Jebb, 106; Rex *v.* Edwards, 4 Taunt. 309, Russ. & Ry. 224, 3 Camp. 207; Rex *v.* Scalbert, 2 Leach, 4th ed. 620; Reg. *v.* Leary, 3 Crawf. & Dix C. C. 212; Reg. *v.* Beere, 2 Moody & R. 472; Hector *v.* The State, 2 Misso. 166; Commonwealth *v.* Fells, 9 Leigh, 613. The sickness must be such as cannot be removed by refreshments. Commonwealth *v.* Clue, 3 Rawle, 498. And proper evidence of the sickness must be produced, Rulo *v.* The State, 19 Ind. 298. As to Sickness of Prosecuting Officer, see United States *v.* Watson, 3 Ben. 1.

<sup>4</sup> Rex *v.* Stevenson, 2 Leach, 4th ed. 546; Rex *v.* Streek, 2 Car. & P. 413; Rex *v.* Kell, 1 Crawf. & Dix C. C. 151; People *v.* Goodwin, 18 Johns. 187; The State *v.* McKee, 1 Bailey, 651; Foster, 34; Brown *v.* The State, 38 Texas, 482; The State *v.* Wiseman, 68 N. C. 203; Lee *v.* The State, 26 Ark. 260.

**Death or Insanity.** — Of course, the death or insanity of a juror or the judge will produce the same effect.<sup>1</sup>

§ 1033. **Jury failing to agree.** — While the doctrine thus far is plain and accepted by all the tribunals, they are divided upon the effect of the inability of the jury to agree on their verdict. It is commonly asserted that anciently in England, if the jury could not come to a verdict before the end of the term, they were carted after the judges into, or to the border of, the next adjoining county.<sup>2</sup> In this country, no such practice has prevailed; yet some of our tribunals have held, that the evidence of time alone can determine their inability to agree during the term of the court, and that, therefore, if they are earlier discharged, on any other testimony whatever, the prisoner is exempt from being tried again.<sup>3</sup> But in England<sup>4</sup> and Ireland,<sup>5</sup> at present, and in the greater part,<sup>6</sup> not all, of our States, when a reasonable period

<sup>1</sup> *People v. Webb*, 38 Cal. 467. See *Bescher v. The State*, 32 Ind. 480; *Ex parte McLaughlin*, 41. Cal. 211.

<sup>2</sup> *Rex v. Ledgingham*, 1 Vent. 97; 3 Inst. 110; Co. Lit. 227; *Foster*, 31 et seq. See *The State v. Hall*, 4 Halst. 256, 261; *United States v. Gibert*, 2 Sumner, 19, 42; *Reg. v. Leary*, 3 Crawf. & Dix C. C. 212. As to this, *Cockburn, C. J.*, in the Court of Queen's Bench, observed: "It was said by the prisoner's counsel that it was competent to judges, and the duty of judges, to carry with them in carts a jury, who could not agree, to the confines of the county where the trial was had, or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Book of Assize (19 Ass. pl. 6; 41 Ass. pl. 11) have been copied servilely by text-writers, and that has given rise to this opinion. I question very much whether such a practice ever existed; I am sure it has not in modern times. But suppose it to have been so, we, nowadays, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a jury should be the result of any thing but the unanimity of conviction." *Winsor v. Reg.*, Law Rep. 1 Q. B. 289, 305, 7 B. & S. 490; s. c. in all its stages, *nom. Reg v. Winsor*, 10 Cox C. C. 276.

<sup>3</sup> *Ned v. The State*, 7 Port. 187; *Ex parte Vincent*, 43 Ala. 402; *Williams c. Commonwealth*, 2 Grat. 567, compared with *Dye v. Commonwealth*, 7 Grat. 662, where it appears that the rule is applied only in felonies; *Commonwealth v. Cook*, 6 S. & R. 577; *Mahala v. The State*, 10 Yerg. 532. And see *Josephine v. The State*, 39 Missis. 613.

<sup>4</sup> *Winsor v. Reg.*, *supra*; *In re Newton*, 13 Q. B. 716, 13 Jur. 606, 18 Law J. n. s. M. C. 201; s. c. *nom. Reg. v. Newton*, 3 Car. & K. 85, 86, 3 Cox C. C. 489; *Archb. New Crim. Proced.* 172. See *Conway v. Reg.*, 7 Ir. Law, 149, 13 Q. B. 735, note, 1 Cox C. C. 210; *Rex v. Shields*, 28 Howell St. Tr. 619, 646, 647.

<sup>5</sup> *Reg. v. Barrett*, Ir. Rep. 4 C. L. 285.

<sup>6</sup> *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick. 521; *Commonwealth v. Townsend*, 5 Allen, 216; *The State v. Updike*, 4 Harring. Del. 581; *People v. Olcott*, 2 Johns. Cas. 301; *United States v. Perez*, 9 Wheat. 579; *The State v. McKee*, 1 Bailey, 651; *People v. Goodwin*, 18 Johns. 187, 206; *The State v. Woodruff*, 2 Day, 504; *Hurley v. The State*, 6 Ohio, 399; *People v. Green*, 13 Wend. 55; *The State v. Hall*, 4 Halst. 256; *Wright v. The State*, 5 Ind. 290 (but see *Miller v. The State*, 8 Ind. 325; *Reese v. The State*, 8 Ind. 416); *Shaffer v. The State*, 27 Ind. 131. *Peo-*

for discussion and reflection has been given the jury, and they have in open court declared themselves unable to come to an agreement, and the judge is satisfied of the truth of the declaration, they may be discharged, and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor. But—

§ 1034. *Continued.*—There is, in practice, some difference in the form of applying this general and better doctrine. The view best sustained in principle is, that, when the record shows an apparent jeopardy, it must contain also matter negating the jeopardy in the particular instance, or, in the absence of a conviction, the prisoner will be entitled to his discharge. In pursuance of which view, it is in many of the cases held that the court must make the inability of the jury to agree matter of express adjudication, and it must appear of record, else their discharge without giving a verdict will entitle the defendant to be discharged.<sup>1</sup> But this doctrine is not recognized in all the cases. Thus, some judges have distinguished between felony and misdemeanor;<sup>2</sup> holding to the necessity of the adjudication, or even denying altogether the right of discharge under the circum-

ple *v. Shotwell*, 27 Cal. 394; *Dobbins v. The State*, 14 Ohio State, 493; *The State v. Walker*, 26 Ind. 346; *The State v. Nelson*, 26 Ind. 366; *The State v. Crane*, 4 Wis. 400; *Barrett v. The State*, 35 Ala. 406; *McCreary v. The State*, 5 Casey, 323; *Avery v. The State*, 26 Ga. 233; *Vanderwerker v. People*, 5 Wend. 530; *Williford v. The State*, 23 Ga. 1; *Lester v. The State*, 33 Ga. 329; *Lee v. The State*, 26 Ark. 260; *People v. Cage*, 48 Cal. 323; *The State v. Bullock*, 63 N. C. 570; *The State v. Alman*, 64 N. C. 364; *The State v. Jefferson*, 66 N. C. 309; *Ex parte McLaughlin*, 41 Cal. 211; *The State v. Vaughan*, 29 Iowa, 286; *Crookham v. The State*, 5 W. Va. 510; *Moseley v. The State*, 33 Texas, 671. See *Morgan v. The State*, 3 Sneed, 475.

<sup>1</sup> See cases cited to the last section; also *Poage v. The State*, 3 Ohio State, 229, 238; *Hines v. The State*, 24 Ohio State, 134; *Ex parte Cage*, 45 Cal. 248; *People v. Cage*, 48 Cal. 323; *Ex parte McLaughlin*, 41 Cal. 211; *The State v. Jefferson*, 66 N. C. 309; *People v. Lightner*, 49 Cal. 226; *The State v. Ephraim*,

2 Dev. & Bat. 162; *Ned v. The State*, 7 Port. 187; *Powell v. The State*, 19 Ala. 577. And see the observations of *Ranney, J.*, in *Dobbins v. The State*, 14 Ohio State, 493, 501, 502. In an Indiana case, *Elliott, J.*, observed: "The discretionary power [to discharge the jury] is not that absolute discretion depending upon the mere will of the judge, but is a sound judicial discretion, to be exercised only upon sufficient reasons, and subject to the supervision of an appellate court." *The State v. Walker*, 26 Ind. 346, 353. See further, on this point, *Price v. The State*, 36 Missis. 531; *Atkins v. The State*, 16 Ark. 568. In England, the right to discharge the jury, because unable to agree, seems to be regarded as a discretionary power, reposing in the breast of the presiding judge, and not to be passed upon in review by the higher tribunal. Still, the record in the case wherein it was so laid down, showed the facts. *Winsor v. Reg.*, Law Rep. 1 Q. B. 289, 290. See also post, § 1035.

<sup>2</sup> Ante, § 990.

stances mentioned, in all trials for felony; yet maintaining, that, in misdemeanor, the discharge is mere matter of discretion with the individual judge.<sup>1</sup> Others have deemed the mere discretionary power, in distinction from the right to adjudicate the fact, to exist in cases of felony, even in capital felonies;<sup>2</sup> especially, therefore, in misdemeanor.<sup>3</sup> Again, —

§ 1035. **Continued — (Necessity).** — Some judges put this doctrine, of discharging a jury who cannot agree, on necessity.<sup>4</sup> And we have seen,<sup>5</sup> that necessity is a great power in the law, overriding even the letter of a statute. Doubtless, therefore, it might create an exception to a constitutional provision also. But the necessity of producing a conviction could not be ingrafted, by construction, on a clause intended to shield prisoners from conviction, without doing violence to sound principles of interpretation. And the necessity of a jury's agreeing on a verdict does not differ from the necessity of a conviction.

§ 1036. **How in Principle.** — The better view of this entire question of discharging the jury after being selected and sworn

<sup>1</sup> *The State v. Morrison*, 3 Dev. & Bat. 115.

<sup>2</sup> *People v. Green*, 13 Wend. 55; *The State v. Waterhouse*, Mart. & Yerg. 278. But see *contra*, decided in the same State with the last, *Mahala v. The State*, 10 Yerg. 532. See *Commonwealth v. Fells*, 9 Leigh, 613.

<sup>3</sup> *People v. Denton*, 2 Johns. Cas. 275; *People v. Olcott*, 2 Johns. Cas. 301; *People v. Ellis*, 15 Wend. 371. And see *People v. The Judges*, 8 Cow. 127. In Massachusetts, a practice prevails in wide departure from the general and better American doctrine. Thus, a case being submitted to the jury in the evening, it was arranged between the parties, that, if the jury agreed upon a verdict, they might reduce it to writing, seal it up, and return it into court in the morning. The judge then told the officer to discharge them if they did not agree in seven hours. The time having elapsed, without an actual agreement, the officer told them they were discharged, while protesting that they should agree in a few minutes, which they did. They sealed up their verdict, and returned it into court; but it was set aside, because rendered after they were lawfully

discharged. Yet Metcalf, J., observed: "While we do not doubt the authority of the court, in its discretion, to order the discharge of a jury after seven hours' disagreement, yet a much preferable course would be to direct the officer, who has charge of them, that, if they should not agree by a certain hour, he should inquire of them whether they were likely to agree, and, if told by them that they were not, then to discharge them. Such is the course adopted by the members of this court, in cases like this, whenever they give any order to the officer, as to discharging the jury before they have applied to the court, through the officer, to be discharged." *Commonwealth v. Townsend*, 5 Allen, 216, 218. See, in contrast to this case, *The State v. Alman*, 64 N. C. 364.

<sup>4</sup> *The State v. Ephraim*, 2 Dev. & Bat. 162; *Powell v. The State*, 19 Ala. 577; *Commonwealth v. Clue*, 3 Rawle, 498; *United States v. Coolidge*, 2 Gallis. 364; *Wright v. The State*, 5 Ind. 290. And see *United States v. Watson*, 3 Ben. 1; *The State v. Wiseman*, 68 N. C. 203; *The State v. Leunig*, 42 Ind. 541; *The State v. Wamire*, 16 Ind. 857.

<sup>5</sup> *Ante*, § 346 et seq.



in a case is the following: Whenever, either in felony or misdemeanor, the judge discovers any thing which will render a verdict against the prisoner void, or subject to be avoided by him, or will render it impossible that a verdict should be reached,—any thing, in other words, establishing that no jeopardy has really attached to the prisoner, and that any further progressing in the trial will be fruitless,—he may adjudge the fact, put the adjudication on record, and discharge the jury. Then, the apparent jeopardy appearing of record, matter nullifying it will appear also, and the defendant will be properly held for further proceedings. But, if the jeopardy appears without the nullifying matter, the defendant may claim to be dismissed from the cause, and be no more prosecuted for the same offence. This leads us to the —

§ 1037. *Further Doctrines as to when the Jury may be discharged:*—

**In General.**—The general doctrine, let it be repeated, is, that if, after the jeopardy already explained has attached, the judge discharges the jury without the prisoner's consent, the prisoner is entitled to be set at liberty, and he is not to be again brought into danger for the same offence.<sup>1</sup> For example,—

**Defects in Evidence**—(Witness Absent, Sick, &c.).—Where, after the jury is sworn, the evidence is found not sufficient to convict; or a material witness for the prosecution appears to be absent;<sup>2</sup> or such witness is shown to be unacquainted with the nature of an oath, and so to require instruction before testifying;<sup>3</sup> or the witness is suddenly taken too ill to proceed,<sup>4</sup>—no second trial can be had.

§ 1038. **Misconduct of Jury.**—If a juror so conducts that no verdict can be rendered,—as, if he escapes<sup>5</sup> before the verdict is reached,—this does not, like a wrongful discharge of the jury by the judge, entitle the prisoner to go free, or protect him from a second jeopardy.<sup>5</sup> Perhaps the distinction rests on the doc-

<sup>1</sup> *Wright v. The State*, 5 Ind. 290; *Hines v. The State*, 8 Humph. 597; ante, § 992, 1016.

<sup>2</sup> *People v. Barrett*, 2 Caines, 804; *United States v. Shoemaker*, 2 McLean, 114; *Harker v. The State*, 8 Blackf. 540; *Foster*, 30.

<sup>3</sup> *Rex v. Wade*, 1 Moody, 86; *Reg. v.*

*Oulaghan, Jebb*, 270. See also *Anonymous*, 1 Leach, 4th ed. 430, note.

<sup>4</sup> *Rex v. Kell*, 1 Crawf. & Dix C. C. 151. Compare with ante, § 1032.

<sup>5</sup> *The State v. Hall*, 4 Halst. 256; *Hanscom's Case*, 2 Hale P. C. 295, 296; *The State v. McKee*, 1 Bailey, 651, 654; *Reg. v. Ward*, 10 Cox C. C. 573.

trine, that the judge is the court, rather than the jury, and that to him, not them, is committed the care of constitutional rights; or, the distinction may itself be too refined, though reasonably well sustained by authority. The North Carolina court held, that, if the jury separate by permission merely of the officer in attendance, the judge not being consulted, the prisoner is, by this separation, privileged not to be tried again.<sup>1</sup> The true view seems to be, that, — since the jury without the concurrence of the judge, and even contrary to his express direction, may in all cases acquit the defendant by verdict, — if, without the defendant's consent, they do what puts it out of their power to return a verdict, he may avail himself of this, using it as an implied acquittal. But the case of one man of the panel committing the offence of escape from his fellows seems to stand on a different ground; for no one juror has the power to acquit, though he has to produce a disagreement. And if, after the disagreement, the court can adjudge the impossibility of there being a conviction, and consequently order a new trial, why not do the same thing after the juror has escaped?

§ 1039. *Juror disqualified.* — If, after the trial has commenced, a juror is found not to have been sufficiently sworn,<sup>2</sup> or to be insane,<sup>3</sup> or not of the panel,<sup>4</sup> he may be discharged, or the error may be otherwise corrected, without entitling the prisoner to go free. Some courts have held, that any disqualification, showing him not to be a proper juror in the case, discovered after trial begun, will authorize his discharge, with no protection to the defendant against further proceedings.<sup>5</sup> Yet the better view is to consider, whether the matter is such as the defendant can make ground for a new trial if the verdict is against him; when it is, the juror should be discharged, and the defendant held to be tried anew, because the proceeding put him in no jeopardy;<sup>6</sup> when it is a thing of which the prosecuting power alone can complain, this power has lost its right to complain by submitting the cause for trial, and the prisoner may refuse his consent to the discharge, which, if ordered without his consent, frees him from

<sup>1</sup> *The State v. Garrigues*, 1 Hayw. 241.

<sup>2</sup> *Rex v. Deleany, Jebb*, 88.

<sup>3</sup> *United States v. Haskell*, 4 Wash. C. C. 402.

<sup>4</sup> *Reg. v. Phillips*, 11 Cox C. C. 142.

<sup>5</sup> *United States v. Morris*, 1 Curt. C. C. 23.

<sup>6</sup> *Ante*, § 1021.

further trial.<sup>1</sup> If a juror is under some legal incompetency, as where he is an alien, unknown to either party when the cause is opened, his discharge does not prevent a new trial.<sup>2</sup>

§ 1040. **Too few Jurors.**—In like manner, one tried by a jury less in number than the law requires, is in no jeopardy, and he may be tried anew.<sup>3</sup> And, —

**Pleadings not ready.**—We have seen,<sup>4</sup> it is the same when the case is put to the jury before the pleadings are ready.<sup>5</sup> Any verdict rendered against the defendant could be avoided by him.

§ 1041. **Revising Erroneous Discharge of Jury.**<sup>6</sup>—If the judge, having improperly discharged the jury, still refuses to let the prisoner go, but holds him for another trial, — does an appeal lie from his discretion to a revising tribunal?<sup>7</sup> The general doctrine in other cases is, that, when a matter concerns the despatch of business, and is of pure discretion, the steps at the trial are not subjects of review,<sup>8</sup> — a doctrine, however, not strictly held in all the States. But a claim, under the constitution, to be exempt from a second jeopardy, is not, in reason, within this class of questions; though, in some of the cases,<sup>9</sup> observations occur indicating that the judges inconsiderately assumed it to be. Moreover we have the distinction, that the finding of a fact by the judge is final, while his decision of a question of law is open to review. Hence, it would seem, that, when the court concurs with the jury in the conclusion that they cannot agree, and therefore discharges them, the propriety of the discharge under the circumstances cannot be reviewed;<sup>10</sup> but, when the question of

<sup>1</sup> *The State v. McKee*, 1 Bailey, 651; *Reg. v. Wardle*, Car. & M. 647; *O'Brian v. Commonwealth*, 9 Bush, 333.

<sup>2</sup> *Stone v. People*, 2 Scam. 326, 335; *The State v. Williams*, 3 Stew. 454, 473, in which latter case, however, the court deemed the discharge erroneous, and a cause of new trial, but not of release from further trial altogether. And see *Brown v. The State*, 5 Eng. 607; *Crim. Proced. I.* § 946-949.

<sup>3</sup> *Brown v. The State*, 8 Blackf. 561.

<sup>4</sup> Ante, § 1029 a.

<sup>5</sup> *The State v. Nelson*, 7 Ala. 610.

<sup>6</sup> See *Crim. Proced. I.* § 818-831.

<sup>7</sup> See *Ned v. The State*, 7 Port. 187.

<sup>8</sup> Illustrations of this principle may be seen in *Commonwealth v. Eastman*, 1

*Cush.* 189; *Reg. v. Wardle*, Car. & M. 144.

<sup>9</sup> *United States v. Haskell*, 4 Wash. C. C. 402; *Commonwealth v. Olds*, 5 Litt. 187; *United States v. Perez*, 9 Wheat. 579; *People v. Olcott*, 2 Johns. Cas. 301; *Commonwealth v. Purchase*, 2 Pick. 521, 524; *The State v. Shoemaker*, 2 McLean, 114; *United States v. Morris*, 1 Curt. C. C. 23. Contra, *Commonwealth v. Cook*, 6 S. & R. 577; *Wright v. The State*, 5 Ind. 290. And see *The State v. McKee*, 1 Bailey, 651, 652.

<sup>10</sup> *People v. Green*, 13 Wend. 55; *United States v. Perez*, 9 Wheat. 579; *People v. Olcott*, 2 Johns. Cas. 301; *In re Newton*, 13 Q. B. 716, 13 Jur. 606, 18 Law J. N. S. M. C. 201; *Winsor v. Reg.*, Law

law arises, whether there was a jeopardy or not, it may be re-examined on appeal, or writ of error, or plea of former acquittal, according to the practice of the tribunal,<sup>1</sup> and the nature of the case.

§ 1042. *Views on Principle* : —

**Constitution to lead.** — In spite of what was laid down at the opening of this sub-title,<sup>2</sup> that, since we are upon constitutional law, we should follow rather the lead of the Constitution than of the decisions, our discussion, conducting us over the field of adjudication, has seemed at places to depart from the Constitution. Let us now, disregarding the paths made for us by the courts, take a few steps where the Constitution goes before.

§ 1043. **Implications in Prohibition of Second Jeopardy.** — When the Constitution declares, that a man shall not be, for one offence, put twice — that is, a second time — in jeopardy, it implies that the jeopardy against which he is thus protected will come, if at all, from the courts. And it implies that, in the absence of any actual consent from him, the courts are forbidden to compel him to the alternative of doing what will be construed into a consent in law, or suffering the loss of life or limb through a violation of law by a judge presiding at his trial. To say to a prisoner, “Be hung contrary to law, or consent to be put in jeopardy a second time,” is, it is submitted, utterly to disregard the implications in this provision of the Constitution.

§ 1044. **Misdirection taking away Jeopardy.** — But the decisions go upon the principle, not perhaps mentioned in them in words, that, if the judge commits an error to the prejudice of the prisoner at his trial, he is not in jeopardy; since, should a verdict be rendered against him, he is entitled to have it set aside. This view is specious, but not just. Such a case differs from that of

Rep. 1 Q. B. 289, 7 Best & S. 490; *The State v. Brooks*, 3 Humph. 70. But see *Williams v. Commonwealth*, 2 Grat. 567; *The State v. Battle*, 7 Ala. 259; *Wright v. The State*, 5 Ind. 290; *The State v. Alman*, 64 N. C. 364; *The State v. Jefferson*, 66 N. C. 309.

<sup>1</sup> *The State v. McKee*, 1 Bailey, 651; *United States v. Shoemaker*, 2 McLean, 114; *People v. Barrett*, 2 Caines, 304; *Ned v. The State*, 7 Port. 187; *Wright v. The State*, 5 Ind. 290. And see *The*

*State v. Benham*, 7 Conn. 414; *Reg. v. Reid*, 1 Eng. L. & Eq. 595; *Mount v. The State*, 14 Ohio, 295; *The State v. Norvell*, 2 Yerg. 24; *Rex v. Wildey*, 1 M. & S. 183; 2 Hale P. C. 243; *Rex v. Bowman*, 6 Car. & P. 101. Contra, *United States v. Morris*, 1 Curt. C. C. 23; *O'Brian v. Commonwealth*, 9 Bush, 333; *The State v. Leunig*, 42 Ind. 541. See *The State v. Waterhouse*, Mart. & Yerg. 278.

<sup>2</sup> Ante, § 1012.

an insufficient indictment, or some accident or force interposing outside of the court. The court is the power that brings the jeopardy upon him; and, when the Constitution declares that this power shall not put him in jeopardy twice, it is a mockery to say, that it may bring him into as many jeopardies as it will, provided it violates the law each time. The interpretation which makes a violation of the common or statutory law a good answer to a charge of violating the Constitution, has no parallel in any thing else known in our jurisprudence.

§ 1045. **What, in Principle, is a Jeopardy.** — If the power which is to try a man has, by valid steps, brought him to trial, he is, the instant such trial is ready to commence, in jeopardy, unless something, patent or latent, not under control of the power itself, exists, making it impossible any verdict should be rendered against him which he will not be entitled to have set aside. This, it is believed, is, in principle, the true test. The valid preparation and instantaneous readiness to begin to receive evidence is the jeopardy, — not the verdict, which is the consummation of the proceedings; for the final judgment is a mere formal utterance of the law's approval of what is already done. Now, if the power which brings a man into and controls the jeopardy — namely, the court — proceeds unlawfully after the jeopardy has thus attached, it is not sound in legal reasoning to say, that this unlawful conduct nullifies the jeopardy. If it did, then the process might be repeated for ever, and the constitutional provision be rendered void. After the case was opened to the jury, or at any time before verdict, if the judge saw that there could be no just conviction, and wished to give the State liberty to retry it, he might discharge them without a verdict, or unlawfully direct them to bring in one of guilty, or do something else unlawful, and thus there might be a second trial, and then a third, and so on without end, to the utter overthrow of this constitutional protection. And, we may presume, it was to prevent exactly this sort of thing that the constitutional inhibition was established.

§ 1046. **Failure of Evidence.** — It is admitted, that, if the evidence introduced is inadequate, and the jury render a verdict of not guilty, the prisoner cannot be tried again. There was, by all opinions, a jeopardy. But if, under the same facts, the judge permits the gossip of the neighborhood to be added to the insuf-

ficient legal evidence, and the jury convict the prisoner on this, — has he not equally been in jeopardy? Yes; it is the doctrine of reason, that he has. But, in this instance, it is said, that, as the court violated the law in admitting the gossip, it may be sharp on him, and, to punish him for its own illegal conduct, may compel him either to be hanged for the court's fault, or to waive the right which the Constitution gave him. Happily, in few other things, do the courts thus trifle with constitutional duty.

§ 1047. **Misdirection of Judge protested against by Prisoner.** — These views, expressed in general language, indicate the methods by which some important questions connected with our present sub-title may be solved. They are not meant to retrace in full the discussion. If they are correct, they show that the course of the courts, adopted apparently without consideration, of trying anew defendants wrongly convicted by reason of a misdirection against which they protested at the time, instead of suffering them to go free, violates this constitutional guaranty. If, only on the waiving of their constitutional rights, they can have the error corrected, — if they can be permitted to take their due only on paying the price of surrendering what the Constitution secures to them, — if, after they have struggled against a misdirection in the cause, and been borne down, they can be permitted to come up again, only on giving back what the Constitution of the country gave them, — if, having opposed a conviction improperly ordered, while entitled to an acquittal, they can have the conviction set aside only on submitting to run their chance of being convicted under a different state of facts appearing, when either they will be unprepared for the trial, or the government will have evidence it had not before, — if the wrong done the prisoner is to be set right only on his submitting to the chance of receiving a fresh wrong, — surely this guaranty of the Constitution is worth but little.

**Why these Views.** — This presentation of the question is made, not because the author supposes, that, in the present condition of legal learning, while a blind reception of mere judicial authority nearly banishes the purer reasonings of the law and true juridical wisdom, many judges will even take the trouble to understand it; but because the question lay in his path, demanding notice. And the consolation is, that, though the practice we are consider-

ing violates the Constitution, it is not often attended with much substantial injustice.<sup>1</sup>

*V. Rules to determine when the Two Offences are the Same.*

§ 1048. **Decisions Discordant.** — If, under the last sub-title, we found the decisions to be in a degree conflicting, and not all to be satisfactory, much more shall we under this. Indeed, some of

<sup>1</sup> 1. **The Common Reason.** — In an Ohio case, the learned judge, arguing in support of the common practice, said: "It is not claimed, for the plaintiff in error, that a conviction upon a defective indictment, when the judgment has been afterwards reversed, can be set up as bar to another prosecution. It is conceded by his counsel, that, in such a case, the prisoner may be put again upon his trial. In such a case he says, according to the construction of all the courts, the prisoner never was in jeopardy. But he claims, that, by a trial before a lawful jury, upon a good indictment, and a finding of a verdict by the jury, the prisoner has been put in jeopardy, and cannot therefore be again prosecuted for the same offence. It is not readily perceived how any real distinction can be drawn between the cases. In both, it is but an error in the proceedings; in the first, the error is found in the indictment; in the second, the error is committed by the court, it may be in admitting or rejecting testimony, in charging or refusing to charge the jury, or in determining some other one of the various legal questions arising in the progress of the cause. If it be, that, when a party is convicted on a bad indictment for murder, he may be tried again because his life was not in jeopardy, it may with equal truth be said, under our system of laws, and since the allowance of bills of exceptions and writs of error in criminal prosecutions, he was not in jeopardy in case any other substantial error is found in the proceedings." *Sutcliffe v. The State*, 18 Ohio, 469, 478. This presentation differs from a possible one conducting to the same conclusion, in denying that there is a jeopardy where the judge gives an erroneous direction at the trial. The jeopardy

is sometimes admitted, yet it is alleged that the defendant waives the benefit of it when he asks for a new trial. And see, on the same side, the reasoning in *People v. Olwell*, 28 Cal. 456.

2. **A better View.** — There is a New York case, depending, to some extent perhaps, on statutes, yet apparently involving so much of general principle as to show an assimilation of views in the minds of the judges to those stated in the text; though, in this instance, as in some others, the judges seemed not to be aware that their views were contrary to judicial opinions held in other States. The note to the case is: "A prisoner against whom a wrong judgment was pronounced upon a regular trial and conviction cannot be subjected to another trial." A statute provided, that, "if the supreme court shall reverse the judgment rendered, it shall either direct a new trial or that the defendant be absolutely discharged." There was a motion in arrest of judgment and for a new trial; and, the sentence appearing to have been wrong, the court, as the head-note discloses, directed, not a new trial, but a discharge of the prisoner, on the ground that the first trial was a protection against further proceedings for the same offence. Said Sutherland, J.: "The circumstance, that the counsel of the prisoner, on moving in arrest of judgment, also asked for a new trial, I regard of no consequence. The constitutional provision is, 'No person shall be subject to be twice put in jeopardy for the same offence.' This provision may be considered as addressed to courts; and, if the prisoner is within its protection, he ought to be discharged, although his counsel did formally ask for a new trial." *Shepherd v. People*, 25 N. Y. 406, 418.

these, like a class of those, are founded on principles which, if adopted throughout, would render practically void the constitutional inhibition.

§ 1049. "**Same Offence.**" — The general doctrine is plain, and there are no conflicts of authority upon it, that, in the words of the Constitution itself, to entitle a prisoner to the protection we are considering, the second jeopardy must be for the "same offence" as the first. If, therefore, a man has been either convicted or acquitted of one crime, he may still be prosecuted for another.<sup>1</sup> And —

**Convicted by Verdict or Plea.** — This doctrine is not limited to convictions and acquittals by the verdict of a jury; but, if a man has pleaded guilty to a valid indictment, the result is the same. The case need not have proceeded to judgment.<sup>2</sup>

§ 1050. **Similarity of Indictments.** — Another proposition about which there is no dispute is, that, to make the offences the same, the two indictments need not be, in exact language, alike.<sup>3</sup> For, to show the identity of the offences, proof outside the indictments is not altogether excluded.<sup>4</sup>

§ 1051. **When, in Reason, Offences the Same.** — Looking further to see when the offences are the same, we have, in reason, the following propositions: They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction, — a proposition of which the exact limits are difficult to define; or, fourthly, when some technical

<sup>1</sup> Reg. v. Bird, 2 Den. C. C. 94; 2 Eng. L. & Eq. 489; McQuoid v. People, 3 Gilman, 76; Commonwealth v. Goodenough, Thacher Crim. Cas. 182; Hite v. The State, 9 Yerg. 357; The State v. Ainsworth, 11 Vt. 91; Hawkins v. The State, 1 Port. 475; Commonwealth v. Somerville, 1 Va. Cas. 164; Commonwealth v. Mott, 21 Pick. 492; Rex v. Phillips, 1 Jur. 427; The State v. Herrick, 3 Nev. 259; Methard v. The State, 19 Ohio

State, 363; The State v. Conlin, 27 Vt. 318; post, § 1070.

<sup>2</sup> People v. Goldstein, 32 Cal. 432; Shepherd v. People, 25 N. Y. 406.

<sup>3</sup> Hite v. The State, 9 Yerg. 357; Thomas v. The State, 40 Texas, 36.

<sup>4</sup> Rake v. Pope, 7 Ala. 161; The State v. De Witt, 2 Hill, S. C. 282; Commonwealth v. Sutherland, 109 Mass. 342; Hughes v. Jones, 2 Md. Ch. 178; Holt v. The State, 38 Ga. 187; Crim. Proced. I § 816.



variance precludes a conviction on the first indictment, but permits it on the second. Yet, fifthly, the offences are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other. And, sixthly, if the two indictments set out offences which are alike, and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offences, though of differing names, are, within the constitutional protection from a second jeopardy, the same. Let us now see what doctrines are derivable from the decisions.

§ 1052. **Variance.** — An indictment does not always set out the offence which the person drawing it intended; as, for example, in cases of variance.<sup>1</sup> If, then, it alleges the forging of a receipt for the use of Hugh *Brison*, and the instrument in evidence is for the use of Hugh *Prison*;<sup>2</sup> or the burning of *Josiah* Thompson's barn, while the true owner was *Josias* Thompson;<sup>3</sup> or of the barn of A & B, while it belonged to A & C;<sup>4</sup> or an attempt to kill *Louisa* Loveland, when the attempt was upon *William P.* Loveland;<sup>5</sup> or larceny of the property of a person named, the proof showing the owner to be unknown,<sup>6</sup> — in these and other like cases,<sup>7</sup> the defendant, being acquitted by reason of the variance, is liable to be prosecuted on a new indictment in which the fact is truly alleged.

**The Test** — is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.<sup>8</sup> And —

<sup>1</sup> *Crim. Proced.* I. § 485-488, 569 et seq.

<sup>2</sup> *Pennsylvania v. Huffman*, Addison, 140.

<sup>3</sup> *Commonwealth v. Mortimer*, 2 Va. Cas. 325.

<sup>4</sup> *Commonwealth v. Wade*, 17 Pick. 395, 400.

<sup>5</sup> *People v. Warren*, 1 Parker C. C. 338; *Vaughan v. Commonwealth*, 2 Va. Cas. 273.

<sup>6</sup> *The State v. Revels*, Busbee, 200.

<sup>7</sup> *The State v. Risher*, 1 Rich. 219; *The State v. Kreps*, 8 Ala. 951; *Rex v. Coogan*, 1 Leach, 4th ed. 448; *The State v. McCoy*, 14 N. H. 364; *The State v.*

*Standifer*, 5 Port. 523; *Rex v. Emden*, 9 East, 437; *Rex v. Clark*, 1 Brod. & B. 473; *Martha v. The State*, 26 Ala. 72; *The State v. Dunham*, 9 Ala. 76; *People v. McNealy*, 17 Cal. 332; *The State v. Stebbins*, 29 Conn. 463; *Conway v. The State*, 4 Ind. 94; *Canter v. People*, 38 How. Pr. 91; *Commonwealth v. Chesley*, 107 Mass. 223; *Oneil v. The State*, 48 Ga. 66.

<sup>8</sup> *Hite v. The State*, 9 Yerg. 357; *People v. Warren*, 1 Parker C. C. 338; *People v. Allen*, 1 Parker C. C. 445; *Durham v. People*, 4 Scam. 172; *Commonwealth v. Curtis*, Thacher *Crim. Cas.* 202.

§ 1053. **Applicable in other Cases.**— This test is applicable, not alone in these cases of technical variance, but in many others.<sup>1</sup> Thus, —

**Wrong County.**— If the acquittal is by reason of the indictment being brought in the wrong county, it will not bar fresh proceedings in the right one.<sup>2</sup> So, —

**Another Person Injured.**— An acquittal on an indictment for the larceny of goods alleged to be the property of one person will not bar an indictment for the larceny of the same goods charged as belonging to another.<sup>3</sup> Again, —

**Larceny and False Pretences.**— If one is acquitted of petit larceny, then a fresh indictment charges him with obtaining the same goods by false pretences, he may be convicted on the latter, under the former evidence, if incompetent in law to produce a conviction on the former indictment.<sup>4</sup> Also, —

**Larceny and Conspiracy — Or Receiving.**— One acquitted of larceny may be convicted of obtaining the same goods through a conspiracy with third persons,<sup>5</sup> or of receiving them as stolen goods.<sup>6</sup> And —

**Homicide by Differing Means.**— An acquittal on an indictment for a murder committed by shooting with powder and shot from a gun is no bar to an indictment for a murder committed by beating upon the head with a gun.<sup>7</sup> Moreover, —

**"Overcoats" and "Cloth."**— An acquittal of embezzling cloth of which overcoats are made, is no defence to an indictment for embezzling overcoats, though the evidence at both trials is the same; because overcoats and cloth to make them are different

<sup>1</sup> *United States v. Nickerson*, 17 How. U. S. 204, 208; *Price v. The State*, 19 Ohio, 423; *Burns v. People*, 1 Parker C. C. 182; *Rex v. Vandercomb*, 2 Leach, 4th ed. 708; s. c. nom. *Rex v. Vandercom*, 2 East, P. C. 519; *Rex v. Taylor*, 5 D. & R. 422, 3 B. & C. 502; *The State v. Jesse*, 3 Dev. & Bat. 98; *Reg. v. Henderson*, 2 Moody, 192; *Rex v. Parry*, 7 Car. & P. 836; *The State v. McClintock*, 1 Greene, Iowa, 392; *Commonwealth v. McChord*, 2 Dana, 242; *Rex v. Dann*, 1 Moody, 424; *Boutelle v. Nourse*, 4 Mass. 431; *Frost v. Rowse*, 2 Greenl. 180; *Hughes v. The State*, 12 Ala. 458; *Rex v. Plant*, 7 Car. & P. 575; *Heikes v. Commonwealth*, 2 Casey, 513; *The State v. Birmingham*,

*Busbee*, 120; *Freeland v. People*, 16 Ill. 380; *The State v. Keogh*, 13 La. An. 243; *Commonwealth v. Bakeman*, 105 Mass. 53; *Morey v. Commonwealth*, 108 Mass. 433; *Commonwealth v. Farrell*, 105 Mass. 189.

<sup>2</sup> *Commonwealth v. Call*, 21 Pick. 509; *Methard v. The State*, 19 Ohio State, 363.

<sup>3</sup> *Morgan v. The State*, 34 Texas, 677.

<sup>4</sup> *Dominick v. The State*, 40 Ala. 680.

<sup>5</sup> *The State v. Sias*, 17 N. H. 558.

<sup>6</sup> *Foster v. The State*, 39 Ala. 229, 233. And see *Commonwealth v. Tenney*, 97 Mass. 50.

<sup>7</sup> *Guedel v. People*, 43 Ill. 226.

things, and proof of the one will not sustain an allegation of the other.<sup>1</sup>

**Limit of the Test.** — Probably the test under consideration is always applicable when its effect is to bar proceedings,<sup>2</sup> while still the proceedings may be barred by other principles when this one fails.<sup>3</sup>

§ 1054. **Crime within Crime.** — Where crimes are included within one another, so that a higher comprehends whatever a lower one does and more, as explained in a previous chapter,<sup>4</sup> a conviction for any higher one bars a prosecution for any lower; since, if the defendant is guilty of all, he is necessarily so of each particular part. It is believed that there is no exception to this rule. In general, the same consequence follows an acquittal; because generally there can be a conviction for the lower on an indictment for the higher.<sup>5</sup> But the effect of an acquittal is not, like that of a conviction, universally so. Thus, —

**In Liquor-selling.** — If one is indicted for being a “common seller of liquor,” contrary to a statute, — an offence which consists of specific sales, with other facts,<sup>6</sup> — and is convicted, he cannot afterward be pursued for making a single sale, at the same time, contrary to the provisions of another statute. “For,” said Bennett, J., “if the government see fit to go for the offence of being ‘a common seller,’ and the respondent is adjudged guilty, it must, in a certain sense, be considered as a merger of all the distinct acts of sale, up to the filing of the complaint, and the respondent can be punished but for one offence.”<sup>7</sup> But where the jury, instead of convicting the defendant, acquit him, he may then be indicted for a single act of selling during the

<sup>1</sup> *Commonwealth v. Clair*, 7 Allen, 525.

<sup>2</sup> But see, and query, *Reg. v. Gisson*, 2 Car. & K. 781; *Reg. v. Henderson*, Car. & M. 328. See *Reg. v. Bird*, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94, 5 Cox C. C. 20.

<sup>3</sup> See post, § 1057 et seq.

<sup>4</sup> Ante, § 780.

<sup>5</sup> Ante, § 794; *The State v. Standifer*, 5 Port. 523; *Rex v. Heaps*, 2 Salk. 593; *Reg. v. Gould*, 9 Car. & P. 364; *Reg. v. Bird*, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94, 5 Cox C. C. 20; *Dinke v. Commonwealth*, 5 Harris, Pa. 126; *Murphy v. Commonwealth*, 23 Grat. 960; *Thomas*

*v. The State*, 40 Texas, 36; *Hamilton v. The State*, 36 Ind. 280; *Reg. v. Smith*, 34 U. C. Q. B. 552; *Canada v. Commonwealth*, 22 Grat. 899; *The State v. Smith*, 43 Vt. 324, 326; *Reg. v. Webster*, 9 L. Canada, 196; *The State v. Pitts*, 57 Misso. 85; *Fritz v. The State*, 40 Ind. 18; *Wemyss v. Hopkins*, Law Rep. 10 Q. B. 378; *Munford v. The State*, 39 Missis. 558; *The State v. Brannon*, 55 Misso. 63; *Reg. v. Elrington*, 9 Cox C. C. 86, 90.

<sup>6</sup> *Stat. Crimes*, § 1018, 1035.

<sup>7</sup> *The State v. Nutt*, 28 Vt. 598, 602, 603. Contra, post, § 1065.

same period ; because, in the words of Dewey, J., "such acquittal is entirely consistent with the fact having been shown of one or two single sales by the defendant, but a failure to show a third sale, or evidence sufficient to convict of the offence of being a common seller."<sup>1</sup> Again, —

§ 1055. **Felony and Misdemeanor. — Form of Allegation.** — If, owing to the form of the allegation,<sup>2</sup> or to the lower offence being a misdemeanor while the higher is a felony,<sup>3</sup> there can be no conviction of the former on the indictment for the latter, an acquittal of the latter will not bar a prosecution for the former.<sup>4</sup> A conviction would bar it, because a necessary part of what the conviction covers. But an acquittal may have been produced by the fact, that the defendant simply committed the lower offence with no aggravations, and for this he was not in jeopardy when on trial for the higher. And, where the rules of the English common law prevail, no acquittal for felony can bar a prosecution for misdemeanor.<sup>5</sup> But, —

**Robbery and Larceny.** — As robbery and larceny are both felonies, and the latter is included in the former, an acquittal for robbery will bar an indictment for the larceny of the same property.<sup>6</sup>

§ 1056. **Conviction on part of Indictment.** — If the indictment covers one of the larger crimes, and there is a conviction of one of the smaller, included in it, the result is a bar to any new prosecution for the larger.<sup>7</sup> For example, —

**Murder and Manslaughter.** — One indicted for murder, and found guilty of manslaughter, is protected from any further prosecution for the murder.<sup>8</sup>

§ 1057. **Indictment covering Part only.** — Where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes, included, as before mentioned, within a larger, — will it bar fresh proceedings for the larger ? If it will not, then

<sup>1</sup> Commonwealth v. Hudson, 14 Gray, 11, 12.

<sup>2</sup> Ante, § 794-796, 803. See Severin v. People, 37 Ill. 414; Wilson v. The State, 24 Conn. 57; Dedieu v. People, 22 N. Y. 178.

<sup>3</sup> Ante, § 804 et seq.

<sup>4</sup> Munford v. The State, 39 Missis. 553.

<sup>5</sup> Ante, § 804; People v. Saunders, 4 Parker, C. C. 196.

<sup>6</sup> People v. McGowan, 17 Wend. 386. And see The State v. Pitts, 57 Misso. 85.

<sup>7</sup> Ante, § 1006; People v. Apgar, 35 Cal. 389; The State v. Pitts, 57 Misso. 85.

<sup>8</sup> Brennan v. People, 15 Ill. 511, 517; Hurt v. The State, 25 Missis. 378.

the prosecutor may begin with the smallest, and obtain successive convictions, ending with the largest; while, if he had begun with the largest, he must there stop, — a conclusion repugnant to good sense. Besides, as a larger includes a smaller, it is impossible one should be convicted of the larger without being also convicted of the smaller; and thus, if he has been found guilty or not guilty of the smaller, he is, when on trial for the larger, in jeopardy a second time for the same, namely, the smaller offence. Some apparent authority, therefore, English<sup>1</sup> and American,<sup>2</sup> that a jeopardy for the less will not bar an indictment for the greater, must be deemed unsound in principle. And, even in authority, the doctrine which holds it to be a bar is sufficiently established in general;<sup>3</sup> though possibly it admits some real or apparent exceptions, as by and by we shall see. Thus, —

§ 1058. In aggravated Arson and Murder. — If a man burns a dwelling-house, in which a human being is consumed, he cannot, after a conviction for the arson, be held to answer for the murder.<sup>4</sup> So, —

**Murder and Manslaughter.** — If, on an indictment for manslaughter, the judge discharges the jury because the proof shows the offence to have been murder, the defendant cannot be afterward brought into jeopardy for the murder.<sup>5</sup> And —

**Assaults with their Aggravations.** — A person convicted of an assault only is protected thereby from prosecution for the battery; because, said Totten, J., “the one is a necessary part of the other; and, if he be now punished for the battery, he will thereby be twice punished for the assault.”<sup>6</sup> And, according to the general and better doctrine, a conviction or acquittal of a common assault will bar proceedings for an assault with intent to do great bodily harm, and other assaults aggravated in like manner.<sup>7</sup>

<sup>1</sup> 2 Hawk. P. C. Curw. ed. p. 518, § 5; *Reg. v. Button*, 11 Q. B. 929, 947, 948, 12 Jur. 1017; 1 Stark. Crim. Plead. 2d ed. 827.

<sup>2</sup> *Scott v. United States*, Morris, 142; *Freeland v. People*, 16 Ill. 880; post, § 1058, note.

<sup>3</sup> *Reg. v. Walker*, 2 Moody & R. 446; *The State v. Shepard*, 7 Conn. 54; *Commonwealth v. Squire*, 1 Met. 258; *Commonwealth v. Kinney*, 2 Va. Cas. 189; *Lohman v. People*, 1 Comst. 379, 2 Barb. 216; *The State v. Townsend*, 2 Harring.

Del. 543; *Thayer v. Boyle*, 30 Maine, 475; *Hickey v. The State*, 23 Ind. 21.

<sup>4</sup> *The State v. Cooper*, 1 Green, N. J. 361.

<sup>5</sup> *People v. Hunckeller*, 48 Cal. 331.

<sup>6</sup> *The State v. Chaffin*, 2 Swan, Tenn. 493.

<sup>7</sup> *Reg. v. Elrington*, 9 Cox C. C. 86, 1 B. & S. 688. *The State v. Smith*, 43 Vt. 324, 326. “There is,” said Pierpoint, C. J., in the case last cited, “considerable conflict in the authorities upon this subject, but we think the rule is

**No Jurisdiction of Higher Offence.** — It has been supposed, that, if the tribunal trying the less offence has no jurisdiction over the higher, the case will be different;<sup>1</sup> yet there does not seem to be any just foundation for this distinction.<sup>2</sup> But, —

§ 1059. **Assault and subsequent Death — (Homicide).** — If, after a battery and a conviction for it, the assailed person dies of his wounds, an indictment may be maintained for the homicide; not, it appears, because the battery is the less offence, but because the blow which had not produced death is, when viewed in the light of its results, a thing different from the blow which had produced death.<sup>3</sup>

now well established, that, when one offence is a necessary element in and constitutes an essential part of another offence, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." In exact opposition to the doctrine of my text and *Reg. v. Elrington*, supra, is an Iowa case in which a conviction for assault and battery is held to be no bar to an indictment for the same with intent to commit great bodily injury. Said Beck, C. J.: "Admitting that the offences of assault and battery, and assault with intent to commit a great bodily injury are degrees of the same offence, it must be conceded that the first named is of a lower degree, and does not include the offence of the higher degree. To this proposition there can be no objection. While an assault, with an intent to commit great bodily injury, may include an assault and battery, it is clear that the assault and battery cannot include the higher assault; the less cannot include the greater. A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offence, or for an offence of a higher degree, and necessarily including the offence for which the accused stands indicted. It follows that a conviction or acquittal for a minor offence is no bar to a prosecution for a greater offence; except in the case of acquittal for manslaughter which would bar an indictment for murder, for the reason if the defendant was innocent of the killing, without malice, he could not be guilty of the killing with malice. *Scott v. United States, Morris*,

142; *Hurt v. The State*, 25 Missis. 378; *Burns v. People*, 1 Parker C. C. 182. This is substantially the rule of section 4720 of the Revision, which is in the following language: 'When the defendant has been convicted or acquitted, upon an indictment for an offence consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offence charged in the former or for any lower degree of that offence, or for an offence necessarily included therein.' " *The State v. Foster*, 33 Iowa, 525. And see *Prine v. The State*, 41 Texas, 300.

<sup>1</sup> *Commonwealth v. Curtis*, 11 Pick. 184.

<sup>2</sup> *Reg. v. Walker*, 2 Moody & R. 446.

<sup>3</sup> *Commonwealth v. Roby*, 12 Pick. 496; *Commonwealth v. Evans*, 101 Mass. 25; *Burns v. People*, 1 Parker C. C. 182; *Reg. v. Salvi*, 10 Cox C. C. 481, note. See *Wright v. The State*, 5 Ind. 527. In an English case, it appeared that the prisoner, after committing assault and battery, had, on complaint of the injured person, been convicted thereof, and sentenced to imprisonment, which sentence he had served out. Then the one beaten died, and the prisoner was indicted for manslaughter from the same beating. The statute of 24 & 25 Vict. c. 100, § 45, provides, that, when, on complaint of the aggrieved party, one shall have suffered an awarded imprisonment, "he shall be released from all further or other proceedings, civil or criminal, for the same cause." Thereupon the majority of the judges, Kelly, C. B., dissenting, held that what had taken place was not a bar to

§ 1060. **One Transaction, one Act, one Crime, distinguished.** — There may be gleaned from the books passages which seem to indicate, that one act may constitute any number of crimes, for each of which the doer may be prosecuted, and a conviction of one will not bar a prosecution for another.<sup>1</sup> And perhaps, in our complicated system of government, one act may be an offence against both the United States and a particular State, and both may punish it.<sup>2</sup> But, in principle, and according to the better authority, while one act may constitute as many distinct offences as the legislature may choose to direct, for any one of which there may be a conviction without regard to the others,<sup>3</sup> “it is,” in the language of Cockburn, C. J., “a fundamental rule of law that out of the same facts a series of charges shall not be preferred.”<sup>4</sup> To give our constitutional provision the force evidently meant, and to render it effectual, “the same offence” must be interpreted as equivalent to the same criminal act. And judicial utterances have even gone apparently to the extent, that there can be only one punishment for one criminal transaction.<sup>5</sup> But this is carrying the rule too far the other way.<sup>6</sup> To illustrate the views of this paragraph, —

§ 1061. **One Blow wounding Two — Killing Two.** — If one blow wounds two men, a conviction for the assault and battery, charged to have been committed on one of them, is a bar to an indictment for it as committed on the other.<sup>7</sup> Or, if it kills two men, a person convicted of the homicide of one of them cannot be tried for

the indictment for manslaughter. *Reg. v. Morris*, Law Rep. 1 C. C. 90, 10 Cox C. C. 480. In a Scotch case, decided in accordance with the doctrine of the text, Lord Ardmillan said: “There never can be the crime of murder till the party assaulted dies; the crime has no existence in fact or law till the death of the party assaulted. Therefore it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person’s death is not merely a supervening aggravation, but it creates a new crime.” *Stewart’s Case*, 5 Irvine, 310, 314.

<sup>1</sup> *The State v. Inness*, 53 Maine, 536; *The State v. Taylor*, 2 Bailey, 49; Com-

monwealth *v. Trickey*, 13 Allen, 559; *The State v. Rankin*, 4 Coldw. 145; *Commonwealth v. Shea*, 14 Gray, 386. See ante, § 779, 782, 798; post, § 1067.

<sup>2</sup> *The State v. Rankin*, supra. See more exactly as to this, ante, § 989.

<sup>3</sup> See, for illustration, *Fant v. People*, 45 Ill. 259; *The State v. Crummey*, 17 Minn. 72; *Crocker v. The State*, 47 Ga. 568; post, § 1068.

<sup>4</sup> *Reg. v. Elrington*, 9 Cox C. C. 86, 90, 1 B. & S. 688.

<sup>5</sup> *Holt v. The State*, 38 Ga. 187; post, § 1064.

<sup>6</sup> *Commonwealth v. Bakeman*, 105 Mass. 58.

<sup>7</sup> *The State v. Damon*, 2 Tyler, 387. And see *Crocker v. The State*, 47 Ga. 568.

the homicide of the other. "If the same act of the defendant resulted in the death of both of them, there was but one crime."<sup>1</sup> Again, —

**Non-repair of Streets.** In North Carolina, there being a duty to keep the streets of an incorporated town in repair, several indictments were found on the same day for breaches of this duty in respect of as many streets, and it was held, that a conviction on one would bar proceedings on the others.<sup>2</sup> But it is not quite clear that all courts will decide thus, or even follow the doctrine of the last paragraph.<sup>3</sup> Thus, —

**In Larceny.** — An English judge even ruled, that, where a man stole at one time two pigs belonging to the same person, he might first be convicted of the larceny of the one pig, and afterward of the larceny of the other;<sup>4</sup> and, if the pigs had different owners, there would be American authority the same way.<sup>5</sup> In Kentucky it was held, that an acquittal for the larceny of one article is a bar to an indictment for the larceny of another, belonging to the same person, taken at the same time, and with the same intent.<sup>6</sup> And there is plainly a limit to the right of multiplying indictments,<sup>7</sup> though we may not find, on authority, exactly what it is. For example, while a complete larceny is committed in every county through which the thief carries his stolen goods, clearly he can be convicted in no more than one county.<sup>8</sup>

<sup>1</sup> *Clem v. The State*, 42 Ind. 420, opinion by Downey, J. And see *Ben v. The State*, 22 Ala. 9.

<sup>2</sup> *The State v. Fayetteville*, 2 Murph. 371.

<sup>3</sup> *The State v. Fife*, 1 Bailey, 1; *Rex v. Champneys*, 2 Moody & R. 26, 2 Lewin, 52; *Smith v. Commonwealth*, 7 Grat. 593; *The State v. Standifer*, 5 Port. 523.

<sup>4</sup> *Reg. v. Brettell*, Car. & M. 609.

<sup>5</sup> *The State v. Thurston*, 2 McMullan, 382. And see, on this question, *The State v. Williams*, 10 Humph. 101; *Lorton v. The State*, 7 Misso. 55; *Reg. v. Bleasdale*, 2 Car. & K. 765; *The State v. Nelson*, 29 Maine, 329; *Rex v. Birdseye*, 4 Car. & P. 386. Some of these cases would admit of one indictment only, where the goods were owned by different persons. In Indiana, a prosecution for larceny of a part only of articles is held to bar an indictment for larceny of the

remainder. Said Perkins, J.: "The State cannot split up one crime and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." *Jackson v. The State*, 14 Ind. 327, 328. See Vol. II. § 888.

<sup>6</sup> *Fisher v. Commonwealth*, 1 Bush, 211.

<sup>7</sup> *Plumbly v. Commonwealth*, 2 Met. 413; *The State v. Johnson*, 12 Ala. 840; *Hinkle v. Commonwealth*, 4 Dana, 518. See post, § 1064.

<sup>8</sup> *Tippins v. The State*, 14 Ga. 422; 2 Hawk. P. C. Curw. ed. p. 517, § 4. And see *Strickland v. Thorpe*, Yelv. 126. See further, as illustrating the matter of this section, *The State v. Parish*, 8 Rich. 322; *Freeland v. People*, 16 Ill. 380; *Fiddler v. The State*, 7 Humph. 508; *Rex v. Carlisle*, 3 B. & Ald. 161; s. o. nom. *Rex v. Carlisle*, 1 Chit. 451; *Copenhagen v. The*



§ 1062. **Burglary and Larceny.** — If a man in the night breaks and enters a dwelling-house, intending to steal therein, and there does steal, he may be punished for two offences or one, at the election of the prosecuting power. If in a single count the indictment charges him with breaking, entering, and stealing, his offence is single, being burglary committed in a particular manner; <sup>1</sup> but, if a first count sets out the burglary as perpetrated by breaking and entering with intent to steal, then a second count may allege the larceny as a separate thing, and he may be convicted and sentenced for both. <sup>2</sup> Therefore an acquittal on an indictment charging the burglary as committed by breaking and entering with intent to steal is no bar to a prosecution for the actual theft. <sup>3</sup> And a conviction of the latter will not bar an indictment for the former. <sup>4</sup> Such are the decisions; yet, on

State, 15 Ga. 264; *Rex v. Britton*, 1 Moody & R. 297; *Bank Prosecutions*, Russ. & Ry. 378; *The State v. Cameron*, 3 Heisk. 78. **Act constituting One Offence and Part of another.** — Some courts maintain that, in the words of Gray, J.: "A single act may be an offence against two statutes; and, if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Morey v. Commonwealth*, 108 Mass. 433, 434. And see *Commonwealth v. Bakeman*, 105 Mass. 53; *Commonwealth v. Shea*, 14 Gray, 386; *Commonwealth v. McConnell*, 11 Gray, 204. But this question has been, in effect, already considered in the text. Ante, § 1054 et seq. By all the authorities, this would not be so if the conviction was for the larger crime. Ante, § 1054. And on the better reason and better authorities it would not be so if the conviction was for the smaller. Ante, § 1057. But the State could choose under which statute the one prosecution should be.

<sup>1</sup> *The State v. Squires*, 11 N. H. 37; *The State v. Moore*, 12 N. H. 42; *The State v. Brady*, 14 Vt. 353; *Rex v. Comer*, 1 Leach, 4th ed. 36; *Rex v. Vandercomb*, 2 Leach, 4th ed. 708; s. c. nom. *Rex v. Vandercom*, 2 East P. C. 519; *Commonwealth v. Brown*, 3 Rawle, 207; *Jones v.*

*The State*, 11 N. H. 269; *Stoops v. Commonwealth*, 7 S. & R. 491; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Hope*, 22 Pick. 1. Of course, a conviction for burglary, on such a form of the indictment, will bar a prosecution for the larceny. *People v. Smith*, 57 Barb. 46.

<sup>2</sup> *Josslyn v. Commonwealth*, 6 Met. 236. But see post, § 1064.

<sup>3</sup> *The State v. Warner*, 14 Ind. 572.

<sup>4</sup> *Wilson v. The State*, 24 Conn. 57. In this case, not of common-law burglary, but of statutory shopbreaking, Storrs, J., observed: "It will be seen, that there is a difference in the two offences, charged in the two informations against the prisoner, founded in the very nature and essence of the offences themselves. Theft is a common-law crime, and its definition is well understood. Breaking a shop with intent to steal is a statute offence only, and the act thus made criminal is the act of breaking, — its criminality depending, as in all cases, upon the intent with which it is done, and which, in the present instance, must be a specific intent to steal. The offence is complete, whether the theft is consummated or not." p. 65. Waite, C. J., who dissented from the judgment pronounced by the majority, said: "I take it to be a sound rule of law, founded upon the plainest principles of natural justice, that, where a criminal act has been committed, every part of

principle, we may question whether they do not press more heavily against defendants than the humane policy of our criminal jurisprudence justifies.<sup>1</sup>

§ 1063. **Robbery, Larceny, and Burglary.** — Other complications have been passed upon in North Carolina and Georgia. In each of these States, a man in the night entered a dwelling-house intending to steal in it, and therein committed the larceny by violence from the person of one found therein. The reader will observe, that the breaking and entering with the intent may alone constitute burglary, that the stealing with violence from the person is robbery, and that the taking away of the property is larceny. In North Carolina, the first indictment was for the burglary, accomplished by the actual commission of the larceny; and the conviction on it was for the larceny only. The second indictment was for the robbery, and it was held to be barred by the first.<sup>2</sup> Here the first indictment covered a part — namely, the larceny — of the second; so the case falls within a principle stated a few sections back.<sup>3</sup>

§ 1064. **Continued.** — In the Georgia case, depending on like facts, the first indictment seems — the report being indistinct — to have been for the burglary, as including only the intent to steal; the second, for the robbery, which includes the actual stealing. On the trial of the first, evidence of the robbery was introduced to establish the burglary, a conviction was obtained, and it was held to bar proceedings under the second. And the court laid down the broad doctrine, that a jeopardy on one indictment will bar a second “whenever the proof shows the second

which may be alleged in a single count in an indictment, and proved under it, the act cannot be split into several distinct crimes, and a separate indictment sustained upon each. And whenever there has been a conviction for one part, it will operate as a bar to any subsequent proceedings as to the residue.” p. 70. Again: “Whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained.” p. 71. Once more: “It has been said, that the prosecuting attorney may elect to join both offences in the same information, or file

separate ones. But, in my opinion, the law gives him no power to make two crimes or one out of the same transaction, at his pleasure. The law, and not the attorney, must determine that matter. He may indeed elect to prosecute for the whole, or any part, but he can sustain but one information.” p. 72. It would be a very bold thing to say, that, leaving out of the account what has been adjudged by the courts, the weight of reason is not clearly with this dissenting opinion by the Chief Justice.

<sup>1</sup> Compare this with post, § 1064.

<sup>2</sup> The State v. Lewis, 2 Hawks, 98.

<sup>3</sup> Ante, § 1057.

case to be the same transaction with the first.”<sup>1</sup> This doctrine, with the decision based upon it, is inconsistent with the proposition — sustained, as the reader has seen, by various other courts<sup>2</sup> — that indictments for burglary and larceny can both be prosecuted to conviction, when a prisoner breaks into a dwelling-house and therein steals.

§ 1065. **Same Evidence to Two Offences.** — The foregoing doctrines should not be confounded with questions of evidence. Cases are numerous in which proof of one crime is received to establish another; but the introduction of such proof does not bar an indictment for the offence not under trial. Thus, —

**Liquor Laws.** — It is so under the more or less complicated statutes regulating the sale of intoxicating liquors. Not to enter much into these questions, some of which have been solved by the application of principles that would prove, if universally adopted, greatly detrimental, we have, in brief, the following. In Maine it is held,<sup>3</sup> contrary to what was laid down some sections back,<sup>4</sup> that specific sales may be prosecuted under a statute forbidding them, after the party has been convicted, under another statute, for having been at the time of making them a common seller;<sup>5</sup> though the practice is familiar, that such sales were competent evidence to the charge in the first indictment.<sup>6</sup> And it was adjudged in another case, that “to punish a person for keeping a drinking-house and tippling-shop, and also for being a common seller of intoxicating liquors, although the same individual act contribute to make up each offence, is not a violation” of the law which forbids a prisoner to be put in jeopardy twice for the same offence.<sup>7</sup> So in Massachusetts the statutory nuisance of keeping a tenement for the sale of intoxicating liquor is held to be a distinct offence from the statutory one of being a common seller of intoxicating liquor; therefore a conviction of the former is no bar to an indictment for the latter.<sup>8</sup> Neither is an acquittal

<sup>1</sup> *Roberts v. The State*, 14 Ga. 8. See also *Copenhagen v. The State*, 15 Ga. 264.

<sup>2</sup> *Ante*, § 1062. And see *ante*, § 1060.

<sup>3</sup> See *ante*, § 782.

<sup>4</sup> *Ante*, § 1054.

<sup>5</sup> *The State v. Maher*, 35 Maine, 225; *The State v. Coombs*, 32 Maine, 529. And see *Commonwealth v. Keefe*, 7 Gray, 332; *Commonwealth v. Hudson*, 14 Gray, 11.

<sup>6</sup> *Commonwealth v. Tubbs*, 1 Cush. 2.

<sup>7</sup> *The State v. Inness*, 53 Maine, 536, 537, opinion by Walton, J. But see *The State v. Layton*, 25 Iowa, 193.

<sup>8</sup> *Commonwealth v. Hardiman*, 9 Allen, 487; *Commonwealth v. Bubser*, 14 Gray, 83; *Commonwealth v. Cutler*, 9 Allen, 486. And see *Commonwealth v. Lahy*, 8 Gray, 459.

a bar to a prosecution for keeping the liquor with intent to sell it.<sup>1</sup> And various other like points have been adjudged under statutes regulating or prohibiting the sale of intoxicating drinks.<sup>2</sup> So, —

§ 1066. **Forgery and Uttering.** — An acquittal for forging a certificate of deposit on one bank is no bar to a prosecution for obtaining money from another bank, by a forged letter enclosing the same certificate.<sup>3</sup> And, in general, an acquittal of forging is no bar to an indictment for uttering the same instrument.<sup>4</sup> Likewise, —

**Larceny and Conspiracy.** — As we have seen,<sup>5</sup> an acquittal for larceny will not bar an indictment for a conspiracy to obtain unlawfully the same goods which were alleged to have been stolen.<sup>6</sup> And —

**Other like Cases.** — There are numerous cases resting on this principle.<sup>7</sup>

§ 1067. **Penal Actions and Indictments.** — It seems to be the doctrine, on a question not well illumined by the decisions (alluded to elsewhere<sup>8</sup>), that, as a civil suit for damages and a criminal prosecution may be carried on together or successively for the same act of wrong;<sup>9</sup> so also may the latter, and an action for a penalty, which also is in general a civil proceeding.<sup>10</sup> Thus the New York court held, that, if a statute creates an offence, and imposes a penalty recoverable in an action civil in form, and also declares the offence to be a misdemeanor punishable by fine and imprisonment, there may be both an indictment and a penal action for one violation, neither of which will bar the other.<sup>11</sup> So, —

<sup>1</sup> *Commonwealth v. McCauley*, 105 Mass. 69; *Commonwealth v. Sheehan*, 105 Mass. 192; *Commonwealth v. Hogan*, 97 Mass. 122.

<sup>2</sup> See *The State v. Andrews*, 27 Misso. 267; *Sanders v. The State*, 2 Iowa, 280; *The State v. Glasgow*, Dudley, S. C. 40; *The State v. Rollins*, 12 Rich. 297; *The State v. Conlin*, 27 Vt. 318; *Commonwealth v. Welch*, 97 Mass. 593; *Commonwealth v. Farrell*, 105 Mass. 189; *Commonwealth v. Connors*, 116 Mass. 85.

<sup>3</sup> *People v. Ward*, 15 Wend. 231. And see *Commonwealth v. Quann*, 2 Va. Cas. 89; *People v. Allen*, 1 Parker, C. C. 445; *United States v. Miner*, 11 Blatch. 511.

<sup>4</sup> *Harrison v. The State*, 36 Ala. 248.

<sup>5</sup> Ante, § 1053.

<sup>6</sup> *The State v. Sias*, 17 N. H. 558, Parker, C. J., observing: "The defendant could not have been convicted of a conspiracy on the former indictment. He cannot be convicted of larceny on this." p. 559.

<sup>7</sup> *Commonwealth v. Chilson*, 2 Cush. 15; *The State v. Jesse*, 3 Dev. & Bat. 98; *The State v. Davis*, 19 Ala. 13. See *People v. Burden*, 9 Barb. 467.

<sup>8</sup> Stat. Crimes, § 171 and note.

<sup>9</sup> Ante, § 264 et seq.

<sup>10</sup> Ante, § 32 and note.

<sup>11</sup> *People v. Stevens*, 13 Wend. 341; *Blatchley v. Moser*, 15 Wend. 215.

**Proceedings for Contempt and Indictment.**—It appears that a prosecution for contempt of court will not bar an indictment for the same act.<sup>1</sup> And—

**Other Cases.**—There are other cases depending on a like principle; but what, exactly, are the limits of the doctrine they do not enable an author to say.<sup>2</sup>

§ 1068. **Statute and By-law.**—Whether there can be a prosecution for the same act as violating both a statute and a city ordinance, or whether the one bars the other, is a question on which opinions differ, discussed in “Statutory Crimes.”<sup>3</sup>

§ 1069. **Civil Suit and Indictment.**—Civil proceedings are no bar to criminal.<sup>4</sup> Therefore,—

**Damages for Loss of Life.**—It was held in Kentucky, that a statute authorizing the recovery of damages by the representatives of one deprived of life through the defendant’s neglect, does not conflict with the constitutional provision we are considering; even though, for the same neglect, an indictment is also provided.<sup>5</sup>

## VI. *The Doctrine of Autrefois Attaint.*

§ 1070. **General View.**—By the English law, when this country was settled, a person *attainted* of one felony could not be prosecuted for another,<sup>6</sup>—a doctrine to which there were some exceptions. But this doctrine, though recognized in one or two American cases,<sup>7</sup> is not usually followed in this country.<sup>8</sup> In England it was long ago abolished by act of Parliament.<sup>9</sup> It probably originated in the idea, that, after a man was condemned to death it would be useless to proceed against him for a second capital offence, since he could die only once.

<sup>1</sup> *Rex v. Lord Ossulston*, 2 Stra. 1107.

<sup>2</sup> See *The State v. Plunkett*, 3 Harrison, 5; *The State v. Sonnerkalb*, 2 Nott & McC. 280; *Hodges v. The State*, 8 Ala. 55; *The State v. Keen*, 34 Maine, 500; *Simpson v. The State*, 10 Yerg. 525; *The State v. Tappan*, 15 N. H. 91; *The State v. Thompson*, 2 Strob. 12; ante, § 1029, note.

<sup>3</sup> *Stat. Crimes*, § 23; *The State v. Thornton*, 37 Misso. 360, 361; *The State v. Cowan*, 29 Misso. 330; *Levy v. The State*, 6 Ind. 281; *Waldo v. Wallace*, 12

Ind. 569; *Gardner v. People*, 20 Ill. 430; *Fant v. People*, 45 Ill. 259.

<sup>4</sup> Ante, § 1067.

<sup>5</sup> *Chiles v. Drake*, 2 Met. Ky. 146.

<sup>6</sup> 4 Bl. Com. 336; 3 Inst. 213; 2 Hale P. C. 252–254; *Armstrong v. L’Isle*, 12 Mod. 109. See *Rex v. Birkett*, Russ. & Ry. 268.

<sup>7</sup> *Crenshaw v. The State*, Mart. & Yerg. 122.

<sup>8</sup> See ante, § 1049.

<sup>9</sup> Stat. 7 & 8 Geo. 4, c. 28, § 4.

## BOOK IX.

## NUISANCE.

## CHAPTER LXIV.

THE GENERAL DOCTRINE OF NUISANCE.<sup>1</sup>

§ 1071. **Course of the Discussion.**—In preceding chapters, we have called to mind many doctrines pertaining to nuisance.<sup>2</sup> And, in the second volume, where the several offences are treated of in their alphabetical order, will be included some of the minor or secondary nuisances.<sup>3</sup> Those which are more purely such will be discussed in chapters next following the present one. In this, we are to consider some general doctrines.

§ 1072. **Nuisance defined.**—A public or common nuisance is any act or neglect the product of which works an annoyance or injury to the entire community; or, the product itself is termed a nuisance.<sup>4</sup>

**Further described.**—The evil must be of magnitude requiring judicial interposition, and within the reasons on which the decisions of the courts have in times past proceeded; or, the offence may be created and defined by statute.<sup>5</sup> Again,—

§ 1073. **Abatable and Indictable, distinguished.**—The reader should carry in his mind the distinctions, illustrated in a previous chapter, between nuisance abatable and nuisance indictable.<sup>6</sup>

<sup>1</sup> See *Crim. Proc.* II. § 860 et seq.; and *Stat. Crimes*, § 20, 21, 156, note, 160, 214, 257, 544–558, 654, 968, 974–976, 1059–1070.

<sup>2</sup> *Ante*, § 221, 227, 236, 241–246, 265, 316, 341, 419–422, 433, 490, 491, 531, 686, 792, 817–835.

<sup>3</sup> For example, *BARRATRY*; *BLASPHEMY* AND *PROFANENESS*; *LIBEL*; *LORD'S DAY*; *RIOT*; *SEPULTURE*; *THREATENING LETTERS*; *WAY*.

<sup>4</sup> See *Stat. Crimes*, § 544. *Gaston, J.*,

observed in the North Carolina court, that the act “should be an offence so inconvenient and troublesome as to annoy the whole community, and not merely particular persons.” *The State v. Baldwin*, 1 Dev. & Bat. 195, 197. As to which see *ante*, § 243–245; *post*, § 1077, 1078.

<sup>5</sup> *Stat. Crimes*, § 552–558; *McLaughlin v. The State*, 45 Ind. 338; *The State v. Fisher*, 52 Misso. 174; *Watertown v. Mayo*, 109 Mass. 315.

<sup>6</sup> *Ante*, § 821–835.

§ 1074. **Actionable and Indictable, distinguished.** — Like any other offence, a nuisance may be actionable, while it is indictable; yet, as we have seen,<sup>1</sup> an action can be maintained only by one who has suffered a damage special to himself. But, —

**Intensity of Evil.** — To be indictable, a nuisance need be no more intensely evil than is required to render it actionable.<sup>2</sup> And —

**Civil in Esseence.** — The doctrine, already mentioned,<sup>3</sup> that a criminal proceeding may be in substance and effect civil, and be governed in a degree by the rules of civil suits, has its most apt illustrations in this department. Thus, —

§ 1075. **Obstructing River — (Intent — Acts of Servants).** — In England, one was indicted for the nuisance of obstructing the navigation of a river, in connection with some works which he carried on near the bank. His workmen had deposited rubbish where it had fallen into the river; but, to excuse himself, he offered to show that this was done, not only without his direction, but in violation of his express orders, while still, however, it was done in the course of the general conduct of his business. This evidence, which was of a sort to establish a complete defence in ordinary criminal cases, as showing that there was no criminal intent, the court rejected.<sup>4</sup> “It is quite true,” said Mellor, J., “that this, in point of form, is a proceeding of a criminal nature; but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail, with regard to such an act as is charged in this indictment, between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them; but here it is perfectly clear that the only reason for proceeding criminally is, that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. . . . The prosecutor cannot proceed by action, but must proceed by indictment; and, if this were strictly a criminal proceeding, the prosecution would be met with the objection that there was no *mens rea*, that the indictment charged the defendant with a criminal offence, when

<sup>1</sup> Ante, § 265.

<sup>2</sup> Ante, § 236.

<sup>3</sup> Ante, § 33, 264–267, 531, 713, 954–957.

<sup>4</sup> See ante, § 316.

in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with. . . . Inasmuch as the object of this indictment is, not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment.”<sup>1</sup>

§ 1076. **Civil in Essence, continued.** — The doctrine of this English case may almost be deemed new in the criminal law, yet there were before some familiar cases lying near it.<sup>2</sup> To what extent this line of adjudication will be followed by our courts, it is not easy to predict. It seems just, if not carried too far, or in improper directions. But if a court were to apply a rule like this where some infamous punishment was to be the consequence of a conviction, or, indeed, where there were to be any consequences not in effect civil, it would wander widely from the path of true principle, as well as of precedent.

§ 1077. **Already discussed.** — In a previous chapter, under the title “The Wrong as a Public in distinction from a Private Injury,” several views were presented relating to the present subject.<sup>3</sup> And, further on, in successive chapters on the protection which the criminal law affords to the “Public Health,” to “Religion, Public Morals, and Education,” to the “Public Wealth and to Population,” to the “Public Convenience and Safety,” and to the “Public Order and Tranquillity,”<sup>4</sup> the leading doctrines in the law of Nuisance were unfolded.

**How many annoy.** — In a general way, we have seen how many of the public a nuisance must annoy to render it indictable.<sup>5</sup> Said a learned judge: “Every nuisance is annoying to only a few of the citizens of the particular place. They are the public of that locality. It is a public nuisance if it annoy such part of the public as necessarily come in contact with it.”<sup>6</sup> But, —

§ 1078. **In Disorderly House.** — The North Carolina court held, that, where the defendant lived remote from any public road, and loud noises and uproar were often kept up in his house by his five sons when drunk, yet he did not encourage them except

<sup>1</sup> Reg. v. Stephens, Law Rep. 1 Q. B. 702, 708, 709, 710.

<sup>2</sup> See ante, § 219-221, 316, 317.

<sup>3</sup> Ante, § 230 et seq.

<sup>4</sup> Ante, § 489-543.

<sup>5</sup> Ante, § 243-245, 1072 and note.

<sup>6</sup> Stuart, J., in Hackney v. The State, 8 Ind. 494, 495.



by getting drunk himself; while, on the other hand, he would sometimes endeavor to quiet them; and, by the disorder, only two families were disturbed,—the nuisance of keeping a disorderly house was not, in law, committed. “Admit,” said the learned judge, “that, if this disorder had been committed in a town, where all the good people of the State had a right to be, and to pass and repass, or on or near a public highway, it would have amounted to a common, as distinguished from a private, nuisance, so as to be indictable, yet it is clearly not so, having been committed in the country, to the disturbance of only two families residing in the vicinity.”<sup>1</sup>

§ 1078 *a*. **Prescription and Usage.**—One by committing an offence to-day does not gain the right to commit a like offence to-morrow. And no prescription and no usage can justify crime. In this respect the criminal law does not follow the analogies of the civil. Therefore, as we shall more particularly see by and by,<sup>2</sup> a nuisance is not the less indictable because it is of long standing.<sup>3</sup>

§ 1079. **Misdemeanor.**—At the common law, nuisance is misdemeanor, not felony; punishable, therefore, by fine and imprisonment. And it is believed that none of our statutes raise it to a higher grade. Consequently, —

**Participants.**—All participants in a nuisance, whether before or at the fact, present or absent, are principal offenders, and to be dealt with as actual doers.<sup>4</sup> We shall see, under the title Bawdy-house, more specifically how this is.<sup>5</sup> But the doctrine applies also to other nuisances.<sup>6</sup>

**Abatement by Judicial Order.**—When the indictment has the necessary allegations, and it is sustained by the proofs, the final judgment of the court may contain an order that the defendant abate the nuisance,<sup>7</sup> “at,” says Hawkins, “his own costs.”<sup>8</sup>

<sup>1</sup> The State *v.* Wright, 6 Jones, N. C. 25, 27, opinion by Pearson, C. J. And see The State *v.* Hathcock, 7 Ire. 52.

<sup>2</sup> Post, § 1181, 1189–1141.

<sup>3</sup> Douglass *v.* The State, 4 Wis. 387; Mills *v.* Hall, 9 Wend. 315; The State *v.* Franklin Falls Co., 49 N. H. 240; Taylor *v.* People, 6 Parker, C. C. 347; The State *v.* Rankin, 3 S. C. 438; People *v.* Mallory, 4 Thomp. & C. 567.

<sup>4</sup> Ante, § 629–633, 656 et seq., 685–689.

<sup>5</sup> Post, § 1090–1096.

<sup>6</sup> The State *v.* Potter, 30 Iowa, 587; Edelmuth *v.* McGarren, 4 Daly, 467; Stevens *v.* People, 67 Ill. 587; Dorman *v.* Ames, 12 Minn. 451. See United States *v.* Chenoweth, 6 McLean, 139.

<sup>7</sup> Crim. Proced. II. § 866, 870–872; Munson *v.* People, 5 Parker, C. C. 16; Smith *v.* The State, 22 Ohio State, 539; Delaware Division Canal *v.* Commonwealth, 10 Smith, Pa. 367.

<sup>8</sup> 1 Haw. P. C. Curw. ed. p. 695, § 14, 15.

This order for abatement is not a necessary part of the judgment, nor is it strictly in the nature of punishment.<sup>1</sup>

**Abatement as affecting Punishment.** — If the defendant has already abated the nuisance, the court, in exercising its discretion as to the punishment, will take this into account in his favor.<sup>2</sup> Also, —

**Acted as Agent.** — It will consider favorably, in fixing the punishment, the fact, should it be so, that he acted only as another's agent.<sup>3</sup>

§ 1080. **Abatement by Private Persons in Pais.** — We have seen<sup>4</sup> that, as general doctrine, any person is authorized to abate, with his own hands, without judicial order, a public nuisance. Thus, —

**Dog.** — If a dog becomes ferocious and dangerous to the public, he is, therefore, a public nuisance, and any one may kill him.<sup>5</sup>

<sup>1</sup> Ante, § 829; *Campbell v. The State*, 16 Ala. 144. And see *Willis v. Warren*, 1 Hilton, 590. An order for the abatement of a nuisance will be made only where the nuisance is alleged to be continuing. *The State v. Noyes*, 10 Fost. N. H. 279; *Crim. Proc.* I. § 393; II. § 866; *Wroe v. The State*, 8 Md. 416; *Munson v. People*, 5 Parker, C. C. 16; *Rex v. Stead*, 8 T. R. 142. In this last case, Lord Kenyon, C. J., observed: "When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it is so stated in *Rex v. Pappineau*, 1 Stra. 686, 'et adhuc existit'; and, in such case, the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence, and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it." p. 144. A Pennsylvania case holds it to be error to order the sheriff to abate a nuisance in the first instance; the order should be on the defendant, but if he fails to comply the sheriff may be commanded to abate it at his cost. *Barclay v. Commonwealth*, 1 Casey, 503. And see *Mayor of Liverpool*, 8 Ellis & B 537. A defendant

being found guilty on an indictment for nuisance in maintaining a mill-dam, and a judgment being entered that the mill-dam be removed, and that a writ issue to the sheriff for its removal, the judgment was held to be a final one upon which error would lie. It was held, also, that the power to order such removal could not precede, but must be exercised at the time of, imposing punishment by fine or imprisonment, and form part of the same judgment; and that, no such punishment having been imposed, the order to remove the nuisance was erroneous. *Crippen v. People*, 8 Mich. 117. See also *Maxwell v. Boyne*, 36 Ind. 420. **Cruel and unusual Punishment.** — An order for abatement is not a cruel or unusual punishment. *McLaughlin v. The State*, 45 Ind. 338.

<sup>2</sup> *Reg. v. Macmichael*, 8 Car. & P. 755. See also *Rex v. Grey*, 2 Keny. 807; *Rex v. Green*, 1 Keny. 379.

<sup>3</sup> *The State v. Bell*, 5 Port. 365.

<sup>4</sup> Ante, § 490, 828, 829; *Stat. Crimes*, § 169, 554, 555, 1070 and note.

<sup>5</sup> 1. The question of one's right to kill another's dog, because a public nuisance, is, in the facts of cases, often blended with that of his right to kill the dog for the protection of himself or property. The topic has been very frequently before the courts; and, oddly, the digest-makers have, in some instances, given us

§ 1081. **Further of Private Abatement.**—The doctrine which authorizes any person to abate a public nuisance, without judicial

the special title *Dog*. Let us look a little at what the courts have held.

2. In an old case it was said by "Holt, C. J., and Turton, J." according to one report, that "there is a great difference between horses and oxen, in which a man has a valuable property, and which are not so familiar to mankind, and dogs; the former the owner ought to confine, and take all reasonable caution that they do no mischief, otherwise an action will lie against him; but otherwise of dogs, before he has notice of some mischievous quality." *Mason v. Keeling*, 1 *Ld. Raym.* 606, 608. According to another report of the case, "Holt, C. J.," said: "The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for the hurt done by them without any notice; but, if they are of a tame nature, there must be notice of the ill quality. And the law takes notice, that a dog is not of a fierce nature, but rather the contrary. . . . If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but, if my dog go into another man's soil, no action will lie." *Mason v. Keeling*, 12 *Mod.* 332, 335. Therefore a man bitten or otherwise injured by a dog cannot recover damages of its owner for the injury, unless the latter had some knowledge or warning of its vicious propensities. *Hogan v. Sharpe*, 7 *Car. & P.* 755; *Thomas v. Morgan*, 2 *Crompt. M. & R.* 496, 4 *Dowl. P. C.* 223; *McKone v. Wood*, 5 *Car. & P.* 1; *Judge v. Cox*, 1 *Stark.* 285; *Vrooman v. Lawyer*, 13 *Johns.* 339.

3. One attacked by another's dog may kill it in self-defence, and the owner can recover no damages. And he may do the same thing for the protection of his property. *Leonard v. Wilkins*, 9 *Johns.* 233; *Brown v. Hoburger*, 52 *Barb.* 15; *King v. Kline*, 6 *Barr.* 318; *Barrington v. Turner*, 3 *Lev.* 28; *Hanway v. Boulton*, 4 *Car. & P.* 350, 1 *Moody & R.* 15; *Janson v.*

*Brown*, 1 *Camp.* 41. But where a defendant alleged, in justification of killing the plaintiff's dog, that it ran violently upon his dog and bit him; this was held not to be sufficient, it should have been shown further that he could not otherwise separate the attacking dog from his own. *Wright v. Ramscot*, 1 *Saund.* 84; *s. c. nom. Wright v. Rainsear*, 1 *Sid.* 336; *s. c. nom. Wright v. Wainscott*, 1 *Lev.* 216; *s. c. nom. Wright v. Wainscott*, 2 *Keb.* 237. And Lord Denman, C. J., once laid it down in a jury case, that "the circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time." *Morris v. Nugent*, 7 *Car. & P.* 572. And see *Hartley v. Harriman*, 1 *B. & Ald.* 620; *Clark v. Webster*, 1 *Car. & P.* 104; *Hanway v. Boulton*, 4 *Car. & P.* 350, 1 *Moody & R.* 15; *Janson v. Brown*, 1 *Camp.* 41. Also, when, after the plaintiff's dog had worried some sheep belonging to the defendant, and gone into another field, the latter shot the dog, — *Alderson, J.*, in an action for this killing, directed the jury to find for the plaintiff, saying, "It was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were." *Wells v. Head*, 4 *Car. & P.* 568. In a North Carolina case, where a dog was kept on its owner's premises, and there ran at a person going to the owner's house, but was called off by the family, yet he shot the dog going away; the court held, that a fierce dog, if kept on its owner's premises, is not a nuisance entitling any one to kill him, and that in this instance there was no necessity for the killing, since the dog was driven off. Hence the shooting was not justifiable. *Perry v. Phipps*, 10 *Ire.* 259.

4. Some of the before-mentioned cases seem to favor the proposition, that, if a dog is dangerous to go at large, still a person whom or whose property he is not molesting is not justified in killing

authority, is essential to the repose of the community. Without it, one man might put a million in danger, or destroy human lives

him. It is submitted, however, that such is not the law, which is directly the contrary; namely, though a dog may not lawfully be killed by any one, simply on the ground of possessing some vicious propensities, yet, if so vicious as, going at large, to be dangerous to the community, any person may lawfully kill such a dog, whether personally in danger or not, and whether the owner has knowledge of the dog's vicious propensities or not. I will state the cases at hand relating to this proposition, leaving the reader to decide whether or not it is sustained by them. In New York it was laid down, in an action of trespass for killing a dog, that, where the defence of the ferocious character of the animal is set up, if it was in the habit of attacking individuals, this is sufficient, and a *scienter*, on the part of the owner, need not be shown. Said Nelson, C. J.: "If the dog be in fact ferocious, at large, and a terror to the neighborhood, the public should be justified in despatching him at once. It seems to be settled that such proof is not necessary when a dog is in the habit of chasing conies in a warren, or deer in a park, and that he may be killed for the protection of those animals. How much more proper is it, that this should be the rule, and most singular would it be were it otherwise, when the persons and lives of rational beings are in danger!" Maxwell v. Palmerton, 21 Wend. 407, 408. In a Pennsylvania case, — where, indeed, the matter adjudged was, that a man might kill his neighbor's dog to protect his own property, — the following dictum was laid down by Coulter, J.: "A dog may be so ferocious as to become a public nuisance; and, in such cases, if his owner permits him to run at large, any person may kill him." King v. Kline, 6 Barr, 318. Also we have the following decisions: Trespass, *vi et armis*, for killing a dog. Held, that the dog, having bitten the defendant, was a nuisance, and anybody might abate a nuisance. *Aliter*, if the dog had been set to guard property, and the defendant had interfered. Bowers v. Fitzrandolph, Ad-

dison, 215. If a dog is so ferocious that, of his own disposition, he will bite men in the street, and is at large, he is a nuisance, and may be killed by any one. Dunlap v. Snyder, 17 Barb. 561. No action will lie against one for killing a dangerous dog, which is permitted by its owner to run at large, or escapes through negligent keeping, the owner having notice of its vicious disposition; or for killing a dog bitten by a mad dog. Putnam v. Payne, 13 Johns. 312. If a dog attacks persons, or attacks and kills domestic animals on the owner's land, it may be killed as a common nuisance. But if it merely chases and worries cattle, the owner of the cattle may not kill it; his remedy is by action against the owner of the dog, upon proof that he knew the dog to be in the habit of doing thus. Hinckley v. Emerson, 4 Cow. 351. A furious dog, accustomed to bite mankind, is a common nuisance. In an action to recover damages for killing such a dog, the defendant need not prove he was obliged to kill it in self-defence. And Redfield, C. J., observed: "Some animals are common nuisances, if suffered to go at large, from their known and uniform instincts and propensities, such as lions and bears, and probably wolves and wild-cats; and domestic animals, from their ferocious and dangerous habits becoming known to their keepers, thus become common nuisances, if not restrained." Brown v. Carpenter, 26 Vt. 638, 643. The inhabitants of a dwelling-house may destroy another's dog, that disturbs their quiet, if the disturbance cannot be otherwise prevented; Nelson, C. J., observing: "The demurrer admits, that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and wilfully neglected to confine him; and that defendants, unable to remove the nuisance in any other way, killed him. No other

by thousands, in the presence of another, who, having the power, would not be permitted by the law to interpose. An infernal machine might be hidden where throngs were passing, a bridge about to be packed with human beings might be so weakened that it would fall, or any number of other dangers might be created, yet, but for this doctrine, they could not be arrested to prevent the calamity. This doctrine is an expression of the better instincts of our nature, which lead men to watch over and shield one another from harm.<sup>1</sup> It is impossible, therefore, to

authority than the experience and observation of every man is necessary to enable him to determine, that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it." *Brill v. Flagler*, 23 Wend. 354, 357. In *Massachusetts* it was held, that the provision in the R. S. c. 58, § 12, permitting any person to kill any dog found without a collar, does not authorize a person to convert the dog to his own use, but trover by the owner will lie for such conversion; *Shaw, C. J.*, observing: "The object of the statute is, not to confer a benefit on the individual, but to rid society of a nuisance by killing the dog. This object would not be accomplished by a person's taking the dog to himself." *Cummings v. Perham*, 1 Met. 555, 556.

5. In some of the States, there are statutes regulating the custody and restraint of dogs, and they are held to be constitutional. *Blair v. Forehand*, 100 Mass. 136. And see further of these statutes, *Commonwealth v. Canada*, 107 Mass. 405; *Commonwealth v. Gorman*, 16 Gray, 601; *Commonwealth v. Kelliher*, 12 Allen, 480; *Kerr v. Seaver*, 11 Allen, 151; *McAneany v. Jewett*, 10 Allen, 151; *Jones v. Commonwealth*, 15 Gray, 193; *Bishop v. Fahay*, 15 Gray, 61; *Tower v. Tower*, 18 Pick. 262; *Commonwealth v. Dow*, 10 Met. 382; *Campbell v. Brown*, 1 Grant, Pa. 82. And see ante, § 832.

<sup>1</sup> And see *Stat. Crimes*, § 1070, note. In a New Jersey case, Vice-Chancellor Dodd observed: "At common law, it was always the right of a citizen, without official authority, to abate a public nuisance, and without waiting to have it

adjudged such by a legal tribunal. His right to do so depended upon the fact of its being a nuisance. If he assumed to act upon his own adjudication that it was, and such adjudication was afterwards shown to be wrong, he was liable as a wrong-doer for his error, and appropriate damages could be recovered against him. This common-law right still exists in full force. Any citizen, acting either as an individual, or as a public official under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or chartered provisions, may abate what the common law deemed a public nuisance. In abating it, property may be destroyed, and the owner deprived of it without trial, without notice, and without compensation. Such destruction for the public safety or health is not a taking of private property for public use, without compensation, or due process of law, in the sense of the Constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the *police power* of the State. By virtue of that power, numerous and onerous restrictions and burdens are imposed upon persons and property which, for other purposes or on other grounds, would be prohibited by the constitutional limitations sought to be applied in this

look upon some late cases, in which it seems to be laid down, in broad terms, that no one is entitled to abate a public nuisance unless personally and specially injured by it, as serious utterances of the courts ; unless we understand them, as probably we should, to refer merely to the special facts in contemplation.<sup>1</sup> Not every thing, which one might imagine, can be done under the name of abating a public nuisance. Thus we have seen<sup>2</sup> that needless damage should not be done. And it was laid down in Maryland, that "the right to abate a public nuisance belongs to every citizen, yet it cannot be lawfully exercised if its exercise involve a breach of the peace. When such is the case, the party erecting the nuisance must be proceeded against legally."<sup>3</sup> It will undoubtedly, in some circumstances, lend strength to the right of abating a public nuisance that the person abating suffers a special injury from it, because this fact will authorize even the abatement of a private nuisance ;<sup>4</sup> yet, when the nuisance is clearly public, it is not, as a general proposition, essential that the person abating should be a special sufferer from the thing abated.<sup>5</sup>

suit." *Manhattan Manuf. & Co. v. Van Keuren*, 8 C. E. Green, 251, 255. But see *Miller v. Forman*, 8 Vroom, 55. And see *Gunter v. Geary*, 1 Cal. 462; *Reg. v. Patton*, 13 L. Canada, 811; *Reg. v. Mathias*, 2 Fost. & F. 570; *James v. Hayward*, Cro. Car. 184; *Ruff v. Phillips*, 50 Ga. 130. **By Municipal Corporations.**—As to abatement by municipal corporations, see *Yates v. Milwaukee*, 10 Wal. 497; *Weil v. Ricord*, 9 C. E. Green, 169; *Babcock v. Buffalo*, 56 N. Y. 268.

<sup>1</sup> See *Clark v. Lake St. Clair, &c. Ice Co.*, 24 Mich. 508; *McGregor v. Boyle*, 34 Iowa, 268; *Brown v. Perkins*, 12 Gray, 89, 101; *Miller v. Forman*, 8 Vroom, 55; *Ruff v. Phillips*, 50 Ga. 130; *The State v. Parrott*, 71 N. C. 311.

<sup>2</sup> Ante, § 828; *The State v. Paul*, 5 R. I. 185; *The State v. Keeran*, 5 R. I. 497; *Roberts v. Rose*, 3 H. & C. 162.

<sup>3</sup> *Day v. Day*, 4 Md. 262, opinion by LeGrand, C. J. So, although an obstruction in the channel of a navigable river is a nuisance, yet it is not to be abated with total disregard of the rights of others. A raft of timber was driven into the mouth of Bayou Lafourche, which it obstructed. The next morning, the captain of the raft proposed to hire a

steamer bound in to tow it out. This offer was refused; and, while the captain of the raft was endeavoring to procure other assistance, the steamer's captain cut it to pieces in order to pass. For this act the boat was held liable. *Lalande v. The Steamboat C. D.*, 1 Newb. Adm. 501. Perhaps the true view of this latter case is, that the raft was not to be deemed a nuisance under the circumstances, being driven to the place where it lay by stress of weather, so long as its owner was making all possible exertions to remove it. As to abating a bridge which obstructed navigation, see *The State v. Parrott*, 71 N. C. 311.

<sup>4</sup> Ante, § 828; *Gates v. Blincoe*, 2 Dana, 158. The assent of a party to a nuisance will not take away his right to abate it afterward, if he thinks proper. *Pilcher v. Hart*, 1 Humph. 524.

<sup>5</sup> Ante, § 828, 829, 1080 and note; *King v. Sanders*, 2 Brev. 111. And see the previous notes to this section and the last. Various statutes having declared the Neuse River between certain points navigable, it is a nuisance to build a bridge across it, between those points, so as to prevent the passage of boats; and such nuisance may be abated by any one.

§ 1082. **Municipal Corporation neglecting to abate.** — An indictment lies against a municipal corporation which has, by its charter, power to enact ordinances to preserve the public health and remove nuisances, if it does not cause to be abated a public nuisance, like a slaughter-house, kept, to the detriment of the public health, on land of an inhabitant within the corporate limits.<sup>1</sup>

*The State v. Dibble*, 4 Jones, N. C. 107. Chancery, on a bill by the attorney-general, may enjoin and abate a public nuisance caused by the obstruction of a highway; and the fact that the authorities of the town in which the nuisance is erected are invested with power to abate nuisances within the corporate limits, does not take away the jurisdiction. *Hoole v. Attorney-General*, 22 Ala. 190.

<sup>1</sup> *The State v. Shelbyville*, 4 Sneed, 176; McKinney, J., observing: "By the act of the General Assembly incorporating the town of Shelbyville, it is expressly declared, that said corporation shall have full power and authority to enact all such laws and ordinances as may be necessary and proper 'to preserve the

health of the town, prevent and remove nuisances,' &c. Session acts of 1819, c. 16, § 2. Under this provision of the charter, there can be no doubt as to the power of the corporation to 'prevent' or to 'remove' the nuisance charged in the indictment; nor can there be any more doubt as to the positive duty of the corporation to exercise this power in all proper cases. The existence of such a power is indispensable to the public health, and welfare of the town; and the corporation is not at liberty to decline its exercise when demanded by the public interest. An indictment against the corporation is the proper mode of redress by the public for a grievance of this nature."

## CHAPTER LXV.

BAWDY-HOUSE.<sup>1</sup>

§ 1083. **How defined.** — A bawdy-house is any place, whether of habitation or temporary sojourn, kept open to the public either generally or under restrictions, for licentious commerce between the sexes.<sup>2</sup>

**More particularly.** — The term house of ill fame is used in the law to signify nearly or exactly the same thing as bawdy-house. It is one form of disorderly house.<sup>3</sup> The keeping of it is, therefore, an indictable misdemeanor.<sup>4</sup> “For although,” says Lord Coke, “adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or brothel-house, being, as it were, a common nuisance, is punishable by the common law; and is the cause of many mischiefs, not only to the overthrow of the bodies, and wasting of their livelihoods, but to the endangering of their souls.”<sup>5</sup>

§ 1084. **The Keeper — (Husband and Wife).** — The keeper may be a man or a woman. And a married woman may be indicted with her husband, or alone, for the offence. “Keeping the house does not necessarily import property, but may signify that share of government which the wife has in the family, as well as the husband.”<sup>6</sup> So, under a statute authorizing wives to own property and carry on business separate from their husbands, if a wife who owns a house keeps it for bawdry, and receives the profits to her separate use, still the husband who lives with her, and, knowing this, does not exercise his marital power to restrain

<sup>1</sup> For the pleading, practice, and evidence relating to this subject, see *Crim. Proced. II.* § 104 et seq.

<sup>2</sup> In *The State v. Evans*, 5 Ire. 603, a bawdy-house is defined to be “a house of ill-fame kept for the resort and convenience of lewd people of both sexes.”

<sup>3</sup> *Crim. Proced. II.* § 106.

<sup>4</sup> *Ante*, § 500, 734; 4 Bl. Com. 168; 1 Russ. Crimes, 3d Eng. ed. 322.

<sup>5</sup> 3 Inst. 205; *Jacobowsky v. People*, 6 Hun, 524.

<sup>6</sup> *Reg. v. Williams*, 10 Mod. 63, 1 Salk. 384; *The State v. Bentz*, 11 Misso. 27; *Commonwealth v. Lewis*, 1 Met. 151; *Commonwealth v. Cheney*, 114 Mass. 281; *ante*, § 361; *Crim. Proced. II.* § 109.



her, is indictable also as keeper.<sup>1</sup> And, in general, a man who suffers his wife and daughters openly to do the forbidden things, and does not dissent, becomes thereby guilty of the offence.<sup>2</sup>

§ 1085. **The Keeping.** — There must be the keeping of a house. For a woman to be a common bawd, or merely to live alone and receive one man or many, is not to keep a bawdy-house. And more women than one must live or resort together to make such a house.<sup>3</sup> Therefore permitting a single act of illicit intercourse will not alone constitute the offence.<sup>4</sup>

**The House.** — A single room in a dwelling-house may constitute a bawdy-house.<sup>5</sup> So may a tent,<sup>6</sup> or a boat on a river.<sup>7</sup> And it is not necessary that the place should be used for habitation.<sup>8</sup>

§ 1086. **Lucre.** — It was at one time deemed not certain,<sup>9</sup> but now it is established, that, to constitute a bawdy-house, there is no necessity for it to be kept for lucre. The offence consists in the public nuisance, and the form of corrupt motive is immaterial.<sup>10</sup> And, —

§ 1087. **Outward Indecency.** — To constitute the common-law offence, there need be no indecency, or disorder of any sort, visible from the exterior of the house.<sup>11</sup>

§ 1088. **How under Statutes.** — Statutes, on this subject, have sometimes been drawn in such terms as to modify the doctrines of the common law. Thus, —

<sup>1</sup> *Commonwealth v. Wood*, 97 Mass. 225. In this case Chapman, J., observed: "It is true that the house they lived in appears to have been owned by her to her sole and separate use, free from the control of her husband. . . . It is also true that under our statute she may carry on a separate trade on her own account. But it has not been decided how far this affects the husband's legal right to control her, nor is it necessary to decide it in this case. These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household so far as to prevent his wife from committing this offence, or relieve him from responsibility if it is committed." p. 229. See ante, § 891 *a*.

<sup>2</sup> *Scarborough v. The State*, 46 Ga. 26.

<sup>3</sup> *The State v. Evans*, 5 Ire. 603; Reg.

*v. Pierson*, 1 Salk. 382; s. c. nom. Reg. *v. Peirson*, 2 Ld. Raym. 1197.

<sup>4</sup> *Commonwealth v. Lambert*, 12 Allen, 177.

<sup>5</sup> Reg. *v. Pierson*, supra; *The State v. Garity*, 46 N. H. 61; *The State v. Main*, 31 Conn. 572; *Commonwealth v. Howe*, 13 Gray, 26.

<sup>6</sup> *Killman v. The State*, 2 Texas Ap. 222.

<sup>7</sup> *The State v. Mullen*, 35 Iowa, 199.

<sup>8</sup> *The State v. Powers*, 36 Conn. 77.

<sup>9</sup> *Jennings v. Commonwealth*, 17 Pick. 80.

<sup>10</sup> Ante, § 500, 734; post, § 1112; *The State v. Bailey*, 1 Fost. N. H. 343, 345; *The State v. Nixon*, 18 Vt. 70; *Commonwealth v. Wood*, 97 Mass. 225; *Crim. Proc.* II. § 108, 274.

<sup>11</sup> Reg. *v. Rice*, Law Rep. 1 C. C. 21; *Sylvester v. The State*, 42 Texas, 496; *Crim. Proc.* II. § 116.

**Reputation of House.**—In Connecticut, “keeping a house of ill fame, resorted to for the purpose of prostitution or lewdness,” is a statutory offence; and the court holds, that the words “ill fame” refer to the reputation of the house, consequently it must not only be a bawdy-house, but must also be reputed such.<sup>1</sup> This form of words is employed in the statutes of some of the other States; and the common and better interpretation is believed to be, that the term “house of ill fame” is a mere synonyme for “bawdy-house,” having no reference to the “fame” of the place, but denoting the fact. Yet, in matter of evidence, some courts allow the proof of the fact to be aided by the fame.<sup>2</sup>

§ 1089. **By-laws.**—The power of municipal corporations to make by-laws is considered in another connection.<sup>3</sup> Under it, ordinances not unfrequently provide penalties for the keeping of houses of ill fame.<sup>4</sup>

§ 1090. *Letting or selling House for Bawdry* :—

**General Doctrine.**—We have seen, that a mere attempt to commit an offence is usually indictable;<sup>5</sup> and that a solicitation is an attempt of a particular kind.<sup>6</sup> On this principle, the letting of a house to be used as a brothel is an attempt; and, as such, the courts have held it to be indictable.<sup>7</sup> Or, on a principle already brought to view,<sup>8</sup> if the house is afterward kept for bawdry, he who let it for the purpose is indictable as keeper.<sup>9</sup>

§ 1091. **Letting as Attempt—As Accessorial Act.**—We saw, while discussing Attempt,<sup>10</sup> that there are substantive offences so small, or otherwise of such a nature, that a mere attempt to com-

<sup>1</sup> Cadwell v. The State, 17 Conn. 467; The State v. Blakesley, 38 Conn. 523. See The State v. Main, 31 Conn. 572; The State v. Morgan, 40 Conn. 44; Morris v. The State, 38 Texas, 608; O'Brien v. People, 28 Mich. 213.

<sup>2</sup> Crim. Proc. II. § 112–115; The State v. Brunell, 29 Wis. 435; The State v. Lyon, 39 Iowa, 379; The State v. Boardman, 64 Maine, 523; United States v. Jourdine, 4 Cranch C. C. 338; United States v. Nailor, 4 Cranch C. C. 372. As to the Massachusetts statutes, see Commonwealth v. Davis, 11 Gray, 48.

<sup>3</sup> Stat. Crimes, § 18–26.

<sup>4</sup> Childress v. Nashville, 3 Sneed, 847; New Orleans v. Costello, 14 La.

An. 37; McAlister v. Clark, 33 Conn. 91; Stat. Crimes, § 21.

<sup>5</sup> Ante, § 723 et seq.

<sup>6</sup> Ante, § 767, 768.

<sup>7</sup> Commonwealth v. Harrington, 3 Pick. 26; Smith v. The State, 6 Gill, 425. And see Commonwealth v. Moore, 11 Cush. 600; Fish v. Dodge, 4 Denio, 311; Commonwealth v. Johnson, 4 Pa. Law Jour. Rep. 398; People v. Saunders, 29 Mich. 269; The State v. Leach, 50 Misso. 535.

<sup>8</sup> Ante, § 1079; Stevens v. People, 67 Ill. 587; The State v. Potter, 30 Iowa, 587; Wilson v. Stewart, 3 B. & S. 913.

<sup>9</sup> And see post, § 1091.

<sup>10</sup> Ante, § 759, 761, 764, 767, 768.

mit them, especially when the attempt is only a solicitation, is not indictable. For which reason, or some other, the New York court has held, that a wrongful letting, where nothing evil is done under the lease, is not, as maintained by other authorities just cited, a crime ;<sup>1</sup> but, to be such, the premises must afterward be used for the criminal purpose, in which case the lessor and lessee may be proceeded against jointly for keeping the house.<sup>2</sup> And the Kentucky tribunal, while holding to the general doctrine, seems to favor the opinion that the house must actually be put to the improper use.<sup>3</sup>

§ 1092. **How in Principle.** — There is no conflict between the two propositions, that the letting, though the premises are not used, is indictable as an attempt ; and that, when they are used, the lessor and lessee may both be proceeded against for the substantive offence of keeping the house. Now, in principle, we have seen,<sup>4</sup> that one is not indictable for making a mere contract to sell spirits, where only the sale is forbidden ; yet he is for procuring an obscene print with the intent to publish it. In other words, an attempt to sell intoxicating liquors contrary to a statute is not pursuable criminally, but an attempt to set up public obscenity is. Plainly, an attempt to establish a bawdy-house is of the latter class ; and, consequently, it is indictable.

§ 1093. **Selling House for Bawdry.** — The Kentucky court has seemed to regard the selling of a house for bawdry as no crime.<sup>5</sup> But, if the vendor knows the use contemplated by the purchaser, why should it not be, at least, an attempt ? It is difficult to draw a distinction in principle between the sale in fee and a sale for a term of years. The disposition is absolute in both instances, carrying with it the entire present possession.

§ 1094. **Neglect to eject Tenant.** — Should a man innocently let a house which afterward the lessee, without his concurrence, converted into a bawdy-house, he would, on principle, be punishable or not, according as, after ascertaining the fact, he used or not the power of the law, if he had it, to suppress the use. Still there is perhaps some judicial authority, and possibly a shadow of

<sup>1</sup> Brockway v. People, 2 Hill, N. Y. 558. ant who keeps a bawdy-house, see Abrahams v. The State, 4 Iowa, 541.

<sup>2</sup> People v. Erwin, 4 Denio, 129.

<sup>4</sup> Ante, § 761.

<sup>3</sup> Ross v. Commonwealth, 2 B. Monr.

<sup>5</sup> Ross v. Commonwealth, 2 B. Monr.

417. As to the failure to expel a ten- 417.

reason, for requiring him to go a little further in order to be responsible as keeper of the house.<sup>1</sup>

**Agent of Owner.** — To bring a person within the doctrines we are considering, he need not be the owner of the house; if he lets it and collects the rents as the owner's agent, he is responsible.<sup>2</sup> And —

**Letting for other Unlawful Purposes.** — These views apply also to the letting of houses for other disorderly purposes, or to become nuisances of any sort, the same as to letting them for bawdry.<sup>3</sup>

§ 1095. **Late English Doctrine.** — In England, this whole doctrine, which subjects to indictment one who lets a house for bawdry, or for any other disorderly purpose, has of late received a heavy blow, if indeed it has not been overturned. A man who owned a house let it out in rooms to prostitutes, knowing they intended to use the rooms for bawdry, and directly or indirectly consenting. But he did not reside in the house, or retain the keys. He collected the rents weekly, had the power to eject the women but refused, yet received nothing of their earnings other than came from their greater ability to pay the rents. When pressed by complaints of neighbors who were disturbed by noises

<sup>1</sup> The State v. Williams, 1 Vroom, 102; See Vason v. Augusta, 38 Ga. 542. There is an English case direct against any possible liability of the landlord. But, as we shall see in subsequent sections, the English judges have drifted into what we in this country deem the wrong on this whole subject, therefore our tribunals would not be expected to follow their first move. In this case, the owner was indicted jointly with the ostensible keepers of a bawdy-house; and it appeared that he had let them the house as weekly tenants, that he had been frequently remonstrated with as to the manner in which the house was conducted, and called upon to interfere, but he took no notice of the remonstrances. It was not proved that he obtained any additional rent by reason of the nature of the occupation. The judge at the trial told the jury, "that, if they were satisfied the defendant well knew the purposes for which the house was occupied, and, having the power of removing the tenants by a week's notice, had continu-

ously permitted them to remain," &c., they should find him guilty. The defendant being convicted, the judges, on a case reserved, held the instructions to the jury, and the consequent conviction, to be wrong. Said Pollock, C.B.: "There was no keeping of the house by the defendant. He was only the owner of the house letting it to another, who used it for improper purposes, with which the defendant had nothing to do. He derived no increase of rent from the traffic there carried on, nor had he any thing to do with the immoral part of the transaction, except in knowing that it might or might not be used as a bawdy-house. My brother Williams has well expressed the ground of our decision in saying, that the not giving a notice to quit was not equivalent to keeping a bawdy-house." Reg. v. Barrett, Leigh & C. 263, 268, 269.

<sup>2</sup> Lowenstein v. People, 54 Barb. 299.

<sup>3</sup> The State v. Williams, *supra*; ante, § 1079.

from the house, he sometimes endeavored to persuade his tenants to be more orderly in behavior. And the judges, on a case reserved, held, that he could not be convicted on an indictment which charged that he "unlawfully did keep and maintain a certain common bawdy-house," &c. Said Pollock, C. B.: "The house was not kept by him. He had no power to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper of the house." There was no distinct intimation that the defendant could be held under any other form of the indictment, though the learned judge said, — "Whatever offence against morality or law he may have committed, he did not keep a disorderly house."<sup>1</sup>

§ 1096. **Observations on this.** — If the English judges were as little informed on the criminal law as are the greater part of those American ones who sit under the shadows of our commercial cities, this eclipse of the judicial understanding would not be a remarkable phenomenon. But it is not easily accounted for in them. "He had no power," it was said, "to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper." No, he was satisfied to let the opening and shutting of the door be done by the women; while he provided the door for them, and the rooms to which the door led, and every week took so much of the money as it was agreed he should have, and concurred in what the women did; only, being clearer-headed, he advised them to be more discreet in their violations of decency and law! Here, therefore, was a joint operation, where each had his sev-

<sup>1</sup> *Reg. v. Stannard*, Leigh & C. 349, 354. Perhaps the most pertinent of the cases referred to on behalf of the prosecution is *Rex v. Pedly*, 1 A. & E. 822. See ante, § 1090, 1091. And see, for the English doctrine on this subject, 1 Russ. Crimes, 5th Eng. ed. by Prentice, 440-442. As there stated, it seems to be, that, if one creates a permanent nuisance on his land, — as, by the erection of a building which is such, or is likely to become such, — then makes a lease of the land, he is punishable for the nuisance while in the possession of the lessee. *Rex v. Pedly*, supra. And see

*Russell v. Shenton*, 3 Q. B. 449; *Rich v. Basterfield*, 4 C. B. 783; *Gandy v. Jubber*, 5 B. & S. 78; *Todd v. Flight*, 9 C. B. n. s. 377. But he is not punishable where the nuisance, like the keeping of a house for bawdry, is the entire act of his lessee, whom he could restrain, but will not, unless he receives an increased rent on account of the unlawful use. Now, according to American doctrine (ante, § 1086), the motive of lucre is unimportant; consequently the question of what rent was paid, or whether or not the letting was gratuitous, could not vary the case.

eral part to perform<sup>1</sup> in carrying out one common object, — the keeping of a bawdy-house. And it is English law, as well as American, that he whose will contributes to an act done by another is, if a felony, to be regarded as a joint doer of it, when done in his presence;<sup>2</sup> or, if, as in this nuisance, it is misdemeanor, he is legally a joint doer whether he is present or absent.<sup>3</sup> Thus, a woman, who has less capacity to penetrate another woman than this man had to open the door of the house, can, by joining her will to that of a man who has the capacity, commit rape.<sup>4</sup> The indictment may, if the pleader chooses, set out the offence according to the legal import of the facts, instead of their outward form.<sup>5</sup> In the same way, a man whose part of the criminal transaction does not consist in passing upon the eligibility of candidates for admission to the house, with its privileges, may, in point of law, keep a bawdy-house. And this doctrine extends through the entire law of crime. But the doctrine of the case under consideration, carried out into its legitimate consequences, would overturn one half of our criminal law. It is impossible, therefore, that it should be accepted in the United States.

<sup>1</sup> See ante, § 630, 632, 638, 650.

<sup>2</sup> Ante, § 647, 648.

<sup>3</sup> Ante, § 685, 686.

<sup>4</sup> Ante, § 689.

<sup>5</sup> Crim. Proced. I. § 332; II. § 949.

## CHAPTER LXVI.

## COMBUSTIBLE ARTICLES.

§ 1097. **Keeping Gunpowder.** — The keeping of large quantities of gunpowder in populous places, being calculated to endanger the public safety, is indictable.<sup>1</sup>

§ 1098. **Dangerous.** — In New York, the majority of the court were of opinion, that the mere keeping of it near the dwellings of divers citizens, and near a public street, does not come up to the mischief; but, to be a nuisance, it must be in manner and place dangerous.<sup>2</sup> The Tennessee court held, that a powder magazine, in which large quantities of gunpowder are stored, is, when erected in a populous part of a city, *per se* a nuisance.<sup>3</sup>

§ 1099. **Kept before Houses built.** — In an old case it seems to have been held, in analogy to a rule concerning offensive trades,<sup>4</sup> that, if the place in which the gunpowder is kept was used for the purpose before dwelling-houses were built in the neighborhood, it is not indictable.<sup>5</sup> This doctrine is perhaps correct in modern law; yet it should be considered in connection with other discussions.<sup>6</sup>

§ 1100. **Statutes and By-laws.** — There are some statutes and municipal ordinances relating to this subject.<sup>7</sup>

<sup>1</sup> Ante, § 531; *Bradley v. People*, 56 Barb. 72. And see *Wier's Appeal*, 24 Smith, Pa. 230.

<sup>2</sup> *People v. Sands*, 1 Johns. 78.

<sup>3</sup> *Cheatham v. Shearon*, 1 Swan, Tenn. 213. See also *Williams v. East India Company*, 3 East, 192, 201; *Trueman v. Casks of Gunpowder*, *Thacher Crim.*

*Cas.* 14; *Wier's Appeal*, 24 Smith, Pa. 230.

<sup>4</sup> Post, § 1139.

<sup>5</sup> *Anonymous*, 12 Mod. 342.

<sup>6</sup> See further, on this subject, post, § 1139, note. And see ante, § 1078 *a*.

<sup>7</sup> *Williams v. Augusta*, 4 Ga. 509.

## CHAPTER LXVII.

COMMON SCOLD.<sup>1</sup>

§ 1101. **Nature of Offence.** — A common scold is an indictable common-law nuisance.<sup>2</sup> This branch of the common law has been received with us.<sup>3</sup> The offence is generally treated of as being confined to the female sex,<sup>4</sup> though perhaps this has not been directly adjudged.

§ 1102. **How Defined.** — The adjudications are too few to enable an author to define this offence with entire certainty. It is substantially accurate to say, that a common scold is a woman who, by the practice of frequent scolding, disturbs the repose of the neighborhood.

**How many Instances.** — We shall see, in the next volume,<sup>5</sup> that common barratry requires three distinct acts, at least, for its constitution; whether this rule applies to a common scold is uncertain on the authorities. On principle, the same reason seems applicable, with perhaps this small difference, that, as a single act of barratry is more injurious than one of scolding, possibly there might be required a greater number of repetitions of the scolding than of the barratry. Yet almost the only light we have on the question is a dictum by Buller, J., who said: "In the case of a common scold, it is not necessary to prove the particular expressions used; it is sufficient to prove generally that she is always scolding."<sup>6</sup>

<sup>1</sup> See, for matter relating to this title, ante, § 540, 943. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 199 et seq.

<sup>2</sup> Ante, § 540; 4 *Bl. Com.* 168; 1 *Hawk. P. C. Curw.* ed. p. 693, 695; 1 *Russ. Crimes*, 3d Eng. ed. 327.

<sup>3</sup> *James v. Commonwealth*, 12 S. & R. 220; *United States v. Royall*, 3 Cranch C. C. 620; *Commonwealth v. Mohn*, 2 Smith, Pa. 243. Contra, as to Pennsylvania, but since overruled. *Commonwealth v. Hutchinson*, 3 Am. Law Reg.

113. In *Commonwealth v. Mohn*, supra, Woodward, C. J., said: "As to the unreasonableness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable." p. 246.

<sup>4</sup> 4 *Bl. Com.* 169; 1 *Russ. Crimes*, 5th Eng. ed. by Prentice, 438.

<sup>5</sup> Vol. II. § 65.

<sup>6</sup> *J'Anson v. Stuart*, 1 T. R. 748, 754. And see *Reg. v. Foxby*, 6 Mod. 11.



§ 1103. **Anger.** — The element of anger does not necessarily enter into this offence.<sup>1</sup> But —

“**Common Scold.**” — The indictment charges that the woman is a common scold; and no other words, as that she is a common slanderer, will do.<sup>2</sup>

§ 1104. **Misdemeanor — Punishment.** — This offence is misdemeanor. The punishment, under the English common law, is by the ducking-stool;<sup>3</sup> for which our courts substitute fine and imprisonment.<sup>4</sup>

§ 1105. **Statutes.** — In some of our States, statutes have been enacted affirming this common-law offence, or creating a new one of a like kind. Thus, —

**Common Railers and Brawlers.** — A statute in Massachusetts makes “common railers and brawlers” punishable.<sup>5</sup> And conduct in the defendant’s own house, in altercations and loud outcries, repeated several times each week, attracting to the house crowds and disturbing the neighborhood, was held to justify a conviction. In this instance, the offender was a man.<sup>6</sup>

<sup>1</sup> United States v. Royall, 3 Cranch C. C. 620.

<sup>2</sup> Reg. v. Foxby, 6 Mod. 11.

<sup>3</sup> Ante, § 943; 1 Hawk. P. C. Curw. ed. p. 695, § 14; Reg. v. Foxby, 6 Mod. 11.

<sup>4</sup> Ante, § 943; James v. Commonwealth, 12 S. & R. 220; United States v. Royall, 3 Cranch C. C. 620.

<sup>5</sup> Gen. Stats. c. 165, § 28.

<sup>6</sup> Commonwealth v. Foley, 99 Mass. 497, Hoar, J., observing: “If the defendant, in his own dwelling-house, was in the habit of using loud and violent language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, on Sundays as well as other days, and in the night as well as in the daytime, he was a disturber of the public peace by railing and brawling. And ‘occasions when he was

betrayed into violent expressions in the heat of an altercation suddenly arising with persons with whom he came in contact, and these expressions aimed at the party with whom he was in altercation,’ were properly regarded as furnishing evidence against him, if they were frequent and habitual, and the language so immoderate and vituperative, and uttered so freely, publicly, and continuously, as to disturb the peace of the neighborhood. The evidence tended to show that he had no control over his temper or his tongue, and thereby made himself a nuisance. The merits of his quarrels had little to do with the question before the jury, which chiefly concerned his manner of conducting them.” p. 499. By how much less the defendant might have incurred guilt, the opinion cautiously does not attempt to show.

## CHAPTER LXVIII.

DISORDERLY HOUSE.<sup>1</sup>

§ 1106. **What Includes.**—The term disorderly house<sup>2</sup> has a wide meaning. It includes bawdy-houses,<sup>3</sup> common gaming-houses,<sup>4</sup> and places of a like character, to which people promiscuously resort for purposes injurious to the public morals,<sup>5</sup> or health,<sup>6</sup> or convenience, or safety;<sup>7</sup> all of which are indictable as public nuisances. But evidently the term does not cover every sort of nuisance indicated by the word house. It cannot include a house kept in so filthy a condition as to be therefore indictable.<sup>8</sup> Consequently, —

**Restricted Meaning.**—It is better restricted in meaning, and it sometimes is, to denote a house or other like place in which people abide, or to which they resort, disturbing the repose of the neighborhood. In this sense, it is a violation of what is called, in a previous chapter, the public order and tranquillity.<sup>9</sup> Still, in strict law, mere bawdry, for example, is disorder. Thus, —

§ 1107. **Bawdry Disorder.**—An indictment charging the defendant with keeping “a certain common, ill-governed, and disorderly house,” specifying acts which show it to be a bawdy-house, is good, and is sustained by proof of bawdry committed within the house, though nothing disorderly appears from without.<sup>10</sup> And, as we have seen,<sup>11</sup> —

**Single Room.**—It is sufficient that the disorder extends to a single room.<sup>12</sup> So, —

<sup>1</sup> See, for matter relating to this title, ante, § 316, 361, 504. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 272 et seq.

<sup>2</sup> Ante, § 504.

<sup>3</sup> Ante, § 1083 et seq.; *United States v. Gray*, 2 Cranch C. C. 675; *Commonwealth v. Stewart*, 1 S. & R. 342.

<sup>4</sup> Post, § 1185 et seq.

<sup>5</sup> Ante, § 495 et seq.

<sup>6</sup> Ante, § 489 et seq.

<sup>7</sup> Ante, § 530 et seq.

<sup>8</sup> *The State v. Purse*, 4 McCord, 472.

<sup>9</sup> Ante, § 533 et seq.

<sup>10</sup> *Reg. v. Rice*, Law Rep. 1 C. C. 21; *Crim. Proced.* II. § 106; ante, § 1087. And see post, § 1109, 1111.

<sup>11</sup> Ante, § 1085.

<sup>12</sup> *The State v. Garity*, 46 N. H. 61; *Commonwealth v. Bulman*, 118 Mass. 456.

**Disorder Outside.** — It may be adequate, though not within the walls of the house, but around it outside.<sup>1</sup>

§ 1108. **Reputation or Fact.** — Nor is it essential that the house be reputed disorderly ; it must be so in fact, and no more is required.<sup>2</sup>

§ 1109. **Injure Others than Inmates.** — Though the disturbance need not be perceptible to the eye or hearing from without,<sup>3</sup> yet a house so kept that only its inmates are liable to be disturbed by it, or corrupted in their morals, or the like,<sup>4</sup> is not in law a disorderly house.<sup>5</sup> It is subject in this to the same rules as other nuisances.<sup>6</sup> Therefore a verdict, “that the defendant kept a disorderly house, and disturbed his neighbors,” is insufficient.<sup>7</sup> And the indictment must in some way show that the public was affected by the disorder.<sup>8</sup> But —

§ 1110. **Disorderly Inns, &c.** — An inn, or other house of like character, differs from a private one in this, — that, “as all have a right to go there and be entertained, they are not to be annoyed there by disorder. And if the innkeeper permits it, he is subject to be indicted for a nuisance.”<sup>9</sup> So that such a place may be a disorderly house, though persons outside are not disturbed, corrupted in their morals, or otherwise injured. Moreover, —

§ 1111. **Open House.** — If the doors of a house are practically open to the public, alluring the young and the unwary into it, to indulge in or witness any thing corrupting to their virtue or sobriety or general good morals, the keeper cannot excuse himself by alleging that the public are not disturbed. To avail himself of such an excuse, he must see that the doors are shut to the outer world while the corrupting practices are carried on.<sup>10</sup>

§ 1112. **Lucre.** — The keeping, to constitute the offence, need not be for lucre.<sup>11</sup>

<sup>1</sup> The State v. Webb, 25 Iowa, 235.

<sup>2</sup> The State v. Foley, 45 N. H. 466.  
The State v. Maxwell, 33 Conn. 259 ;  
ante, § 1088.

<sup>3</sup> Ante, § 1107.

<sup>4</sup> Ante, § 1077.

<sup>5</sup> Hunter v. Commonwealth, 2 S. & R.  
298 ; The State v. Mathews, 2 Dev. &  
Bat. 424. See United States v. Jourdain,  
4 Cranch C. C. 338 ; ante, § 1106, 1107.

<sup>6</sup> Ante, § 1077.

<sup>7</sup> Hunter v. Commonwealth, supra.

<sup>8</sup> Mains v. The State, 42 Ind. 327.

<sup>9</sup> The State v. Mathews, 2 Dev. &  
Bat. 424. See United States v. Colum-  
bus, 5 Cranch C. C. 304.

<sup>10</sup> See ante, § 1106, 1107.

<sup>11</sup> The State v. Bailey, 1 Fost. N. H.  
343 ; The State v. Williams, 1 Vroom,  
102 ; ante, § 1086. See The State v.  
Bertheol, 6 Blackf. 474.

§ 1113. *Tippling Shops*:—

**General Doctrine.**—Aside from statutory inhibitions, it is not a crime to sell intoxicating liquor.<sup>1</sup> But if one keeps a house or shop, open to the public, and there sells such liquor to persons generally, who come together, and, stimulated by it, or otherwise, make disturbance, or commit acts of immorality, or in any manner violate public decency and decorum, his place is a disorderly house, for which he is indictable.<sup>2</sup> And though he has a license to make the sales, it will not protect him on this charge.<sup>3</sup>

§ 1114. **Extent and Nature of Disorder.**—What degree of disorder the seller of liquor must permit to render himself indictable, or what conduct is within this principle, the cases do not clearly show. But—

**Lord's Day.**—Conduct allowed on Sundays may make the place disorderly, while the same conduct on other days would not;<sup>4</sup> because the Sabbath is set apart for religious observances, for quiet, and for repose. And,—

**Slaves formerly.**—During slavery, it was particularly reprehensible to draw together in this way congregations of slaves.<sup>5</sup> So—

<sup>1</sup> Ante, § 505.

<sup>2</sup> The State *v.* Thornton, Busbee, 252; Bloomhuff *v.* The State, 8 Blackf. 205; Smith *v.* Commonwealth, 6 B. Monr. 21; Wilson *v.* Commonwealth, 12 B. Monr. 2; The State *v.* Mullikin, 8 Blackf. 260; The State *v.* Bertheol, 6 Blackf. 474; United States *v.* Coulter, 1 Cranch C. C. 203; United States *v.* Prout, 1 Cranch C. C. 203; United States *v.* Lindsay, 1 Cranch C. C. 245; United States *v.* Columbus, 5 Cranch C. C. 304; United States *v.* Bede, 5 Cranch C. C. 305, note; United States *v.* Benner, 5 Cranch C. C. 347; United States *v.* Elder, 4 Cranch C. C. 507; Stephens *v.* Watson, 1 Salk. 45; The State *v.* Burchinal, 4 Harring. Del. 572; ante, § 318. See the civil case of Walker *v.* Brewster, Law Rep. 5 Eq. 25. And see post § 1146, note.

<sup>3</sup> United States *v.* Elder, 4 Cranch C. C. 507, in which Cranch, C. J., observed: "If the defendant had the most favorable license which the law allows, it could not have justified him in suffering idle, disorderly, suspicious, and drunken persons to meet together in and frequent his house; nor to suffer inhabi-

tants of this city, not being lodgers or boarders in his house, to remain there drinking and tippling, for his lucre and gain, at any time; and especially on Sundays." s. p. The State *v.* Mullikin, 8 Blackf. 260, the court saying: "The license to retail is not, in the eye of the law, a license to keep a nuisance." And in a Delaware case it was laid down, that, if one keeping a store and selling liquor, whether lawfully or unlawfully, permits persons to collect in his store or on the sidewalk, in crowds, and, under the influence of the liquor sold, to be noisy and riotous, and cursing and swearing, to the annoyance of the neighborhood, he is guilty of keeping a disorderly house. The State *v.* Buckley, 5 Harring. Del. 508.

<sup>4</sup> United States *v.* Columbus, 5 Cranch C. C. 304; United States *v.* Prout, 1 Cranch C. C. 203; United States *v.* Elder, 4 Cranch C. C. 507; Hall *v.* The State, 4 Harring. Del. 132, 145. And see The State *v.* Williams, 1 Vroom, 102.

<sup>5</sup> United States *v.* Prout, 1 Cranch C. C. 203; Smith *v.* Commonwealth, 6

§ 1115. **Dissolute Persons.** — A liquor-shop, around and within which dissolute persons are permitted, at night and in the day, to be drinking, tipping, carousing, swearing, hallooing, and the like, has been held to be, in a town, an indictable disorderly house at the common law.<sup>1</sup> And it is the same, though the proprietor of the shop has a license to sell the liquor.<sup>2</sup> Likewise, —

**Outside Disturbances.** — The keeper of a liquor shop who allows the promiscuous assembling about it of persons disturbing the quiet by loud noises, quarrelling, and swearing, as a consequence which he might know would probably follow his acts, is indictable.<sup>3</sup>

§ 1116. **Place Populous — On Highway — Other Circumstances.** — It is also to be considered whether many or few people reside near, whether the house is on or off a highway, and the like.<sup>4</sup> In fact, the legal result may depend upon complications of circumstances, such as cannot be analyzed in advance, while yet the skilful practitioner will have no difficulty in dealing with them.<sup>5</sup>

§ 1117. **Statutes.** — There are statutory tipping-shops, discussed in another connection.<sup>6</sup> Nor is the legislature prohibited by the constitutions of our States to make it an indictable nuisance to keep a shop for the selling of intoxicating drinks contrary to law.<sup>7</sup> But to discuss the statutes here would be a repeating of what is said elsewhere.<sup>8</sup>

§ 1118. *Disorderly Inns* : —

**In General.** — A common form of disorderly house is a disorderly

B. Monr. 21; *Wilson v. Commonwealth*, 12 B. Monr. 2. See also *The State v. Boyce*, 10 Ire. 536.

<sup>1</sup> *The State v. Bertheol*, 6 Blackf. 474. It is perceived that this is an early Indiana case; at present, there are no common-law offences in this State. Ante, § 35.

<sup>2</sup> *The State v. Mullikin*, 8 Blackf. 260; *Bloomhuff v. The State*, 8 Blackf. 205.

<sup>3</sup> *The State v. Thornton*, Busbee, 252. And see a series of cases decided in the District of Columbia; namely, *United States v. Prout*, 1 Cranch C. C. 203; *United State v. Coulter*, 1 Cranch C. C. 203; *United States v. Lindsay*, 1 Cranch C. C. 245; *United States v. Elder*, 4 Cranch C. C. 507; *United States v. Co-*

*lumbus*, 5 Cranch C. C. 304; *United States v. Bede*, 5 Cranch C. C. 305, note; *United States v. Benner*, 5 Cranch C. C. 347.

<sup>4</sup> Ante, § 1077, 1078, and the sections there referred to, and the cases there cited; also, ante, § 1109–1111.

<sup>5</sup> And see post, § 1119–1121.

<sup>6</sup> Stat. Crimes, § 1064–1070.

<sup>7</sup> *McLaughlin v. The State*, 45 Ind. 338; *Commonwealth v. Howe*, 13 Gray, 26; *The State v. Paul*, 5 R. I. 185; *The State v. Keeran*, 5 R. I. 497.

<sup>8</sup> And see *Commonwealth v. Gallagher*, 1 Allen, 592; *Wallace v. The State*, 5 Ind. 555; *Robinson v. Commonwealth*, 6 Dana, 287; *The State v. Hopkins*, 5 R. I. 53; *The State v. Knott*, 5 R. I. 293.

inn.<sup>1</sup> Said a learned judge: "The keeper of an inn, tavern, or house of entertainment, who conducts himself in such a manner — either in the entertainment of travellers or other persons, or in permitting improper assemblages in or about his house on Sunday — as profanes the Lord's day, or violates public order and decorum, or shocks the religious sense or feelings of the neighborhood, is guilty of a nuisance at common law; and may be indicted, fined, imprisoned, and his house suppressed; according to the aggravated nature or enormity of his offence."<sup>2</sup> A peculiarity relating to disorderly houses of this class is noticed in a preceding section.<sup>3</sup>

§ 1119. *House in which Offences are committed: —*

**Doctrine Stated.** — A doctrine, first developed, it appears, in the Kentucky court, is the following. Whenever a house becomes a common place for the commission of petty offences, such as those punishable by fine, this renders it disorderly, however well it may be otherwise conducted. The original case was an indictment against the keeper of an establishment wherein liquor was habitually sold to slaves, the particular sales being forbidden by law. "The habitual perpetration," said Ewing, C. J., "of the prohibited offences, in a house kept for the purpose, constitutes the house a public nuisance, as it tends in a greater degree to the spread of the evil which was intended to be prohibited by these enactments. There is a specific penalty for fornication and adultery; yet it is an offence, and a much higher grade of offence, to keep a bawdy-house, or a house where those practices are indulged. And, though the single offence may be punished by a specific fine, the keeping of a house where those offences are habitually encouraged and indulged, is an offence of a much higher grade, and is punishable, as such, by an indictment at common law."<sup>4</sup>

§ 1120. **The Principle.** — This doctrine, apparently new, is truly as old as the law itself. If one draws together persons to commit petty offences with him, and renders his house the place of the common commission of them by congregated numbers, surely

<sup>1</sup> Ante, § 504, 505. As to what is an inn, see Stat. Crimes, § 297. As to an innkeeper's refusing to entertain travellers, see ante, § 532.

<sup>2</sup> Booth, C. J., in *Hall v. The State*, 4 Harring. Del. 132, 145. And see *The*

*State v. Mathews*, 2 Dev. & Bat. 424; *Bloomhuff v. The State*, 8 Blackf. 205.

<sup>3</sup> Ante, § 1110.

<sup>4</sup> *Smith v. Commonwealth*, 6 B. Monr. 21, 23; *Wilson v. Commonwealth*, 12 B. Monr. 2.

this is to make a “disorderly” use of it, and it becomes a “disorderly house.” Such a house disturbs the neighborhood, corrupts the morals of the young, obstructs governmental order, and in other respects is an evil of the same sort with the more familiar forms of disorderly house. And whether the people assemble in a mass, or come one after another, only a single one or two presenting themselves at a time, the effect is the same, the offender’s guilt is the same. On this principle proceed many determinations in our books.<sup>1</sup> And —

**Judicially Affirmed.** — This doctrine, with this application of it, has been expressly affirmed in New Jersey.<sup>2</sup> But, —

§ 1121. **The Individual Acts.** — To bring a case within this principle, the acts done in the house must be either indictable, or, in some sense, unlawful. Therefore, —

**Delivery of Pregnant Women.** — In England, an indictment was quashed which alleged, that the defendant converted a house into a hospital for taking in and delivering lewd, idle, and disorderly unmarried women, “who, after their delivery, went away, and deserted their children, whereby the children became chargeable to the parish.” “By what law,” asked Lord Mansfield, “is it criminal to deliver a woman when she is with child?”<sup>3</sup>

<sup>1</sup> And see particularly Vol. II. § 965. 102, 110; *Meyer v. The State*, 13 Vroom,

<sup>2</sup> *The State v. Williams*, 1 Vroom, 145, 12 Vroom, 6.

<sup>3</sup> *Rex v. McDonald*, 3 Bur. 1645.

## CHAPTER LXIX.

EAVESDROPPING.<sup>1</sup>

§ 1122. **At Common Law.** — Eavesdropping is indictable at the common law, not only in England but in our States.<sup>2</sup> It is seldom brought to the attention of the courts, and our books contain too few decisions upon it to enable an author to define it with confidence. But with, at least, proximate accuracy, —

**How defined.** — It may be said to be the common nuisance of hanging about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood.

**More fully described.** — Our books contain nothing on this subject more full than Blackstone's short exposition; namely, that "eavesdroppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and punishable at the court leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior."<sup>3</sup> And it has been said in one of our courts, that the offence consists, not in peeping or looking, which is not indictable, but in hearking.<sup>4</sup>

§ 1123. **Listening about Grand Jury Room.** — The Tennessee court has held, that one who secretly and stealthily comes near the room of the grand jury, while in the performance of their duties, to overhear what they say and do, commits thereby this offence of eavesdropping.<sup>5</sup>

§ 1124. **Conclusion.** — It is impossible to discuss this offence further, with special profit; because we have not the necessary decisions. It never occupied much space in the law, and it has nearly faded from the legal horizon.

<sup>1</sup> For the pleading, practice, and evidence, see *Crim. Proced.* II. § 312, 313.

<sup>2</sup> *Ante*, § 540; *The State v. Williams*, 2 *Tenn.* 108.

<sup>3</sup> 4 *Bl. Com.* 168; 1 *Hawk. P. C. Curw. ed.* p. 695; 1 *Russ. Crimes*, 3d

*Eng. ed.* 327; 1 *Gab. Crim. Law*, 319. And see *ante*, § 544-549.

<sup>4</sup> *Commonwealth v. Lovett*, 4 *Pa. Law Jour. Rep.* 5, 6.

<sup>5</sup> *The State v. Pennington*, 3 *Head*, 299.



## CHAPTER LXX.

EXPOSURE OF PERSON.<sup>1</sup>

§ 1125. **How defined.** — Exposure of the person is any such intentional exhibition, in a public place, of the naked human body, as is calculated to shock the feelings of chastity in those who witness it, or to corrupt their morals.

**Viewed as Public Show.** — As judicially observed: “Every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law.”<sup>2</sup> Of which sort is exposure of the person.<sup>3</sup>

§ 1126. **Distinguished from other Nuisances.** — This nuisance differs from others in the particular, that, while others are of a nature to create a permanent inconvenience, or other permanent general injury, in the place where they are established, this one is of temporary operation, coming and going at once. Therefore, —

**Must be seen.** — Though other nuisances — for example, an obstruction in a highway — need not be seen to be indictable, this one must be. The authorities are not quite distinct or harmonious as to the extent to which it must be witnessed, or how liable to meet the public eye. They are as follows: —

§ 1127. **Continued.** — The Irish Court of Criminal Appeal has held it not to be indictable for a man to expose his person to one woman, though in a public way, unless there were other persons in a situation to see him; but the latter circumstance would complete the offence, even though they did not in fact witness what

<sup>1</sup> For matter relating to this title, see ante, § 244, 500. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 351 et seq.

<sup>2</sup> *Knowles v. The State*, 3 Day, 103, 108.

<sup>3</sup> In *The State v. Rose*, 32 Misso. 560, 561, Bay, J., observed: “The indictment in this case does not allege, in the words

of the statute, that the act of public indecency was open and notorious, and is therefore not good under the statute; but the offence charged is indictable at common law, for whatever outrages decency and is injurious to the public morals is a misdemeanor at common law, and punishable as such.”

was done.<sup>1</sup> Yet, in an English case, where a man and woman openly committed fornication together, on a common beside a public way, and one passer-by saw them, and others could have seen, but there was no evidence whether or not there were others in situations to see, the court was divided on the question whether the offence was complete, and no judgment was given.<sup>2</sup> Where the proof is simply, that the exhibition was privately made to one person, there is, the authorities concur, no offence.<sup>3</sup> The case of an exposure in the presence of multitudes of people, yet no one seeing it, could not arise; because there would be no witnesses to bring the facts before a court. In North Carolina, an indictment was held to be sufficient which simply alleged, that the defendant exposed his person in "public view in a public place;" the court observing: "It is not necessary to the constitution of the criminal act, that the disgusting exhibition should have been actually seen by the public; it is enough if the circumstances under which it was obtruded were such as to render it probable that it would be publicly seen; thereby endangering a shock to modest feeling, and manifesting a contempt for the laws of decency."<sup>4</sup> Still this case could not have arisen if the fact had not been seen. Moreover, —

§ 1128. **Public Place.** — A strictly private exhibition is not indictable; it must be, certainly according to the English doctrine, in a public place.<sup>5</sup> What is a "public place" under our statutes against gaming, we saw in "Statutory Crimes."<sup>6</sup> In the offence now under consideration, the English courts have held that a public omnibus is such a place, an exposure in which is indictable.<sup>7</sup> So may be a urinal, on a public foot-path, exposed to sight from the windows of dwelling-houses fourteen and a half feet away.<sup>8</sup> And where a man exposed himself from the roof of

<sup>1</sup> Reg. v. Farrell, 9 Cox C. C. 446. And see ante, § 244.

<sup>2</sup> Reg. v. Elliot, Leigh & C. 103.

<sup>3</sup> See, among other cases, Reg. v. Webb, 1 Den. C. C. 333, 2 Car. & K. 933, Temp. & M. 23, 13 Jur. 42, 18 Law J. n. s. M. C. 39; Reg. v. Watson, 20 Eng. L. & Eq. 599, 2 Cox C. C. 376.

<sup>4</sup> The State v. Roper, 1 Dev. & Bat. 208, opinion by Gaston, J. See also The State v. Millard, 18 Vt. 574.

<sup>5</sup> Reg. v. Orchard, 3 Cox C. C. 248, 20 Eng. L. & Eq. 598; Reg. v. Holmes,

Dears. 207, 3 Car. & K. 360, 20 Eng. L. & Eq. 597, 22 Law J. n. s. M. C. 122, 17 Jur. 562; Reg. v. Thallman, Leigh & C. 326.

<sup>6</sup> Stat. Crimes, § 298, 878.

<sup>7</sup> Reg. v. Holmes, supra.

<sup>8</sup> Reg. v. Harris, Law Rep. 1 C. C. 282. Said Bovill, C. J., in an opinion in which the other judges concurred: "If the judge was bound to tell the jury that a urinal could not be such a place, of course the conviction was wrong and must be set aside, but not otherwise. Now, it appears

a house, so situated that he could be seen and was seen by persons at the back windows of several other houses, yet he was not visible from the street, the place was held to be public within the import of this branch of the law, and the conviction was sustained.<sup>1</sup>

§ 1129. *Continued.* — In New York, where six women made an indecent exposure of their persons for hire, in the presence of five men, in a room in a house of prostitution, the doors, windows, and shutters being closed, the place was held to be public, subjecting the women to punishment for the exposure.<sup>2</sup> But, —

*Continued — (To how Many).* — There are American cases in which it appears not to have been deemed always necessary that the place should be public, or that the exposure should be to more than one. In Vermont, a statute provided a punishment “if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior;” and thereupon an indecent exposure, by a man, of his person to a woman whom he solicited to acts of sexual intercourse, persisting in the solicitation in spite of her denial and remonstrance, was held to be within the statute. The learned judge who delivered the opinion said: “I am not prepared to say, that the conduct of the respondent would not have been indictable at common law, notwithstanding the intimation to the contrary in the case of *Fowler v. The State*.<sup>3</sup> There is a precedent of an indictment against one Bennett, in 2 Chitty, 41, on which he was convicted,

that the urinal was open to the public; that it was in Hyde Park, upon a public foot-path; and that the entrance to it was from that foot-path. I think it was just as much a public place, with respect to that portion of the public who use it, as a public highway. Every place must be more or less screened from view on some side, and the size of an enclosure does not necessarily affect the question whether it is a public place or not. We are only bound to decide whether this could be a public place. But I think it clearly was so; and just the sort of public place to which the law ought to be applied.” p. 283. In *Reg. v. Orchard*, *supra*, before the Central Criminal Court, a urinal situated in an open market, with boxes or divisions for the convenience of

the public, was deemed not to be a public place, at which this offence could be committed; but this ruling seemed not to meet with favor in *Reg. v. Harris*, before the Court of Criminal Appeal.

<sup>1</sup> *Reg. v. Thallman*, *supra*. The reporter observes: “This case somewhat resembles *Rex v. Crunden*, 2 Camp. 89, in which it was held that it is an indictable offence for a man to undress himself on the beach, and to bathe in the sea, near inhabited houses, from which he may be distinctly seen.” p. 329, note. Of a like sort with *Rex v. Crunden*, is *Reg. v. Reed*, 12 Cox C. C. 1, 2 Eng. Rep. 157. And see post, § 1131.

<sup>2</sup> *People v. Bixby*, 4 Hud, 636.

<sup>3</sup> *Fowler v. The State*, 5 Day, 81.

which would have been sustained by the same evidence produced against this respondent. Of the soundness of the decision in *Commonwealth v. Catlin*,<sup>1</sup> we have nothing to say,—and only remark, that, in that case, the lewdness was designed to be private, and it was rather accidental that the offenders were discovered; and, in this particular, the case is essentially different from the one before us.”<sup>2</sup> And in Pennsylvania it was decided, that the exhibition of an obscene print need not be public to be indictable; for “an offence may be punishable, if, in its nature and by its example, it tends to the corruption of morals, although it be not committed in public.”<sup>3</sup>

§ 1130. **How in Principle.**—In principle, the offence being a nuisance, punishable because injurious to the public, the place should, as a general rule, be public, or the act will be only a private nuisance. Yet a place not permanently public may be so for the occasion.<sup>4</sup> No reasons are apparent rendering it universally necessary that the exhibition should be seen; provided it was publicly made, in the presence of people who could see it, and was meant for their observation. Still the intent to have it seen could not, as before observed, be shown where no person was present to see. And one might innocently do, in a very public place, having ascertained to his satisfaction that no persons were actually present, what he would never do in any place before the eyes of a crowd. When a man puts into the public way or other public place some nuisance without intelligence, and leaves it there, the evil intent springs up in proof out of the fact itself; not so, in respect of the misdemeanor now under discussion.

§ 1131. **Custom of Exposure.**—We have seen,<sup>5</sup> that the right to carry on a public nuisance cannot be prescribed for, or established by usage. If the place has always been used for bathing, yet it is upon a public footway frequented by females, men cannot innocently make there the exposure of their nude bodies necessary for the bath, unprotected by screen or covering.<sup>6</sup> And, where one was indicted for an exposure by bathing in the sea,

<sup>1</sup> *Commonwealth v. Catlin*, 1 Mass. 8.

<sup>4</sup> Stat. Crimes, § 298.

<sup>2</sup> *The State v. Millard*, 18 Vt. 574,  
opinion by Williams, C. J.

<sup>5</sup> Ante, § 1078 a.

<sup>3</sup> *Commonwealth v. Sharpless*, 2 S. Eng. Rep. 157.  
& R. 91.

<sup>6</sup> *Reg. v. Reed*, 12 Cox C. C. 1, 2

observable from windows of dwelling-houses, he was not permitted the defence, that, before the houses were built, it was a bathing-place for whole regiments of soldiers. "Whatever place," said McDonald, C. B., "becomes the habitation of civilized man, there the laws of decency must be enforced."<sup>1</sup>

§ 1132. **How Much and what Part Exposed.** — How large a part, and what part, other than the privates of the person, must be exposed to constitute the offence, the cases do not disclose. Ordinarily the exposure is merely of the private member, and this is sufficient. The same follows, where the exposure is of the entire naked body.<sup>2</sup> In an old case, an indictment, says the report, "for running in the common way, naked down to the waist, the defendant being a woman," was quashed; the recorded observation of the court being, that "nothing appears immodest or unlawful."<sup>3</sup> But we should hesitate to say, that a common woman could go thus through a principal street in one of our cities, without subjecting herself to this prosecution.<sup>4</sup>

§ 1133. **Intent.** — The exposure must plainly be other than accidental, as already observed;<sup>5</sup> and a New York case holds, that the evil purpose must be alleged in the indictment, and proved as a fact to the jury.<sup>6</sup>

§ 1134. "**Public Indecency.**" — A statute in Indiana having made indictable "notorious lewdness or other public indecency," it was observed: "The term *public indecency* has no fixed legal meaning, is vague and indefinite, and cannot in itself imply a definite offence. And hence, the courts, by a kind of judicial

<sup>1</sup> Rex v. Crunden, 2 Camp. 89, 1 Russ. Crimes, 3d Eng. ed. 326; s. c. nom. Rex v. Cranden, 1 Gab. Crim. Law, 744, 745.

<sup>2</sup> Rex v. Sedley, 17 Howell St. Tr. 155, note; s. c. nom. Rex v. Sidley, 1 Sid. 168; s. c. nom. Sydlyes Case, 1 Keb. 620; Rex v. Crunden, 2 Camp. 89.

<sup>3</sup> Rex v. Gallard, W. Kel. 163.

<sup>4</sup> So it seems that, according to the old books, a *man* is not punishable for passing through a thronged public way, stripped merely to the waist. Rex v. Tallard, 2 Barn. 328, 345. The counsel for the defendant argued in this case, "that a man's being stripped from the middle upwards could be no indecent sight. If it was so, the legislature would

not have ordered that men shall be whipped in that manner, as they have done by several acts of Parliament. The court was of the same opinion," and quashed the indictment. s. c. nom. Rex v. Gallard, 1 Sess. Cas. 231. I apprehend, that, at the present day, a court should apply, not the outward shell of the old rule to subvert the modern manners, but its inner substance for sustaining and perfecting the new. Such, in many instances, is the proper use to be made of cases from the old books, decided when modes and fashions of life now antiquated prevailed.

<sup>5</sup> Ante, § 1126, 1130.

<sup>6</sup> Miller v. People, 5 Barb. 203.

legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person; the publication, sale, or exhibition of obscene books and prints; or the exhibition of a monster,—acts which have a direct bearing on public morals, and affect the body of society.”<sup>1</sup>

<sup>1</sup> *McJunkins v. The State*, 10 Ind. 140, 145; opinion by Hanna, J.

## CHAPTER LXXI.

GAMING-HOUSE.<sup>1</sup>

§ 1135. **Indictable and why.**—Simple gaming, and no more, is not generally, at the common law, indictable; though, in most of our States, it is, in some circumstances, by statutes.<sup>2</sup> But, even at the common law, a common gaming-house may be a public nuisance, and the keeper punishable, it being deemed a disorderly house.<sup>3</sup> And the reason is, that persons attracted to it, especially youths, are there lured to vice.<sup>4</sup>

<sup>1</sup> For matter relating to this title, see ante, § 504, 974, 975. For the pleading, practice, and evidence, see *Crim. Proced.* II. § 487 et seq.

<sup>2</sup> *Stat. Crimes*, § 846 et seq.

<sup>3</sup> Ante, § 504; *Bloomhuff v. The State*, 8 Blackf. 205; *The State v. Haines*, 30 Maine, 65; *United States v. Dixon*, 4 Cranch C. C. 107; *The State v. Doon*, R. M. Charl. 1; *Barada v. The State*, 13 Misso. 94; *Vanderworker v. The State*, 8 Eng. 700; *Rex v. Medlor*, 2 Show. 36; *The State v. Savannah*, T. U. P. Charl. 235; *Rex v. Dixon*, 10 Mod. 335, 336; *People v. Jackson*, 3 Denio, 101; *West v. Commonwealth*, 3 J. J. Mar. 641; *People v. Sergeant*, 8 Cow. 139; *Commonwealth v. Tilton*, 8 Met. 232, 235; *People v. Raynes*, 3 Cal. 366. The same has been held, on great consideration, in Scotland. *Greenhuff's Case*, 2 Swinton, 236.

<sup>4</sup> 1 Hawk. P. C. Curw. ed. p. 693, § 6; *Vanderworker v. The State*, 8 Eng. 700; *The State v. Doon*, R. M. Charl. 1; *United States v. Dixon*, 4 Cranch C. C. 107; *Commonwealth v. Stahl*, 7 Allen, 304; *Lord v. The State*, 16 N. H. 325. In an old case, we read: "It is a public nuisance, not for the unlawfulness of the thing itself, but for keeping houses to decoy idle persons

and apprentices, and consequently it becomes a means of debauching the youth of the nation; it must be done for lucre's sake [no, post, § 1137]; it must be done often, and not once only." *Rex v. Medlor*, 2 Show. 36. "It draws together evil disposed persons; encourages excessive gaming, idleness, cheating, and other corrupt practices; and tends to public disorder." *Bronson, C. J.*, in *People v. Jackson*, 3 Denio, 101. "The hurt or injury to the community, which has occasioned bowling-alleys kept for gain and common use to be regarded as common nuisances, arises from their tendency to withdraw the young and inconsiderate from any useful employment of their time, and to subject them to various temptations; from their affording to the idle and dissolute encouragement to continue in their destructive courses. Clerks, apprentices, and others are induced, not only to appropriate to them hours which should be employed to increase their knowledge and reform their hearts, but too often to violate higher moral duties to obtain means to pay for the indulgence. Other bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular, and industrious habits, which are the basis of a prosperous and happy community, are

§ 1136. **Quiet Billiard-room and Bowling-alley.** — In a New York case it seems to have been laid down, that keeping a billiard-room, without noise disturbing the neighborhood, does not come within this description of offence.<sup>1</sup> But the reader need only consult the authorities cited to the last section to see, that this is not the general doctrine; for youth may be as effectually lured to vice by a noiseless process as by any other. A bowling-alley is as harmless as a billiard-table; yet the doctrine appears to be, that even a common bowling-alley is a nuisance indictable.<sup>2</sup>

§ 1137. **How Public.** — To constitute a common gaming-house, not all persons need have access to it; if it is open to people generally, that is sufficient.<sup>3</sup>

**Lucre.** — The language of some of the cases implies, that the house must be kept for lucre;<sup>4</sup> but we have seen,<sup>5</sup> that, by the better doctrine, the motive of lucre is not a necessary ingredient in this class of offences. And —

**Ownership.** — It is immaterial whether the keeper of the house is the owner of the building or not.<sup>6</sup>

frequently impaired or destroyed. Bowling-alleys, without doubt, may be resorted to by many persons without such injurious results. The inquiry is, not what may be done at such places without injury to persons of fixed habits and principles, but what has been, in the experience of man, their general tendency and result. The law notices the usual effect, the ordinary result of a pursuit or course of conduct, and by that decides upon its character." Shepley, C. J., in *The State v. Haines*, 30 Maine, 65. "Such a house is an encouragement to idleness, cheating, and other corrupt practices; tends to produce public disorder by congregating many people; and to draw the young and unwary from the paths of virtue. A disorderly house is a nuisance, if the persons there assembled annoy the neighborhood by loud noises, cursing, or swearing; a gaming-house is also a nuisance, if it hold out inducements and attractions to bring together persons in such numbers, or so often, as to make it injurious to the public, and dangerous to the neighborhood, by drawing the sober and industrious into habits of idleness and vice, and corrupting the young and unwary."

*Harrington, J.*, in *The State v. Layman*, 5 Harring. Del. 510.

<sup>1</sup> *People v. Sergeant*, 8 Cow. 139. But see *The State v. Layman*, 5 Harring. Del. 510.

<sup>2</sup> *The State v. Haines*, 30 Maine, 65. But there seems to have been a statute on the subject. *The State v. Currier*, 23 Maine, 43. In New Jersey, a ten-pin alley, kept for gain in a populous village, and open to public use, is not deemed *per se* a disorderly house, or public nuisance. Nor does the fact of its being kept in connection with a lager-beer saloon make it such. *The State v. Hall*, 3 Vroom, 158. And see, as to billiards, 3 Chit. Crim. Law, 677.

<sup>3</sup> *Rice v. The State*, 10 Texas, 545; *Lockhart v. The State*, 10 Texas, 275.

<sup>4</sup> *Rex v. Medlor*, 2 Show. 36; ante, § 1135, note; *The State v. Layman*, 5 Harring. Del. 510. See *The State v. Leighton*, 3 Fost. N. H. 167; *Bloomhuff v. The State*, 8 Blackf. 205; *The State v. Haines*, 30 Maine, 65; *Commonwealth v. Tilton*, 8 Met. 232, 235.

<sup>5</sup> Ante, § 1086, 1112.

<sup>6</sup> *The State v. Haines*, 30 Maine, 65. See *The State v. Currier*, 23 Maine, 43.



**Extent of Gaming.** — What extent of gaming is requisite depends perhaps on familiar principles, but they are not much illustrated by decisions.<sup>1</sup>

**Misdemeanor.** — This offence is misdemeanor.<sup>2</sup>

<sup>1</sup> According to an Indiana case, the jury are to determine whether the fact of the defendant's permitting, in a single instance, a game of roulette in his house, is sufficient evidence that he kept a gaming-house. Said the court: "The question before the jury was, whether the defendant occupied the room for gambling.

That was purely a question of fact. If the defendant did so occupy his room, then the law said he should be fined."

<sup>2</sup> Ante, § 1079; *The State v. Crummev*, 17 Minn. 72; *People v. Raynes*, 3 Cal. 386; *Buford v. Commonwealth*, 14 B. Monr. 24.

## CHAPTER LXXII.

OFFENSIVE TRADES.<sup>1</sup>

§ 1138. **Indictable and Why.** — The carrying on of offensive trades, in populous places, is indictable as injuring the public health,<sup>2</sup> also as a disturbance to the public convenience.<sup>3</sup> Both of these grounds need not exist together; but, —

**Noise — Smell — Health.** — If the senses, for instance, are offended by the smell,<sup>4</sup> or by the noise,<sup>5</sup> this is sufficient. There is no need the offensiveness should produce disease.<sup>6</sup>

**How many injured.** — How many persons must be put to inconvenience, or be injured, to render the nuisance indictable, is a question already discussed.<sup>7</sup>

§ 1139. **Useful Trades and Pleasant Homes.** — The community is as much benefited by its members carrying on useful trades, as by their having pleasant homes. And from this proposition comes another, generally but not universally accepted; namely, that, —

**Business established before Houses.** — Whenever a man has established himself, remote from habitations, in a business which is lawful, and is useful to the community, those who afterward settle near him are not entitled to complain of its offensiveness, and he is not indictable for continuing it.<sup>8</sup> Even if, after the

<sup>1</sup> For the pleading, practice, and evidence, see *Crim. Proced.* II. § 875-877.

<sup>2</sup> *Ante*, § 489 et seq.

<sup>3</sup> *Ante*, § 530 et seq.

<sup>4</sup> *Rex v. Neil*, 2 Car. & P. 485; *Rex v. White*, 1 Bur. 333; *Rex v. Pierce*, 2 Show. 327; *Commonwealth v. Brown*, 13 Met. 365; *The State v. Wetherall*, 5 Harring. Del. 487. And see *Aldred's Case*, 9 Co. 57 b; *People v. Cunningham*, 1 Denio, 524; *Rex v. Davey*, 5 Esp. 217.

<sup>5</sup> Anonymous, stated 2 Show. 327. See *The State v. Riggs*, 22 Vt. 321; *Commonwealth v. Smith*, 6 Cush. 80; *Rex v. Smith*, 1 Stra. 704; *Commonwealth v. Harris*, 101 Mass. 29; *The State v. Russell*, 1 Houst.

*Crim.* 122; *Sturges v. Bridgman*, 11 Ch. D. 852; *ante*, § 531, 537.

<sup>6</sup> *Ashbrook v. Commonwealth*, 1 Bush, 139. **Livery Stable.** — In a Texas civil case, it was laid down that a livery stable in a town is not necessarily a nuisance; but it may be so located, constructed, or kept, as to be such. And *Wheeler, J.*, said: "What constitutes a nuisance is well defined. The word means, literally, annoyance; in law, it signifies, according to Blackstone, 'any thing that worketh hurt, inconvenience, or damage.'" *Burditt v. Swenson*, 17 Texas, 489, 502.

<sup>7</sup> *Ante*, § 243-245, 1077, 1078.

<sup>8</sup> *Ellis v. The State*, 7 Blackf. 534; *Rex v. Cross*, 2 Car. & P. 483. *Gun-*

coming of inhabitants, he makes in the form of it slight changes, so as to vary a little its noxious character but not increase it in degree, he may still, it seems, rely on his prior occupancy of the place. And his acquired rights will pass to his successors.<sup>1</sup> According to an English *nisi prius* ruling, a man may set up a new manufactory in the neighborhood of old ones, if the new, though noxious, does not materially enhance the discomfort of persons dwelling near.<sup>2</sup> Where it increases the mischief, the result is otherwise.<sup>3</sup> But without a prior occupancy, the right to carry on an offensive trade cannot be acquired by prescription,<sup>4</sup> — a proposition a little weakened by some English cases.<sup>5</sup> And —

§ 1140. **Limited to Useful Trades.** — This doctrine is limited to useful trades ; for, as we have seen,<sup>6</sup> it is, in general, no excuse for one who commits a nuisance to-day that he did the same thing yesterday. Even, as we have also seen,<sup>7</sup> nude bathing in the sea, after inhabitants come to the place, is not justified by a custom of bathing there before. The distinction rests on the difference between a necessary trade and a mere innocent recreation. And it suggests another ; namely, between such trade and an immoral business, — the latter clearly not being protected by any prior occupancy of the ground. But, —

§ 1141. **Business before Houses, continued.** — In some American cases, it is even denied that a man may carry on any trade, however useful, and however long established, after the coming of inhabitants to the locality, if it is such as would otherwise be an

**powder.** — Where one was indicted for the nuisance of keeping several barrels of gunpowder in a house in a village, sometimes for two days, sometimes a week, till they could be conveniently sent to London, "Holt, C. J., resolved: First, that, to support this indictment, there must be apparent danger, or mischief already done. Secondly, though it had been done for fifty or sixty years, yet, if it be a nuisance, time will not make it lawful. Thirdly, if, at the time of setting up this house in which the powder was kept, there had been no houses near enough to be prejudiced by it, but some were built since, it would be at the peril of the builder. Fourthly, though gunpowder be a necessary thing, and for defence of the kingdom, yet, if

it be kept in such a place as it is dangerous to the inhabitants or passengers, it will be a nuisance." Anonymous, 12 Mod. 342.

<sup>1</sup> I do not see any case exactly covering the points in the last two sentences ; but they are within the doctrine of the cases cited in the next two notes.

<sup>2</sup> Rex v. Neville, Peake, 91.

<sup>3</sup> Rex v. Watts, Moody & M. 281.

<sup>4</sup> People v. Cunningham, 1 Denio, 524 ; Wright v. Moore, 38 Ala. 593. See Ashbrook v. Commonwealth, 1 Bush, 139.

<sup>5</sup> Rex v. Watts, Moody & M. 281 ; Rex v. Neville, Peake, 91, 98.

<sup>6</sup> Ante, § 1078 a.

<sup>7</sup> Ante, § 1131.

indictable nuisance. Thus, in Massachusetts, one was held to be rightly convicted of the nuisance of a slaughter-house, originally erected remote from the public way and from habitations; but afterward inhabitants settled in the place, and a public highway was laid out by the slaughter-house. It is submitted, that, on principle, the coming of inhabitants would not alone have justified the declaring of the slaughter-house a nuisance. The reason is, that men must eat, as well as breathe and exercise the sense of smell; and, after one has made lawful and proper arrangements to supply his fellow-beings with food, others cannot justly say to him, "We will set ourselves down by your side, and you shall no more carry on your business of supplying our wants." Yet clearly, proceeding to another point in the case, the legislature has authority so to control public industry as to prevent any one man's interfering with the industry of others, or with their comfort.<sup>1</sup> And if the legislature, or a subordinate power acting under legislative authority, causes a highway to be laid out, the result implies a legislative direction for the removal of all nuisances along the way. The judge, delivering the opinion of the court in this case, held the following language: "The public health, the welfare, and safety of the community, are matters of paramount importance, to which all the pursuits, occupations, and employments of individuals, inconsistent with their preservation, must yield. It is therefore immaterial, so far as the government is concerned in the administration of the law for the general welfare, how long a noxious practice may have prevailed, or illegal acts been persisted in. [This is true; but the doctrine which permits the continuance of the business, correctly viewed, does not rest on the idea of a prescription, or on any supposed right of a man to do for the one hundredth or one millionth time an illegal act, because permitted to go unpunished before.] Easements may be created in lands, and the rights of individuals may be wholly changed by adverse use and enjoyment, if it is sufficiently protracted; but lapse of time does not equally affect the rights of the State."<sup>2</sup> In harmony with this doctrine, it is held in Kentucky, that the carrying on of an offensive business for more than thirty years, in a place remote from dwellings and public roads,

<sup>1</sup> And see post, § 1144.

also *Brady v. Weeks*, 3 Barb. 157;

<sup>2</sup> *Commonwealth v. Upton*, 6 Gray, 473, 476, opinion by Merrick, J. See *Howell v. McCoy*, 3 Rawle, 256.

does not authorize the owner to continue it after houses have been built and roads laid out in the vicinity, if it is then found to be a nuisance to those dwelling in the neighborhood and to passers-by.<sup>1</sup> And there are some other American cases to the like effect.<sup>2</sup>

§ 1142. **What Trades are Nuisances.** We sometimes read in the books, that such a trade is, or is not, a nuisance *per se*.<sup>3</sup> Now, in reason, no useful trade can be a nuisance *per se*; because every such trade must be carried on somewhere, and it is a nuisance or not according to the manner in which it is conducted, and its proximity to habitations and public ways. And no one can foretell what means may yet be found to conduct a business now offensive in a manner not to be so. But let us look at some views supplied by the books. Thus, —

**Brewer — Chandler.** — Hawkins says: “It hath been holden, that it is no common nuisance to make candles in a town,<sup>4</sup> because the needfulness of them shall dispense with the noisomeness of the smell. But the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town: and surely the trade of a brewer is as necessary as that of a chandler; and yet it seems to be agreed, that a brew-house, erected in such an inconvenient place wherein the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so, in the like case, may a glass-house, or swine-yard.”<sup>5</sup>

§ 1143. **Other Specific Nuisances.** — Among other nuisances, or things which may be such, are a lime-kiln,<sup>6</sup> a manufactory of acid

<sup>1</sup> *Ashbrook v. Commonwealth*, 1 Bush, 139.

<sup>2</sup> *Taylor v. People*, 6 Parker C. C. 347; *Commonwealth v. Van Sickle*, Brightly, 69; *Philadelphia's Appeal*, 28 Smith, Pa. 33; *Douglass v. The State*, 4 Wis. 387; *Pettis v. Johnson*, 56 Ind. 139.

<sup>3</sup> As, see, *Huckenstine's Appeal*, 20 Smith, Pa. 102; *The State v. Trenton*, 7 Vroom, 283; *Wier's Appeal*, 24 Smith, Pa. 230; *Commonwealth v. Van Sickle*, Brightly, 69; *Fairbanks v. Kerr*, 20 Smith, Pa. 86; *Waupun v. Moore*, 34 Wis. 450.

<sup>4</sup> *s. p. Allen v. The State*, 34 Texas, 230.

<sup>5</sup> 1 Hawk. P. C. Curw. ed. p. 694, § 10. In a civil case it was held, that the erection of a tallow furnace, by a chandler, to the annoyance of an innkeeper and his guests, is a nuisance for which an action will lie. “And so,” added the court, “in *Taohyles's Case*, who erected a tallow furnace across the street of Denmark-house in the Strand, it was found a nuisance upon the indictment, and adjudged to be removed.” *Morley v. Pragnell*, Cro. Car. 510.

<sup>6</sup> *Aldred's Case*, 9 Co. 57 b.

spirit of sulphur,<sup>1</sup> a soap-boiling establishment,<sup>2</sup> one for the rendering of petroleum,<sup>3</sup> a livery stable,<sup>4</sup> a pig-sty,<sup>5</sup> a slaughter-house,<sup>6</sup> a tannery,<sup>7</sup> brick-burning,<sup>8</sup> and keeping a dairy.<sup>9</sup> Yet the criterion is not, what business is carried on; but what is its effect, as creating a nuisance or otherwise.

§ 1144. **Legislation.**—It is competent, as already intimated, for a legislative act to regulate, directly or indirectly, whatever pertains to indictable nuisances.<sup>10</sup> For example, it may prohibit the use of any building, in a town of a specified population, as a slaughter-house, without permission from the town officers.<sup>11</sup> And where it has authorized a citizen to establish a dam of a specified height, at a place named, he is not liable to an indictment for any nuisance thereby created.<sup>12</sup> So works of internal improvement, erected under legislative act by the State, do not become public nuisances in law, whatever may be their character or consequences in fact; nor is it otherwise though they are transferred to a private corporation, obligated to keep the works up for the purposes of their creation.<sup>13</sup> For the State cannot complain of what it authorizes by its statute.<sup>14</sup>

<sup>1</sup> *Rex v. White*, 1 Bur. 333.

<sup>2</sup> *Rex v. Pierce*, 2 Show. 327. As to a blacksmith's shop in a village, see *Ray v. Lynes*, 10 Ala. 63.

<sup>3</sup> *Commonwealth v. Kidder*, 107 Mass. 188.

<sup>4</sup> Ante, § 1138, note.

<sup>5</sup> *Commonwealth v. Van Sickle*, Brightly, 69.

<sup>6</sup> Ante, § 1141; post, § 1144; *Phillips v. The State*, 7 Baxter, 151.

<sup>7</sup> *The State v. Trenton*, 7 Vroom, 283.

<sup>8</sup> *Huckenstine's Appeal*, 20 Smith, Pa. 102.

<sup>9</sup> *The State v. Boll*, 59 Misso. 321.

<sup>10</sup> Ante, § 1141; Stat. Crimes, § 1059 et seq.; *McLaughlin v. The State*, 45 Ind. 338; *Mobile, &c. Railroad v. The State*, 51 Missis. 137; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191; *The State v. Fisher*, 52 Misso. 174; *Blydenburgh v. Miles*, 39

Conn. 484; *Commonwealth v. Kidder*, 107 Mass. 388; *Ex parte Ah Fook*, 49 Cal. 402; *The State v. Williams*, 11 S. C. 288; *Sugar Refining Co. v. Jersey City*, 11 C. E. Green, 247; *Davis v. The State*, 2 Texas Ap. 425.

<sup>11</sup> *Watertown v. Mayo*, 109 Mass. 315. And see *Taylor v. The State*, 35 Wis. 298.

<sup>12</sup> *Stoughton v. The State*, 5 Wis. 291; one judge dissenting, on the ground that the statute should not be construed to authorize the nuisance, but merely the erection of the dam as far as possible without becoming such.

<sup>13</sup> *Commonwealth v. Reed*, 10 Casey, Pa. 275. See *Delaware Division Canal v. Commonwealth*, 10 Smith, Pa. 367.

<sup>14</sup> *People v. Detroit, &c. Plank Road*, 37 Mich. 195; *The State v. Davenport, &c. Railway*, 47 Iowa, 507.

## CHAPTER LXXIII.

PUBLIC SHOWS.<sup>1</sup>

§ 1145. **What, and Indictable.** — It already sufficiently appears, that any public exhibition tending to corrupt the morals, or to disturb the peace, or to create any breach of the good order of the community, is, if adequate in magnitude, indictable at the common law.<sup>2</sup> Thus, —

§ 1146. **Collecting Crowd — (Effigies or Pictures at Windows).** — It has been laid down in England, that, if one having a house on a street exhibits effigies at his windows, attracting a crowd, and thereby causing the footway to be obstructed, he commits an indictable nuisance, even though the effigies should not be libellous.<sup>3</sup> If the exhibition is libellous as being obscene, offensive, or

<sup>1</sup> For the procedure relating to this title, see *Crim. Proced.* II. § 865.

<sup>2</sup> *Ante*, § 500, 504; *Rex v. Bradford*, *Comb.* 304; *Hall's Case*, 1 *Mod.* 76.

<sup>3</sup> *Rex v. Carlile*, 6 *Car. & P.* 636. The general doctrine is well discussed in a civil case, which, according to the reporter's head-note, is as follows: "The collection of a crowd of noisy and disorderly people, to the annoyance of the neighborhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance for which the giver is liable to an injunction; even though he has excluded all improper characters from the grounds, and the amusements within the grounds have been conducted in an orderly way, to the satisfaction of the police." *Walker v. Brewster*, *Law Rep.* 5 *Eq.* 25. As I understand it, the doctrine is, also, that an indictment would lie in a case like this. And see *ante*, § 1074–1076. Said *Sir W. Page Wood*, *V. C.*: "Common

sense must be used with reference to transactions of this kind. If persons use their houses for the enjoyment of life, and one of the ordinary enjoyments of life is supposed to be the occasional entertainment of one's friends at a rout, it would be very difficult for any one complaining of the noise and inconvenience caused by a rout to obtain an indictment at law, still more so, I apprehend, to persuade this court to interfere. At all events, that differs altogether from a case like this, where the defendant makes a business and a profit by giving entertainments, which are carried on so as to induce this crowd of idle people to collect in large numbers to the annoyance of the plaintiff. In this respect, the language of Lord Tenterden in *Rex v. Moore*, 3 *B. & Ad.* 184, is applicable to the present case: 'The defendant asks us to allow him to make a profit to the annoyance of all his neighbors. . . . If a person collects together a crowd of peo-

disgusting, — for example, the picture of a man naked to the waist and covered with eruptive sores, — it is punishable without regard to the collecting of any crowd.<sup>1</sup> Thus, —

**Obscene Pictures.** — The exhibition of obscene pictures is a common-law nuisance.<sup>2</sup>

**In General.** — The entire doctrine of this chapter is closely related to the subject of obscene libel. It is not very important to preserve the distinction. These illustrations cover only a fragment of what might be treated of under this title.

§ 1147. *Statutory Provisions* : —

**Puppet Shows, &c.** — In aid of the common law, it is provided by statute in New York, that “no person shall exhibit or perform for gain or profit any puppet show, any wire or rope dance, or any other idle shows, acts, or feats, which common showmen, mountebanks, or jugglers usually practise or perform,” &c.; and it was held by the majority of one of the courts, that this statute is violated by white persons appearing in public, dressed as negroes, singing negro songs, and doing pretended feats as physiologists and mesmerizers and the like.<sup>3</sup>

§ 1148. **Shows, Amusements, &c. — Dancing-school.** — A statute in Massachusetts made it indictable to set up, without license, “public shows, public amusements, and exhibitions of every description, to which admission is obtained upon payment of money, or the delivery of any valuable thing, or by any ticket, or voucher obtained for money or any valuable thing.”<sup>4</sup> And the court deemed it not applicable to a school for teaching dancing, admission to which was obtained by a payment of money for each evening.<sup>5</sup>

§ 1149. **Theatrical Exhibitions.** — It being provided in Vermont, that, “if any company of players or persons whatever shall ex-

ple, to the annoyance of his neighbors, that is a nuisance for which he is answerable.’ There the nuisance complained of was the trampling of grass and destruction of fences.” p. 33. **Making Speech.** — The making of a speech in the street is not *per se* a nuisance. *Fairbanks v. Kerr*, 20 Smith, Pa. 86.

<sup>1</sup> *Reg. v. Grey*, 4 Fost. & F. 73. And see *Reg. v. Saunders*, 1 Q. B. D. 15, 19, 13 Cox C. C. 118.

<sup>2</sup> *Willis v. Warren*, 1 Hilton, 590.

<sup>3</sup> *Thurber v. Sharp*, 13 Barb. 627.

<sup>4</sup> Stat. 1849, c. 231.

<sup>5</sup> *Commonwealth v. Gee*, 6 Cush. 174.

See also as to this sort of statute, *Commonwealth v. Twitchell*, 4 Cush. 74; *Pike v. The State*, 35 Ala. 419; *The State v. Bowers*, 14 Ind. 195; *Cate v. The State*, 3 Sneed, 120.



hibit any tragedies, &c., in any public theatre or elsewhere, for money, &c., each person, so exhibiting, shall forfeit," &c.; the court has held, that the offence, whatever it may be, cannot be committed by a single individual. Therefore an indictment against one person, not alleging any connection with others, cannot be sustained.<sup>1</sup>

<sup>1</sup> The State v. Fox, 15 Vt. 22. In Alabama, by construction of the statutes, a license to keep a theatre will not protect one who, by contract with the licensee, exhibits therein feats of legerdemain or sleight of hand. Jacko v. The State, 22 Ala. 73.

## CHAPTER LXXIV.

## WOODEN BUILDINGS AND THE LIKE.

§ 1150. **Protection against Fire.** — There are statutes and ordinances for the protection of populous places against fire ; forbidding, under various qualifications, the erection of wooden buildings. These provisions differ somewhat ; therefore we need only refer to the work on Statutory Crimes, in which some points of interpretation are stated,<sup>1</sup> and to the cases.<sup>2</sup>

§ 1151. **Buildings for Particular Purposes.** — Likewise there are enactments against the erection of buildings, in particular localities, and for particular purposes.<sup>3</sup>

**Contracted for.** — Though one has dug the cellar and contracted for the erection of a wooden building, he cannot proceed if by the terms of a city ordinance afterward passed it becomes unlawful.<sup>4</sup>

<sup>1</sup> Stat. Crimes, § 208, 292.

<sup>2</sup> *Stewart v. Commonwealth*, 10 Watts, 306; *Tuttle v. The State*, 4 Conn. 68; *Booth v. The State*, 4 Conn. 65; *Daggett v. The State*, 4 Conn. 60; *Douglass v. Commonwealth*, 2 Rawle, 262; *The State v. Brown*, 16 Conn. 54; *Rex v.*

*Gregory*, 2 Nev. & M. 478, 5 B. & Ad. 555; *Waupun v. Moore*, 34 Wis. 450; *Udye v. Skillman*, 3 Dutcher, 131; *The State v. Parker*, 5 Vroom, 352.

<sup>3</sup> *Rex v. Watts*, 2 Car. & P. 486.

<sup>4</sup> *Salem v. Maynes*, 123 Mass. 372.

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