

COMMENTARIES
ON
THE CRIMINAL LAW.

BY
JOEL PRENTISS BISHOP.

SEVENTH EDITION,
REVISED AND ENLARGED.

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P R E F A C E

TO THE SEVENTH EDITION.

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.

CAMBRIDGE, January, 1882.

PREFACE

TO THE SIXTH EDITION.

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.¹

¹ 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.

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.

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-judicial, 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. In deed 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.¹

¹ 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 avoidpots 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 presenti* is a present marriage, though none is more deeply radicated in that law."¹ 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.

¹ Dalrymple v. Dalrymple, 2 Hag. Con. 54, 98.

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;¹ because

¹ 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. x. 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.¹ 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 therefor, 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.

¹ Dillon, J., 4 Cent. Law Jour. 328.

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.¹ 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

¹ 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.¹

¹ 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

confidently 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. 428. 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

pende, 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 negated 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 "negated," 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-opera-

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.¹

¹ 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 Triibner, 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.

BOOK I.

OUTLINES AND INTRODUCTORY VIEWS.

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.¹ 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

¹ 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-

particle 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,¹ 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.²

§ 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,³ 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,⁴ 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*,⁵ as applied in the common law.⁶ The meaning of which maxim with us is

¹ 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.

² Vol. II. § 311.

³ *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.

⁴ 2 Bishop Mar. & Div. § 75.

⁵ Broom Leg. Max. 2d ed. 506-538.

⁶ 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.¹

§ 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.

¹ 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,¹ 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.² It is the same when a new organization of government follows a political revolution.³ 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.⁴

¹ 1 Kent Com. 2.

² *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.

³ *Shaw, C. J.*, in *Commonwealth v. Chapman*, 13 Met. 88, 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.

⁴ *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.¹

§ 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.² 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; 435. See Hedges v. Price, 2 W. Va. 192; Culbreath v. Hunter, 30 Texas, 713; Thornburg v. Harris, 8 Coldw. 157; 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. 484; Winter v. Dickerson, 42 Ala. 92; The State v. McGinty, 41 Missis.

¹ 1 Bishop Mar. & Div. § 69. See, for a somewhat full discussion, Bishop First Book, § 48-50.

² 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."¹ 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.² And because it

¹ Turley, J., in Jacob v. The State, 3 Humph. 493, 514.

² 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!¹

§ 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

¹ 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.¹

§ 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.

¹ 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,¹ 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

¹ Ante, § 23.

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.”¹ 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.² Judges fre-

¹ 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.

² *Indianapolis v. Fairchild*, 1 Ind. 315, Smith, Ind. 122; *Woodward v. Squires*, 39 Iowa, 435; *Keith v. Tuttle*, 28 Maine, 826, 835; *People v. Hoffman*, 3 Mich. 248; *United States v. Brown, Deady*, 566. See, however, *Reed v. Cist*, 7 S. & R. 158; *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*, 86 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. 557; *Matter of Eggington*, 2 Ellis & B. 717, 23 Law J. n. s. M. C. 41, 18 Jur. 224, 24 Eng. L. & Eq. 146;

Levensworth 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 *Backwalter 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. 431; *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. 575, 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;¹ 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;² 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;³ but it is otherwise in Illinois.⁴ According to late English cases, a matter is not necessarily criminal merely because an indictment will lie;⁵ or civil, merely because the proceeding is at the suit of a private person.⁶ That an action is in the name of the State, and its object is the recovery of a penalty, does not make it criminal.⁷

§ 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.⁸

§ 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.

¹ See 2 Bishop Mar. & Div. § 233.

² *The State v. Bruce*, 1 Tread. 165, 174.

³ *Williams v. Augusta*, 4 Ga. 509. See, however, *Slaughter v. People*, 2 Doug. Mich. 334, note; *Mixer v. Manistee*, 28 Mich. 422.

⁴ *Wiggins v. Chicago*, 68 Ill. 372.

⁵ *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.

⁶ *Parker v. Green*, 9 Cox C. C. 169.

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

⁸ 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.¹

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."² And, in Indiana, by statute, "crimes and misdemeanors shall be defined, and the punishment thereof fixed, by statutes of this State, and not otherwise."³ So, in Florida and

¹ The State v. Danforth, 3 Conn. 112; The State v. Rollins, 8 N. H. 550; The State v. Conrail, Harper, 58; Commonwealth v. Newell, 7 Mass. 245; The State v. Boase, 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; Grindler v. The State, 2 Texas, 388; 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. Pulle, 12 Minn. 164.

² Key v. Vattier, 1 Ohio, 132; Van v. Valkenburg v. The State, 11 Ohio, 404; Allen v. The State, 10 Ohio State, 287, 301; Smith v. The State, 12 Ohio State, 463. See Young v. The State, 6 Ohio, 435, 438; Bloom v. Richards, 2 Ohio State, 337. This Ohio doctrine seems to be partly, at least, adopted in Iowa. Estes v. Carter, 10 Iowa, 400.

³ 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.¹

§ 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.²

The State, 14 Ind. 219; Beal v. The State, 15 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.

¹ 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.

² 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, Louisiana¹ and Texas,² 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.³ 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.⁴ 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.

¹ *The State v. Mullen*, 14 La. An. 570, 572; *The State v. Davis*, 22 La. An. 77.

² *Ante*, § 35, note.

³ 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.

⁴ And see *Bishop First Book*, § 59.

so much of the law administered in them as relates to the civil affairs of men,¹ 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,² and do penance; the usual penance being to make confession in the vestry of the church,³ unless the judge will consent to receive, in commutation, "an oblation of a sum of money for pious uses,"⁴ or unless the penalty is remitted on account of his ill health, or for some other cause.⁵ 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,⁶ 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.⁷

§ 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

¹ 1 *Bishop Mar. & Div.* § 66 et seq.

² *Palmer v. Tjion*, 2 *Add. Ec.* 193, 203; *Griffiths v. Reed*, 1 *Hag. Ec.* 195, 210; *Newbery v. Goodwin*, 1 *Phillim.* 282, 286.

³ *Coote Ec. Pract.* 269, 272; *Courtall v. Homfray*, 2 *Hag. Ec.* 1; *Blackmore v. Brider*, 2 *Phillim.* 359, 362, note.

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

⁵ *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.* 334, 393.

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

⁷ *The State v. Moore*, 1 *Swan, Tenn.* 136; *The State v. Smith*, 32 *Texas*, 187; 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.”¹

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

¹ Lord Justice-General, in *Alston's Case*, 1 Swinton, 433, 478.

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;¹ and the adjudged points are always wrong — never law — when counter to the legal reason.

¹ 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.”¹ It is deemed, in a certain sense, criminal law.² 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,³ 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.”⁴ At present, both in England and the United States, the military law is administered chiefly in courts-martial.⁵

¹ O'Brien Courts-Martial, 26; The State v. Davis, 1 Southard, 311.

² 3 Greenl. Ev. § 469.

³ 1 McArthur Courts-Martial, 3d ed. 13, 18, 20.

⁴ 2 Hawk. P. C. 6th ed. b. 2, c. 4, § 7, 11.

⁵ Concerning courts-martial, see Bell v. Tooley, 11 Ire. 805; Brooks v. Adams, 11 Pick. 441; Mills v. Martin, 19 Johns. 7; Wise v. Withers, 8 Cranch, 331; Contested Election of Brigadier-General, 1 Strob. 190; Coffin v. Wilbourn, 7 Pick.

149; Opinion of the Justices, 8 Cush. 586; White v. McBride, 4 Bibb. 61; Alden v. Fitts, 25 Maine, 488; Hall v. Howd, 10 Conn. 614; 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.¹

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.”² Now, we have seen, that no community can exist without law.³ 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.

¹ 1 McArthur Courts-Martial, 3d ed.

² 3 Greenl. Ev. § 468.

³ O'Brien Courts-Martial, 26.

⁴ 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.¹ In the extreme circumstances which justify martial law, it may be proclaimed by a military commander;² or, as in the Dorr rebellion in Rhode Island, by the legislature of a State.³

§ 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."⁴ 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."⁵

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

¹ And see *Luther v. Borden*, 7 How. 45; *Commonwealth v. Blodgett*, 12 Met. U. S. 1; *Commonwealth v. Blodgett*, 12 Met. 56; *Commonwealth v. Fox*, 7 Barr, 336; *People v. McLeod*, 1 Hill, N. Y. 377, 415, 485; 8 Greenl. Ev. § 469.

² 1 Bouv. Inst. 58; *Johnson v. Duncan*, 3 Mart. La. 590; 1 Kent Com. 341, note.

³ *Luther v. Borden*, 7 How. U. S. 1,

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;"¹ yet, as we have seen,² 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."³

§ 49. **United States and States as to the same.**—We have seen,⁴ 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-

¹ Const. U. S. art. 1, § 10.

² Ante, § 45.

³ *Luther v. Borden*, 7 How. U. S. 1, 45.

⁴ Ante, § 28.

haps, by a very liberal interpretation, a State may be said to be "invaded" when she is beset by a domestic rebellion.¹ 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;"² 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."³ 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-

¹ 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.

² Const. U. S. art. 1, § 8.

³ Const. U. S. art. 2, § 2.

partment of the law, as in all others, an unwritten, or common, law.¹ 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."² 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.³

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

¹ Ante, § 45.

² Lieber Instruct. pl. 4.

³ 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.”¹

§ 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

¹ 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.¹ 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

¹ Post, § 346-355, 824.

supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”¹ 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

¹ 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,¹ 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.”² 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.³

§ 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.”⁴ In another clause, he is enjoined to “take care that the laws be faithfully executed.”⁵

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-

¹ Ante, § 50.

² Const. U. S. art. 1, § 8.

³ Prize Cases, 2 Black, 636.

⁴ Const. U. S. art. 2, § 1.

⁵ Const. U. S. art. 2, § 3.

executed 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."¹ 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;² 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-

¹ Const. U. S. art. 2, § 2.

Vanderheyden v. Young, 11 Johns. 150;

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

Ela v. Smith, 5 Gray, 121, 136.

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."¹

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,² — 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*;³ much less has the

¹ Const. U. S. art. 1, § 9.

² 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.

³ I 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.¹

§ 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.

¹ 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.¹

¹ 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, § 56), 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.¹

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.

¹ 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, 1868. *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, 468; *Ex parte Law*, 35 Ga. 285; *The State v. Cook*, Phillips, 585. 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,¹ 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.

¹ 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.¹ The collection is of considerable value, and it has the marks of greater accuracy than most of the old posthumous reports.²

§ 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

¹ Wallace Reporters, 3d ed. 209; Foster, 204.

² 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,¹ 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.

¹ 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 Court¹ 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

¹ 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.¹ 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.² Consequently, —

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

¹ Bishop First Book, § 282.

² 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.¹ "Hale and Hawkins," said an American judge of great criminal-law learning, "are justly regarded, not as respectable compilers, but as standard authorities."²

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.³

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

¹ 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.

² Gaston, J., in The State v. Johnson, 1 Ire. 354, 363.

³ 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.¹ 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 times² been judicially discussed. In a general way it may be said to prevail in the

¹ Bishop First Book, § 51-59.

² For a sort of discussion of this question by the notorious Jeffreys, see Rose-

well's Case, 10 Howell St. Tr. 147, 267. Crim. Proc. 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.¹ 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;² though, of course, a mere established practice, which originally might have been better some other way, will be followed.³ And in various other cases the doctrine of *stare decisis* will and should prevail even against reasons of considerable weight.⁴ 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,

¹ Carver v. Louthain, 38 Ind. 530, 538, 539; Harrow v. Myers, 29 Ind. 469; Barden v. Southerland, 70 N. C. 523, 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.

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

³ Bachman v. Sulzbacher, 5 S. C. 58, 63.

⁴ Jansen v. Atchison, 16 Kan. 358, 382; Usill v. Hales, 3 C. P. D. 319, 327; Fugh v. Golden Valley Railway, 15 Ch. D. 330, 334, 335; Selby v. Bardens, 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,¹ and especially if upheld only by a single case.² 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.

¹ Post, § 295, 296.

² 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."¹

¹ Crim. Proceed. I. § 46-67.

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.¹

§ 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

¹ *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.¹

§ 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,² 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.³ The true measurement would seem to be from low-water mark, and from the actual shore, not from the shoals.⁴ 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.⁵

¹ *Wheaton Int. Law*, 6th ed. 243; *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.

² *The Ann*, 1 *Gallis*. 62; *The Twee Gebroeders*, 3 *Rob. Adm.* 336; *Rex v.*

Forty-nine Casks of Brandy, 3 *Hag. Adm.* 257, 259, 290; *The Anna*, 5 *Rob. Adm.* 373; 1 *Kent Com.* 29; *Wheaton Int. Law*, 6th ed. 233, 234, 245, 496.

³ See *Wheaton Int. Law*, 2d annotated ed. by Lawrence, 321, note, 715, note.

⁴ *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.

⁵ *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,¹ 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.² Pretty clearly, also, the doctrine as to such places extends even further; though it is difficult to say how far. Thus, the Chesapeake Bay,³ which is twelve miles across at the ocean, and the Delaware Bay,⁴ which is a little more,⁵ are claimed, no doubt justly, to be within the territorial limits of the United States.⁶ 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.⁷

¹ Post, § 146.

² Wheaton International Law, 8th ed. 248, 249, 252; Flanders Maritime Law, § 42.

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

⁴ 1 Kent Com. 29.

⁵ 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.

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

⁷ 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 transshipped 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;¹ 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. Hubbard² to be conformable to the laws and usages of nations.”³ 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.”⁴

§ 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

¹ See R. S. of U. S. § 2760, 2811, 2812, 2814, 2867, 2868.

² Church v. Hubbard, 2 Cranch, 187.

³ 1 Kent Com. 81.

⁴ 1 Kent Com. 30. See Wheaton International Law, 6th ed. 496; The Apollon, 9 Wheat. 362.

instance.¹ 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,² 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.³

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;⁴ 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;⁵ 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.⁶ Yet—

¹ The Two Gebroeders, 8 Rob. Adm. 386; Flanders Maritime Law, § 44.

² Wheaton International Law, 6th ed. 252, 253.

³ And see Tyler v. People, 8 Mich. 320; People v. Tyler, 7 Mich. 161.

⁴ 1 Bishop Mar. & Div. § 365; post, § 110.

⁵ Crim. Proced. I. § 45 et seq.

⁶ 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.¹ 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;² or, himself being abroad, circulates through an agent libels here;³ or in like manner obtains goods by false pretences;⁴ or does any other crime in our own locality against our laws;⁵ 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;⁶ in obedience to the rule, that he must answer where, and only where, he does the procuring.⁷ 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.

¹ Crim. Proced. I. § 53.

² 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.

³ Commonwealth v. Blanding, 3 Pick. 804; Rex v. Johnson, 7 East, 65, 8 Smith, 94.

⁴ Adams v. People, 1 Comst. 173; People v. Adams, 3 Denio, 190, 610.

⁵ Commonwealth v. Gillespie, 7 S. & R. 469; Rex v. Munton, 1 Esp. 62; Barkhamsted v. Parsons, 8 Conn. 1, 8; Wooten v. Miller, 7 Sm. & M. 330; 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. 232, 241, 6 Cox C. C. 260, 22 Eng. L. & Eq. 607.

⁶ 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.

⁷ 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.¹ 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.²

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

¹ See *Commonwealth v. Gillespie*, 7 S. & R. 469, 478; *The State v. Grady*, 84 Conn. 118; *Commonwealth v. Pettes*, 114 Mass. 307; *Noyes v. The State*, 12 Vroom, 418.

² See, as explaining the principle, *Stat. Crimes*, § 75, 82, 88, 114, 128, 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, 159, 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.¹ 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.² 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-

¹ *Reg. v. Lewis*, *Dears. & B.* 182, 186, 198; *Reg. v. Seberg*, *Law Rep.* 1 C. C. 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. 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.

² *Reg. v. Bjornsen*, *Leigh & C.* 545.

eignty 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?"¹

§ 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.² 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."³ 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.⁴ 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.⁵

§ 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

¹ The State v. Carter, 3 Dutcher, 499, 500, 501.

² 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.

³ Riley v. The State, 9 Humph. 646, 667.

⁴ People v. Gill, 6 Cal. 637.

⁵ See, for authorities on both sides, Crim. Proc. 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."¹ 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.²

§ 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-

¹ Tyler v. People, 8 Mich. 320, 334. ² 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,¹ 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.²

¹ Ante, § 112.

² 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 death 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. Proceed. 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. § 301, 308; *Weston's Case*, 3 Inst. 50, 135; *Jackson's Case*, 18 Howell St. Tr. 1069, 1075, 1111; 2 Hawk. P. C. c. 23, § 83; *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 Simbology, 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. Proceed. 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. Proceed. II. § 538); if death proceeded from starvation, the charge is, that the deceased became "mortally emaciated and consumed" (Crim. Proceed. II. § 557); or, if from poisoning, the indictment alleges that the deceased was made "mortally sick and distempered in his body" (Crim. Proceed. 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 *interfect*." 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 Deag. 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. § 262-266.* 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. 8,—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. Proced. 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's 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.¹

§ 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.

¹ 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,¹ 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.²

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,³ subject to the laws of the foreign country; but it does not follow that they are not also subject to their own laws, criminal⁴ 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.⁵

§ 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.⁶ 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.

¹ Ante, § 103.

² *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.

³ Post, § 130.

⁴ *Polson Law of Nations*, 25.

⁵ *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. 286; *United States v. Howard*, 8 Wash. C. C. 340; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Holmes*, 5 Wheat. 412; *Reg. v. Lopez, Dears. & B.* 625; *People v. Tyler*, 7 Mich. 161. Act of March 3, 1825, c. 65, § 5; R. S. of U. S. § 780.

⁶ See *United States v. Klintock*, 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,¹ has its limitations;² 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.³ This rule refers only to piracy as defined in international law, not to offences made such by the local jurisprudence of a particular country.⁴ 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

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

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

³ *United States v. Pirates*, 5 Wheat. 184; *Adams v. People*, 1 Comst. 178, 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.

⁴ *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.¹

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;² while we can go thus upon the high seas.³

§ 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.”⁴ 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.⁵ According to international law, the person offending must be a subject of the government whose tribunals call him to account;⁶ and, therefore,—

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

¹ And see *Wheaton International Law*, 6th ed. 159.

² Post, § 135; *Tyler v. People*, 8 Mich. 320.

³ *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.

⁴ *Rex v. Sawyer*, 2 Car. & K. 101, 111.

⁵ *Rex v. Sawyer*, supra, reported also, but more briefly, Russ. & Ry. 294, Car. Crim. Law, 3d ed. 103. See likewise *The State v. Dunkley*, 8 Ire. 116, 122; *Republica v. De Longchamps*, 1 Dall. 111; *Rex v. Speke*, 3 Salk. 358.

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

⁷ See ante, § 112.

⁸ *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,¹ 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.² 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.³ Thus, observes Mr. Lawrence, the editor of a late edition of Wheaton's "International Law:"⁴ "In the treaty of 1828, with Prussia, art. 10,⁵ 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.⁶ 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. 208, 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.

¹ Reg. v. Azzopardi, 1 Car. & K. 208, 2 Moody, 288; Reg. v. Zulueta, 1 Car. & K. 215.

² Foster v. Glazener, 27 Ala. 391.

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

⁴ Wheaton International Law, 6th ed. 171, 172, note. And see *Ib.* p. 165, 166.

⁵ 8 U. S. Statutes at Large, 382.

⁶ 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."¹

§ 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."²

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.³ So also has the British government over the subjects of Great Britain in China.⁴ Other illustrations might be cited,⁵ 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

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

² Wheaton International Law, 6th ed. 172, note.

³ Wheaton International Law, 6th ed. 166, 173, note.

⁴ 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!

⁵ "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,¹ we have never permitted any foreign laws to supersede our own, further than they are entitled to do under the general law of nations.²

Exceptions by Law of Nations. — To the law of nations every government is bound to conform,³ and every municipal statute is construed as subject to the exceptions required by it.⁴ 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.⁵

§ 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.⁶ The person of such a functionary, his secretary, attendants, and retinue; his house and household; his carriages, his couriers, and even his domestic⁷ 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.⁸ The only

¹ Ante, § 122.

² Post, § 134.

³ Pollard v. Bell, 8 T. R. 434, 437; The Le Louis, 2 Dods. 210, 251.

⁴ See ante, § 112, 115, note, par. 9; also ante, § 121.

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

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

⁷ 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.

⁸ 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.¹

§ 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.² But our legislation provides, in the broadest terms, that "any writ or process" against a foreign minister or other exempted person shall be void.³ And all persons who participate in violating this provision are punishable.⁴ 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.⁵

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

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

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

¹ 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.

² 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.

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

⁴ 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 Republica v. De Longchamps, 1 Dall. 111; United States v. Hand, 2 Wash. C. C. 435.

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

⁶ Vattel Law of Nations, b. 4, § 69-74; 1 Kent Com. 39.

⁷ Vattel Law of Nations, b. 4, § 122; Ex parte Cabrera, 1 Wash. C. C. 232. And see United States v. Benner, Bald. 234; Republica 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 embassador; 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,"¹ do not enjoy this immunity.² 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."³ 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."⁴

§ 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.⁵ 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,⁶ except where we may have agreed otherwise by treaty.⁷

§ 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;⁸ or, in general, for belligerent acts.⁹ 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

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."¹

§ 132. **Hostile Acts in Peace — in War.** — In principle, but perhaps not certainly on judicial authority, if a foreigner who is not a spy,² 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,³ 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.⁴

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

¹ 1 Kent Com. 41.

² 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.

³ 1 Kent Com. 43. See *Respublica v. De Longchamps*, 1 Dall. 111.

⁴ 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.

⁵ The Constitution, 4 P. D. 39.

⁶ United States v. Dickerman, 92 U. S. 520; *Schooner Exchange v. McFaddon*, 7 Cranch, 116; as to which see the *Santissima Trinidad*, 7 Wheat. 233. And see *Polson Law of Nations*, 25; *Wheaton International Law*, 6th ed. 144.

⁷ Ante, § 122.

⁸ 1 Hale P. C. 59; and the authorities cited in the next section.

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

¹ Wheaton International Law, 6th ed. 184.

² Ante, § 32.

³ Post, § 209-211.

⁴ *Vattel Law of Nations*, b. 3, § 179.

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;¹ 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.² 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.³

§ 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;

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

² 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; *Baron v. Denman*, 2 Exch. 167; *Phillips v. Eyre*, Law Rep. 6 Q. B. 1, 24.

³ *United States v. Pirates*, 5 Wheat. 184. And see *The Santissima Trinidad*, 7 Wheat. 283.

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.¹ On the other hand, also, they equally protect all;² 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.³ If he submits, and lays down his arms, his life must be spared.⁴

§ 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.⁵ Yet the fugitive himself, arriving home, could not there so take advantage of the unauthorized proceeding as to have the prosecution against him dismissed.⁶ We may, perhaps, surrender such fugitives if we will;⁷ though the governor of one of our States has not the authority, derived solely from his office;⁸ neither, it appears, have our courts.⁹ Indeed, the whole question of the surrender of fugitives to foreign powers

¹ 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. 63; ante, § 124.

² *The State v. Jones*, Walk. Missis. 83.

³ 4 Bl. Com. 198; 1 East P. C. 227.

⁴ Vattel Law of Nations, b. 3, § 149.

⁵ *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.

⁶ *Ex parte Scott*, 4 Man. & R. 361, 9 B.

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

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

⁸ *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."

⁹ *Case of José Ferreira dos Santos*, 2 Brock. 493.

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

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.⁵

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.⁶ 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.⁷

Punishable where committed.—And this offence, like every

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

² *Wheaton International Law*, 6th ed. 176.

³ *Wheaton International Law*, 6th ed. 177; 1 *Kent Com.* 36, 37, and notes; *Commonwealth v. Deacon*, 10 S. & R. 126; *Ex parte Holmes*, 12 Vt. 631; *Case of Jose Ferreira dos Santos*, 2 Brock. 493.

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

⁵ 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. 83; *The State v. Allen*, 2 Humph. 263; *Matter of Fetter*, 3 Zab. 311. See also *Crim. Proced. I.* § 219-224b.

⁶ *Post*, § 983 et seq.

⁷ *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.¹ 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.² 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.

¹ *Crim. Proced. I.* § 59, 60; *II.* § 727-729.

² *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.¹ 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

¹ Crim. Proceed. 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.¹

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.²

¹ 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.

² *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.¹ 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.² 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.³

§ 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

¹ Post, § 264, 267, 268, 271.

² Vol. II. § 839.

³ 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 Melvaine, 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.”¹ And the doctrine has been since applied, in England, to goods stolen both in other parts of the king's dominions² and in foreign countries.³ This doctrine has been followed by the courts of New York,⁴ New Jersey,⁵ Pennsylvania,⁶ North Carolina,⁷ Tennessee,⁸ Indiana,⁹ Louisiana,¹⁰ and Nebraska.¹¹ It has been discarded, and the opposite¹² held in Connecticut,¹³ Vermont,¹⁴ Maine,¹⁵ Mississippi,¹⁶ Iowa,¹⁷ Kentucky,¹⁸ Nevada,¹⁹ Illinois,²⁰ and Oregon.²¹ In Massachusetts, the court discarded it also, holding defendants liable where the original larceny was in another of the United States; ²² but afterward, where it was in one of the British provinces, the conviction was overthrown,²³ — a distinction which the Maine tribunal has refused to recognize, deeming it without foundation.²⁴ So, in Ohio, a conviction was sustained where the original taking had been in another State of the Union,²⁵ but reversed where it had been in Canada.²⁶ 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 York²⁷ since the before-mentioned adjudication was made;

¹ Butler's Case, cited 13 Co. 53, 3 Inst. 113. And see *Reg. v. Wallace*, Car. & M. 200.

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

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

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

⁵ *The State v. LeBlanch*, 2 Vroom, 82.

⁶ *Simmons v. Commonwealth*, 5 Binn. 617.

⁷ *The State v. Brown*, 1 Hayw. 100.

⁸ *Simpson v. The State*, 4 Humph. 456, 459.

⁹ *Beal v. The State*, 15 Ind. 378.

¹⁰ *The State v. Reonnals*, 14 La. An. 278.

¹¹ *People v. Loughridge*, 1 Neb. 11.

¹² Ante, § 137.

¹³ *The State v. Ellis*, 3 Conn. 185; *The State v. Cummings*, 33 Conn. 260.

¹⁴ *The State v. Bartlett*, 11 Vt. 650.

¹⁵ *The State v. Underwood*, 49 Maine, 181.

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

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

¹⁸ *Ferrill v. Commonwealth*, 1 Duvall, 153; ante, § 140, note.

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

²⁰ *Myers v. People*, 26 Ill. 178.

²¹ *The State v. Johnson*, 2 Oregon, 115.

²² *Commonwealth v. Cullins*, 1 Mass. 116; *Commonwealth v. Andrews*, 2 Mass. 14; *Commonwealth v. Rand*, 7 Met. 475.

²³ *Commonwealth v. Holder*, 9 Gray, 7.

²⁴ *Commonwealth v. Uprichard*, 3 Gray, 434.

²⁵ *The State v. Underwood*, supra.

²⁶ *Hamilton v. The State*, 11 Ohio, 435.

²⁷ *Stanley v. The State*, 24 Ohio State, 166; ante, § 140, note.

²⁸ *People v. Kurke*, 11 Wend. 129.

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

§ 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.⁶

§ 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.⁷ Thus, —

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

¹ The State v. Seay, 8 Stew. 123; The State v. Adams, 14 Ala. 486; Murray v. The State, 18 Ala. 727; La Vaul v. The State, 40 Ala. 44.

² Hemmaker v. The State, 12 Misso. 453; The State v. Williams, 35 Misso. 229.

³ McFarland v. The State, 4 Kan. 68.

⁴ Morissey v. People, 11 Mich. 327; People v. Williams, 24 Mich. 156.

⁵ 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.

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

⁷ And see, as illustrating the general

is indictable, the same as if the duel were to be fought here.¹

Blow and Death in Homicide. — It has indeed been held by some tribunals, as we have already seen,² 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.

¹ The State v. Farrier, 1 Hawks, 487; The State v. Taylor, 1 Tread. 107, 3 Brev. 243.

² 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.¹ The outward boundaries of the States on the borders are coincident with these.²

§ 146. **Counties.** — States are divided into counties. A State may have portions of its territory not within any county, though it has the right³ 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;⁴ while, as we have seen,⁵ 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.⁶ 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

¹ Ante, § 102-108.

² *United States v. Bevens*, 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.

³ See post, § 149.

⁴ *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.

⁵ Ante, § 104.

⁶ 2 East P. C. 805; 1 Gab. Crim. Law, 815; *Rex v. Bruce*, Russ. & Ry. 243, 2 Leach, 4th ed. 1098. And see *Rex v. Soleguard*, 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.¹ "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 *faucibus terræ*, where the main ocean terminates."²

§ 148. **Statutes as to Counties on the Sea.** — In New York,³ in Virginia,⁴ 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.⁵ But —

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

§ 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.⁷ 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.⁸

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;⁹ so that over them the counties extend to the

¹ *Commonwealth v. Peters*, 12 Met. 387; *United States v. Grush*, 5 Mason, 290; *United States v. Bevens*, 3 Wheat. 336.

² *United States v. Grush*, 5 Mason, 290, 302.

³ *Manley v. People*, 3 Seld. 205; *People v. Wilson*, 3 Parker C. C. 199.

⁴ *Commonwealth v. Gaines*, 2 Va. Cas. 172.

⁵ *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.

⁶ *Keyser v. Coe*, 9 Blatch. 32, 87 Conn. 597.

⁷ *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.

⁸ Ante, § 108; post, § 150.

⁹ Ante, § 105, 108; post, § 178, 179.

limits of the State.¹ 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 stream² 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.³

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.⁴

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.”⁵

§ 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,⁶ 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

¹ *People v. Tyler*, 7 Mich. 161.

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

³ *Booth v. Shepherd*, 8 Ohio State, 248; *McFall v. Commonwealth*, 2 Met. Ky. 894.

⁴ *The State v. Babcock*, 1 Vroom, 29.

⁵ So it was observed by counsel in *The State v. Hoofman*, 9 Md. 28; referring to *Binney's Case*, 2 Bland, 99, 123. *Georgia and Alabama.* — As to the line between Georgia and Alabama, see *Alabama v. Georgia*, 23 How. U. S. 505.

⁶ *Ante*, § 100; post, § 183-186.

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.¹ So did the Wisconsin court.² 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.”³ 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.⁴ And this has been held in Michigan,⁵ and probably elsewhere, and it is perhaps the better doctrine in principle.⁶ 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.

¹ *Commonwealth v. Gaines*, 2 Va. Cas. 172.

² *The State v. Main*, 16 Wis. 398.

³ *The State v. Knight*, 2 Hayw. 109, Taylor, 65.

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

⁵ 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.

⁶ 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.¹ 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.²

§ 154. **Indian Territory.** — Questions have arisen, concerning the power of the States to extend their jurisdiction over Indian territory within their limits,³ and concerning the power of Congress to exercise the Federal jurisdiction over Indian territory within the States;⁴ 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.⁵ Congress has, by the Constitution, power to “regulate commerce . . . with the Indian tribes;”⁶ 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.⁷ But if the members of an Indian tribe scatter themselves among the people of a State, they become amenable to the State laws.⁸

§ 155. **State and United States Jurisdiction over same Act.** — A

¹ Ante, § 132, 133.

² Commonwealth v. Blodgett, 12 Met. 66. And see Luther v. Borden, 7 How. U. S. 1; United States v. Bright, 1 Whart. Pa. Dig. 6th ed. p. 506.

³ Worcester v. Georgia, 6 Pet. 515; United States v. Ciska, 1 McLean, 254; Caldwell v. The State, 1 Stew. & P. 327; The State v. Tassels, Dudley, Ga. 229; The State v. Foreman, 8 Yerg. 266; 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. Doxtater, 47 Wis. 278; The State v. Harris, 47 Wis. 298.

⁴ 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.

⁵ McKay v. Campbell, 2 Sawyer, 118.

⁶ Const. U. S. art. 1, § 8.

⁷ United States v. Shaw-mux, 2 Sawyer, 364. And see United States v. Seveloff, 2 Sawyer, 311.

⁸ 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.¹ 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.²

¹ Ante, § 142; post, § 984, 987-989.

² See post, § 173, 179, 987-989; and 34 Cal. 183; Jett v. Commonwealth, 18 Grat. 963; The State v. McPherson, 9 Iowa, 53; The State v. Brown, 2 Oregon, 221; People v. Kelly, 33 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."¹

§ 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;² 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.

¹ Const. U. S. amend. art. 10.² 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."¹ 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.² The difficulty as to such places is, whether the State authority has ceased before Congress has exercised over them its full legislative powers.³ 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.⁴ An offence, therefore, is triable, not in the State court, but the United States.⁵ 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."⁶

¹ 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.

² *United States v. Bevans*, 3 Wheat. 338; *United States v. Davis*, 5 Mason, 356; *New Orleans v. United States*, 10 Pet. 662. 787; *Mitchell v. Tibbets*, 17 Pick. 298; *United States v. Cornell*, 2 Mason, 60.

³ See *United States v. Bevans*, 3 Wheat. 338.

⁴ *United States v. Davis*, 5 Mason, 356.

⁵ *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*, 8 Heisk. 141. *Military Reservation.* — *Kansas* exercises criminal jurisdiction over the military reservation at Fort Leavenworth. *Clay v. The State*, 4 Kan. 49.

⁶ 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.¹ 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.

¹ *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 unorganized. 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.¹ 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,² 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.”³ 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-

¹ *Bishop First Book*, § 112, 113.

³ *Const. U. S. art. 6.*

² *Ante*, § 166.

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.¹ 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.² 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,

¹ *Luther v. Borden*, 7 How. U. S. 1.

² 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.¹ 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.²

§ 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

¹ *Luther v. Borden*, 7 How. U. S. 1.

² 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.¹

§ 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

¹ 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, 637, 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."¹ 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

¹ Oath before the Justices, 12 Co. 130, 131. And see *Heard v. Pierce*, 8 Cush. 838, 848, 845; *Stat. Crimes*, § 137.

acted, the thing is, or may be made by the national statute, no longer within the competency of the States.¹ 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;”² 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.³

“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;”⁴ which power extends to the regulation of navigation,⁵ 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.⁶ 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.⁷ Even roads may be laid out

¹ 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.

² Const. U. S. art. 3, § 2.

³ *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. Phobus*, 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.

⁴ Const. U. S. art. 1, § 8.

⁵ *Gibbons v. Ogden*, 9 Wheat. 1; *North River Steamboat Co. v. Livingston*,

3 Cow. 718; *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.

⁶ *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*, 18 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.

⁷ *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.¹ But Congress, under the power to regulate commerce, may exercise any jurisdiction over the public ways of the country required for this object;² and perhaps some authority also under other provisions of the United States Constitution.³ 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.⁴ 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.⁵ 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.⁶ 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; *Wilson 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.

¹ *United States v. Railroad Bridge Co.*, 6 McLean, 517.

² *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.

³ See *Pennsylvania v. Wheeling and Belmont Bridge*, supra.

⁴ *Pennsylvania v. Wheeling and Belmont Bridge*, 18 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.

⁵ *Milnor v. New Jersey Railroad*, 6 Am. Law Reg. 6; *Grier, J.* See *Silliman v. Hudson River Bridge Co.*, 1 Black, 582.

⁶ 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.¹ Congress may constitutionally legalize a bridge already erected.²

§ 176. *Continued — Crimes against Commerce.* — Although Congress may regulate the ways of commerce within the States, concurrently with them,³ or doubtless even to the exclusion⁴ of State laws should she be so unwise; yet, as to crimes, she has not to any considerable⁵ 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.⁶ 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;”⁷ 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.

¹ Columbus Insurance Co. v. Curtin, 6 McLean, 209; Columbus Insurance Co. v. Peoria Bridge, 6 McLean, 70; Jelly v. Terre Haute Draw-Bridge, 6 McLean, 237; Gibbons v. Ogden, 9 Wheat. 1.

² Clinton Bridge, 10 Wal. 454.

³ See Waring v. Clarke, 5 How. U. S. 441. And see Rex v. Bruce, Russ. & Ry. 243, 2 Leach, 4th ed. 1093.

⁴ Commonwealth v. Peters, 12 Met. 387.

⁵ 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.

⁶ United States v. Bevens, 8 Wheat. 336; 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.

⁷ 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.¹ 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,² a statutory provision for such localities; or has extended over them her county lines, as has New York.³

§ 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.⁴ 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.⁵ 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.⁶

§ 178. *Acts offending both United States and State.* — There are, we have seen,⁷ 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.⁸ But however this may be, if the national statute neither in terms nor by

¹ United States v. Grush, 5 Mason, 290; Commonwealth v. Peters, 12 Met. 387; United States v. Bevens, 8 Wheat. 336. And see further, on this question, United States v. Wilberger, 5 Wheat. 76; United States v. Holmes, 5 Wheat. 412.

² Commonwealth v. Gaines, 2 Va. Cas. 172.

³ Ante, § 149.

⁴ 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.

⁵ Charge on Law of Treason, 1 Story, 614; People v. Lynch, 11 Johns. 549.

⁶ Post, § 194.

⁷ Ante, § 155.

⁸ Ante, § 176. See Fox v. Ohio, 5 How. U. S. 419; 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.¹ 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.² Congress has not attempted to restrict the power of the States.³

Other Crimes.—And there are other cases of like concurrent jurisdiction.⁴

§ 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.⁵

§ 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.⁶ In such a case, however, a man in the employ of the United States, for instance, could not be permitted, further than

¹ 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.

² *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. 186; *Manley v. People*, 3 Seld. 295, 302, 303; *The State v. Brown*, 2 Oregon, 221. And see Vol. II. § 283-287.

³ 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. 138.

⁴ 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.

⁵ 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.

⁶ *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;¹ 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 States² nor a State³ 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.⁴ 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.

¹ *United States v. Hart*, Pet. C. C. 390.

² *The Collector v. Day*, 11 Wal. 113.

³ *Dobbins v. Erie*, 16 Pet. 435.

⁴ 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,¹ 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.”² “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.³ 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.”⁴

¹ Ante, § 109 et seq.

² Const. U. S. art. 2, § 2.

³ Const. U. S. art. 1, § 8.

⁴ 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,¹ —

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*² 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,”³ a proposition to insert the word “expressly” before delegated was rejected, it not being deemed wise thus to restrict the interpretation.⁴ 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-

¹ Ante, § 145 et seq.

² *McCulloch v. Maryland*, 4 Wheat. 316; *Gibbons v. Ogden*, 9 Wheat. 1, 187;

United States v. Fisher, 2 Cranch, 358; Story Const. § 1237, 1256, 1258.

³ Ante, § 156.

⁴ 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."¹

§ 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."² 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.

¹ Const. U. S. art. 1, § 8.

² Const. U. S. art. 4, § 8.

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.¹

§ 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.² 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-

¹ See, also, for a discussion of this and, more fully, Bishop First Book, subject, 1 Bishop Mar. & Div. § 66-86; § 43-59.

² Ante, § 14.

dering certain powers which the general government assumed,¹ 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 though² 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,³ carry to an uninhabited country the laws, but not the tribunals, of the coun-

¹ 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.

² Ante, § 190.

³ 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 1857,¹ 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.²

§ 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,³ — 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.”⁴ 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.”⁵ 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.⁶

The Procedure. — Neither does this provision extend to the procedure, which is regulated by other national laws.⁷ So inflexible

¹ Stat. 1857, c. 214.

² 1 Bishop Mar. & Div. § 70.

³ Ante, § 190–193.

⁴ 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.

⁵ *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.

⁶ *Boyce v. Tabb*, 18 Wal. 546.

⁷ *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; *Suydam 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.¹

The Criminal Laws of States.—Moreover, it has been said,² and in respect of a particular interpretation held,³ 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.⁴ 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.⁵

§ 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.”⁶ This source of jurisdiction does not give the courts permission to act in advance of a statute or treaty creating matter to act upon.⁷ But—

Laws of States.—Even here, in questions reaching beyond the statute or treaty, the court looks for its common-law principles,

¹ Wheat. 356; Lane v. Townsend, Ware, 286; United States v. Douglass, 2 Blatch. 207; Téese v. Phelps, 1 McAl. 17.

² Gaines v. Relf, 15 Pet. 9; Lorman v. Clarke, 2 McLean, 568; United States v. Howland, 4 Wheat. 103, 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.

³ United States v. Burr, 1 Burr's Trial, 482; Du Ponceau Jurisd. 5; 1 Kent Com. 333.

⁴ United States v. Reid, 12 How. U. S. 361.

⁵ Post, § 199, 200.

⁶ Du Ponceau Jurisd. 38 et seq.; Law on Jurisd. 63, note. And see post, § 195-200.

⁷ Const. U. S. art. 3, § 2. And see Home Insurance Co. v. Northwestern Packet Co., 32 Iowa, 223.

⁸ “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.”¹

§ 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.”² And it is generally so in “cases affecting ambassadors or other public ministers and consuls,”³ where the State courts have no jurisdiction.⁴ 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.⁵ 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 Ponceau⁶ does

¹ Wheaton v. Peters, 8 Pet. 591, 658, 545; Davis v. Packard, 7 Pet. 276. Contra, the majority of the court in The State v. De La Foret, 2 Nott & McC. 217.

² Const. U. S. art. 3, § 2; Lorman v. Clarke, 2 McLean, 563, 572; United States v. Lancaster, 2 McLean, 431, 433; Cobens v. Virginia, 6 Wheat. 204. This provision is partly restricted by amendm. art. 11.

³ Const. U. S. art. 3, § 2; ante, § 181.

⁴ Mannhardt v. Soderstrom, 1 Binn. 135; United States v. Ravara, 2 Dall. 297; Commonwealth v. Kosloff, 5 S. & R.

⁵ 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. 388.

⁶ “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.¹ 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;² 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.³ 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.

¹ Ante, § 9, 14, 190, 192.

² Act of Sept. 24, 1789, c. 20, § 9, 11; Stat. 1842, c. 188, § 8; R. S. of U. S. § 553, 829, 711, 4300-4305.

³ United States v. Hudson, 7 Cranch, 82; 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 Biss. 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.¹ 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.² 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."³

§ 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.⁴ In just principle, therefore, the unwritten law of crime as applied in such localities by the English jurisprudence,⁵ 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.⁶ 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.⁷ This case was decided without argument, and the court in effect

¹ See, particularly, ante, § 192.

² Ante, § 194; United States v. Hawthorne, 1 Dillon, 422; United States v. Shepard, 1 Abb. U. S. 431.

³ United States v. Reid, 12 How. U. S. 361. See United States v. Block, 4 Saw. 211.

⁴ Ante, § 145 et seq., 182 et seq. 192.

⁵ See, however, The State v. Sluby, 2 Har. & McH. 480.

⁶ 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.

⁷ 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.¹

§ 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.²

§ 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.³ 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.⁴

¹ "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. Willberger*, 5 Wheat. 76;

United States v. Smith, 5 Wheat. 153; *United States v. Shepherd*, 1 Hughes, 520; *United States v. Reese*, 4 Saw. 629.

² See ante, § 157, 192.

³ *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.

⁴ *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,¹ 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,² 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.³ But to *procure* such money or other things, with the criminal intent, is an offence; because the procuring or receiving is an act.⁴ This is a nice distinction; yet the principles of the com-

¹ Ante, § 11.

² Ante, § 32.

³ *Rex v. Stewart*, Russ. & Ry. 288; s. c. nom. *Rex v. Stuart*, 1 Russ. Crimes, 3d Eng. ed. 48; *Reg. v. Fulton*, Jebb, 48; *Rex v. Heath*, Russ. & Ry. 184; *Commonwealth v. Morse*, 2 Mass. 133; *Dugdale v. Reg.*, 16 Eng. L. & Eq. 880, 1 *Ellis*

& B. 485, Dears. 64, 22 Law J. n. s. M. C. 50, 17 Jur. 548; *The State v. Penny*, 1 Car. Law Repos. 517; *Rex v. Rosenstein*, 2 Car. & P. 414. But see *Reg. v. Willis*, Jebb, 48, note.

⁴ *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.¹

"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.²

§ 205. *Evil Intent also essential.*—Prompting the act, there must be an evil intent,—to be explained further on.³ For example, if a child is too young to have an evil intent,⁴ or if a person of any age is insane and therefore incapable of having such intent,⁵ or if one acts honestly under a misapprehension of facts,⁶ 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.⁷

¹ See *Rex v. Sutton*, Cas. temp. Hardw. 370, 373, 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. 30, 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 1760. 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*, 1689 [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.

² *Rex v. Fuller*, *Russ. & Ry.* 308 *Brown's Case*, 1 *Lewin*, 42.

³ *Post*, § 285 et seq.

⁴ *Post*, § 367 et seq.

⁵ *Post*, § 374 et seq.

⁶ *Post*, § 301 et seq.

⁷ *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; *Yoss 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.¹ Therefore—

Larceny.—Larceny, composed of the act of trespass and the superadded intent to steal,² is not committed when this trespass and this intent do not exist at the precise moment together.³ 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.⁴

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,⁵ 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.* 482, *Temp. & M.* 90, 13 *Jur.* 885; *Case of Le Tigre*, 8 *Wash. C. C.* 567, 572; *Rex v. Sutton*, *Cas. temp. Hardw.* 370, 2 *Stra.* 1074; *Reg. v. Turvy*, *Holt*, 364.

¹ 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.

² *Post*, § 342.

³ *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*, 3 *Car. & P.* 346; *The State v. Roper*, 3 *Dev.* 473; *Reg. v. Thistle*, 1 *Den. C. C.* 662, 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.

⁴ *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.

⁵ 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.¹ 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.² 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.³ 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.⁴

¹ 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. 287; 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.

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.

² Post, § 782, 733; United States v. Fox, 95 U. S. 670.

³ Post, § 733; Clements v. The State, 50 Ala. 117.

⁴ The State v. Moore, 12 N. H. 42;

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,¹ 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.² 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

¹ Ante, § 204.

Wayland Moral Science, 10; Paley Moral Phil. b. 6, c. 9; Ruth. Inst. b. 1, Penal Law, 3d ed. 6; 4 Bl. Com. 16; c. 18, § 8, 16.

courts, as we have seen,¹ 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.²

§ 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,³ 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.⁴

¹ Ante, § 10, 209.

² Commonwealth v. Mash, 7 Met.

³ "State punishments are to be considered as founded on, and limited by, first, natural justice; secondly, public utility." Eden Penal Law, 3d ed. 6.

472; post, § 908; Stat. Crimes, § 356.

⁴ 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;¹ 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."²

§ 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,³ "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.⁴

¹ Broom Leg. Max. 2d ed. 105.

² Broom Leg. Max. 2d ed. 165.

³ Ante, Introduction.

⁴ 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, § 380-341. 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,¹ 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;² or, as more strongly expressed, the grossest ignorance or most criminal inattention.³

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;"⁴ 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.⁵ And such is generally, perhaps universally, the just doctrine where the omission is not connected with a legal duty;⁶ but not where it is.⁷ The difference between omitting and doing is not so much in principle as in degree.⁸ The delinquency must

¹ Post, § 313 et seq.

² Rex v. Long, 4 Car. & P. 398; Rex v. Van Butchell, 3 Car. & P. 629.

³ Rex v. Williamson, 3 Car. & P. 635; Vol. II. § 664.

⁴ 1 East P. C. 262. And see, as to what is sufficient carelessness, Reg. v. Conrah, 2 Crawf. & Dix C. C. 86; Rex v. Waters, 6 Car. & P. 328; Rex v. Conner, 7 Car. & P. 438; The State v. Hildreth, 9 Ire. 440; Matheson's Case, 1 Swinton, 593. See also Vol. II. § 656 b, 681, 690.

⁵ Rex v. Green, 7 Car. & P. 156.

⁶ 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, 3d 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, 5 Cox C. C. 379.

⁷ 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.

⁸ 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,¹ 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 escape² suffered by a deputy, as his jailer; because he "ought to put in such a jailer as for whom he will be answerable."³ 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;⁴ though he may be liable in proceedings *quasi* criminal, for the enforcement of civil rights.⁵

§ 219. **Further of Principal and Agent**. — We shall see,⁶ 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.

¹ Post, § 316 et seq.

² See post, § 316, 321.

³ 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.

⁴ Commonwealth v. Lewis, 4 Leigh, 664; The State v. Berkshire, 2 Ind. 207; Overholzer v. McMichael, 10 Barr, 139; 1 East P. C. 831.

⁵ Matter of Stephens, 1 Kelly, 584; Overholzer v. McMichael, 10 Barr, 139. And see Miller v. Lockwood, 6 Harris, Pa. 248.

⁶ Post, § 217.

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.¹ 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.² Other cases followed, as may be seen.³ 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."⁴

§ 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

¹ Hipp v. The State, 5 Blackf. 149; The State v. Dawson, 2 Bay, 360; Barnes v. The State, 19 Conn. 898. And see Ewing v. Thompson, 13 Misso. 132; Caldwell v. Sacra, Litt. Sel. Cas. 118.

² Rex v. Almon, 5 Bur. 2686.

³ 2 Stark. Slander, 2d ed. 34; 2 Hawk. P. C. 7th ed. c. 73, § 10; Rex v. Walter,

8 Esp. 21; Rex v. Gutch, Moody & M. 433, 437; Attorney-General v. Siddon, 1 Cromp. & J. 220, 1 Tyrw. 41; Attorney-General v. Riddle, 2 Cromp. & J. 493; s. c. nom. Attorney-General v. Riddell, 2 Tyrw. 523.

⁴ 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.¹ 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.²

Nuisance — Quasi Civil. — The case of a nuisance, to be considered further on,³ perhaps occupies special ground; for, as to it, the public has a *quasi* civil right to establish; and in later pages we shall see⁴ 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

¹ *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."

² *Rex v. Williams*, Lofft, 759; *Anon-ymous*, Lofft, 544, 780; *Rex v. Gutch*, Moody & M. 433, 437; *Rex v. Walter*, 3 Esp. 21.

³ Post, § 316.

⁴ 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."¹ 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.² 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.³ Therefore, in cases of this kind, the doctrine under consideration does not apply.⁴

§ 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-

¹ Paley Phil. b. 2, c. 6.

² *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, 380; *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.

³ *The State v. Mitchell*, 5 Ire. 350; *Stat. Crimes*, § 310.

⁴ 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.¹

§ 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.² 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.³ 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.⁴ 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

¹ Stat. Crimes, § 86-90, 123, 124.

² Ex parte Bollman, 4 Cranch, 75. And see Eden Penal Law, 3d ed. 117, 118; Vol. II. § 1232.

³ 1 East P. C. 139, 140; Eden Penal Law, 3d ed. 202; post, § 717, 722.

⁴ 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. Solegnard, 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."¹

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.² From these illustrations, which might be added to³ 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.⁴ 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.

¹ 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, 152.

² 1 East P. C. 234; Rex v. Lynch, 5 Car. & P. 324. And see ante, § 216, 217.

³ 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.

⁴ 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.

250-264. 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;¹ 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.² 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

¹ Ante, § 32.² Ante § 212 et seq.

injurious to itself.¹ 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,² so does each individual suffer when the public does. Therefore every injury to the public is an injury to each individual.³ 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.⁴ Therefore the rule of the law is, that, under such circumstances, no one can have his private action.⁵

¹ See ante, § 32, 210.² Ante, § 231.³ See 4 Bl. Com. 5.⁴ 4 Bl. Com. 167.⁵ 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,¹ 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.² 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.³ Or, if a nuisance affects the public, it is indictable, while actionable if it affects only individuals.⁴ 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.⁵ If it were a special injury to an individual, he would have his common-law action;⁶ and an

indictment would not lie, unless it were also injurious to the public.¹ 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.²

§ 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.³ 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.

¹ Rex v. Leginham, 1 Mod. 71. And see Crumpton v. Newman, 12 Ala. 199; Rex v. Watson, 2 T. R. 199.

² Stat. Crimes, § 138.

³ Stat. Crimes, § 249-253.

¹ Ante, § 212 et seq.

² 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.

³ Commonwealth v. Eckert, 2 Browne, Pa. 249.

⁴ 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.

⁵ 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, 8 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 Stro. 12; Rex v. Howard, 7 Mod. 307; Commonwealth v. Shattuck, 4 Cush. 141, 146; Tate v. The State, 6 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. 526; Phillips v. The State, 19 Texas, 158. Contra, The State v. Ashley, Dudley, Ga. 188. And see the State v. McKentyre, 3 Ire. 171.

⁶ Beckford v. Hood, 7 T. R. 620; Barden v. Crocker, 10 Pick. 383; Colburn v. Swett, 1 Met. 232; Jenner v. Joliffe, 9

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 duty¹ of a public nature, any neglect of it, or act done in violation of it, is indictable.² Still, —

Limits of Doctrine. — As said many times in these pages,³ 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.⁴

§ 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,⁵ or a woman and her bastard child,⁶ or to pay the costs of an appeal to the poor's rate,⁷ or to admit an individual to membership in a friendly or benefit society,⁸ and other like orders⁹ 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.¹⁰ But most of these orders are unknown in our practice, or they are founded on a statute which itself provides a

¹ That the duty must be a legal one, see *Reg. v. Vann*, 8 Eng. L. & Eq. 596, 2 Den. C. C. 825, 5 Cox C. C. 379; *The State v. Bailey*, 1 Post. N. H. 185; *Reg. v. Everett*, 8 B. & C. 114.

² See *People v. Norton*, 7 Barb. 477; post, § 818 et seq.

³ See ante, § 212 et seq.

⁴ And see the observations of Dade, J., in *Anderson v. Commonwealth*, 5 Rand. 627, 631.

⁵ *Reg. v. Turner*, 5 Mod. 829.

⁶ *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.

⁷ *Reg. v. Boys*, Say. 143.

⁸ *Reg. v. Gilkes*, 3 Car. & P. 52; *Reg. v. Wade*, 1 B. & Ad. 861; *Reg. v. Byce*, Bott, P. L. 324.

⁹ *Reg. v. Gash*, 1 Stark. 441; *Reg. v. Mytton*, Cald. 586, 1 Bott P. L. 439, note, 4 Doug. 833; *Reg. v. Robinson*, 2 Bur. 799, 2 Keny. 513; *Reg. v. Boyall*, 2 Bur. 832, 2 Keny. 549; *Reg. v. Wood Ditton*, 18 Law J. n. s. M. C. 218; *Reg. v. Wiggot*, Comb. 205; *Reg. v. Crossley*, 2 Per. & D. 319, 10 A. & E. 182, 3 Jur. 675.

¹⁰ 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.¹

Officer disobeying Magistrate. — So an officer² commits a criminal misdemeanor who refuses to serve³ or return⁴ 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.⁵ This sort of ill conduct is, in most of our States, cognizable by the magistrate as a contempt;⁶ 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,⁷ 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.⁸

¹ *Reg. v. Harris*, 2 Leach, 4th ed. 549, 4 T. R. 202.

² See *The State v. Berkshires*, 2 Ind. 207.

³ *Reg. v. Mills*, 2 Show. 181.

⁴ *Reg. v. Wyatt*, 1 Salk. 830; s. c. nom. *Reg. v. Wyatt*, 2 Ld. Raym. 1189.

⁵ *Reg. v. Johnson*, 11 Mod. 62.

⁶ Vol. II. § 244, 263.

⁷ Vol. II. § 1231.

⁸ 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.¹

§ 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.² 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 misdemeanour. 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 pointing 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.

¹ 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. Proce. II. § 862-364.

² See Ellis v. The State, 7 Blackf. 534; Rex v. Pierce, 2 Show. 827; Rex v. Cross,

number of persons, — in one case, it was said, the inhabitants of three houses,¹ — it is not indictable.² 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.³ This is a distinction sometimes made on a question not well settled in authorities which are perhaps not uniform.⁴

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.⁵

§ 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.⁶

Way for less than Entire Public.—If it belongs merely to a town, whose inhabitants only are entitled to use it,⁷ and, *a fortiori*, if it is simply the private way of an individual,⁸ an obstruction of it will not be indictable.⁹

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. Carille, 6 Car. & P. 636; Rex v. Neville, Peake, 91.

¹ Rex v. Lloyd, 4 Esp. 200.

² Rex v. Hornsey, 1 Rol. 406.

³ 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. Catlin, 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.

⁴ Post, § 1125 et seq.

⁵ See Vol. II. § 1272-1277.

⁶ And see, as illustrative, People v. Jackson, 7 Mich. 432; The State v. Rye, 35 N. H. 368.

⁷ 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.”

⁸ The State v. Randall, 1 Strob. 110.

⁹ 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.¹

§ 246. **Refusal to accept Local Office.** — A refusal to accept office of a public nature being indictable,² 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.³ Still there are circumstances in which a court, acting under a discretion, will not interfere by information, while yet an indictment will lie;⁴ and possibly instances in which a public corporation has power to provide a remedy superseding even the indictment.⁵ 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."⁶

¹ Commonwealth v. Gowen, 7 Mass. 417; 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.

² Post, § 458.

³ 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. 781; Rex v. Jones, 7 Mod. 410, 2 Stra. 1146; Rex v. Prigg, Ayleyn, 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. Hoyt, 3 Post. 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.

⁴ 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.

⁵ See Anonymous, 11 Mod. 132; Reg. v. Hungerford, 11 Mod. 142; The State v. McEntyre, 3 Ire. 171; Rex v. Grosvenor, 2 Stra. 1193.

⁶ Rex v. Plympton, 2 Ld. Raym. 1377, 1879; Vol. II. § 88, note.

§ 247. *How Intense the Evil:* —

Varying. — A wrong to the public need not, we have seen,¹ 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,² 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 regarded³ 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.⁴ 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.⁵

§ 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

¹ Ante, § 235.

² Ante, § 221, 226, 235.

³ 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, 18 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. 87; Reg. v. Hext, 4 Jur. 339.

⁴ Ante, § 226; post, § 604, 716-722.

⁵ 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."¹ 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.*"²

§ 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.³

¹ Matt. vii. 14.

² Matt. xviii. 7.

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.¹ 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.

¹ 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.¹ 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.² 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 information³ against another who has injured him, unless free himself from blame in the transaction complained of, and prompt in the pursuit of his remedy.⁴

¹ Post, § 257, 258.

² Reg. v. Hutchinson, 9 Cox C. C. 555, 557; Vol. II. § 862a.

³ Crim. Proceed. I. § 145.

⁴ Anonymous, Lofft, 314; Rex v. Haswell, 1 Doug. 387; Rex v. Miles, 1 Doug. 234; 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, 3 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. 887; 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.¹

§ 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.² 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.³ 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,⁴ — a doctrine, however, not everywhere accepted.⁵ In larceny, it is no defence that the person from whom the goods are stolen, himself stole them, or procured them by other wrong.⁶

Unauthorized Consent. — Obviously a consent from one having no legal right to give it avails nothing.⁷

§ 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

¹ *Rex v. Williams*, 1 D. & B. 197, 5 B. & Ald. 595; *Rex v. Haswell*, 1 Doug. 387; *Reg. v. Gregory*, 1 Per. & D. 110, 8 A. & E. 907.

² *Rex v. Beacall*, 1 Car. & P. 310, 454; *Rex v. Wellings*, 1 Car. & P. 454; *Reg. v. Longbottom*, 3 Cox C. C. 439, 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; *Rex v. Rew*, J.

³ *Kel. 26*; *Hutton's Case*, 1 Swinton, 497.

⁴ *Hayden v. The State*, 4 Blackf. 546.

⁵ *People v. Stetson*, 4 Barb. 151; Vol. II. § 469. See *Rex v. Beacall*, 1 Car. & P. 454.

⁶ Vol. II. § 468, 469. And see *Reg. v. Hudson*, Bell C. C. 263, 8 Cox C. C. 305; *Reg. v. —*, 1 Cox C. C. 250.

⁷ Vol. II. § 781, 789.

⁸ *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.¹ It is thus where death is inflicted in a duel.² So likewise, —

Mayhem. — It being the gist of the crime in mayhem that the injured person is rendered less able in fighting,³ one may not innocently maim himself; and, if at his request another maims him, both are guilty.⁴ 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.⁵

§ 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.⁶

Battery. — He may inflict self-torture, at least to a limited degree, though, as we have seen,⁷ he must neither maim nor kill himself; consequently another who in good faith whips him at his request,⁸ or with his consent does any other act which under

¹ *Rex v. Hughes*, 5 Car. & P. 126. Lit. 127 a; *People v. Clough*, 17 Wend. 351, 352.

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.

² *Rex v. Taverner*, 1 Rol. 360, 8 Bulst. 171; *Rex v. Rice*, 3 East, 581; *Reg. v. Young*, 3 Car. & P. 644; ante, § 10. And see *McAfee v. The State*, 31 Ga. 411.

³ *Stat. Crimes*, § 316; Vol. II. § 1001.

⁴ *Rex v. Wright*, 1 East P. C. 396, Co.

⁵ *Wright v. The State*, 4 Humph. 194; *The State v. Murphy*, 6 Ala. 765; Vol. II. § 1115, 1122-1126.

⁶ *Dodge v. Brittain*, Meigs, 84; *Dodd v. Hamilton*, N. C. Term R. 31; *The State v. Jernagan*, N. C. Term R. 44. And see *The State v. Chambers*, 6 Ala. 855.

⁷ Ante, § 259.

⁸ *The State v. Beck*, 1 Hill S. C. 393.

ordinary circumstances would amount to an indictable battery,¹ commits no crime.

§ 261. **Consent obtained by Fraud, Force, &c.** — But if in these cases the consent is obtained by fraud;² or if the person from tender years³ or other cause is incapable of consenting; or if, without absolute fraud or actual incapacity, the will is overpowered,⁴ as by an array of force,⁵ or by the false pretence, the accused being a physician, that the act done is necessary in a course of medical treatment;⁶ 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.⁷ Still —

Rape — Assault — Adultery. — The peculiar offence of rape is not committed where a fraud procures the consent,⁸ as where the man personates the husband of the woman;⁹ though the act is in law an assault.¹⁰ Such act is also adultery in him, in those

¹ *Smith v. The State*, 12 Ohio State, 406; *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. § 85. **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. 637; 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, 437. 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.

² *Reg. v. Saunders*, 8 Car. & P. 265; *Reg. v. Williams*, 8 Car. & P. 286.

³ *Reg. v. Read*, 1 Den. C. C. 377, *Temp. & M.* 52, 3 New Sess. Cas. 405, 18 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.

⁴ *Hays v. People*, 1 Hill, N. Y. 351; *Reg. v. Day*, 9 Car. & P. 722; *Rex v. Nichol, Russ. & Ry.* 130.

⁵ *Reg. v. Hallett*, 9 Car. & P. 748.

⁶ *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.

⁷ *Bishop First Book*, § 68-99, 125; Vol. II. § 36, 751, 752, 811, 1122-1126.

⁸ So also in Alabama, *The State v. Murphy*, 6 Ala. 765.

⁹ Vol. II. § 1122.

¹⁰ *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.¹

§ 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.² And, in general terms, exposing property, or neglecting to watch it, under the expectation that a thief will take it,³ or furnishing any other facilities or temptations to such or any other wrong-doer,⁴ 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.⁵ 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.⁶ 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.⁷

Reg. v. Stanton, 1 Car. & K. 415; *Reg. v. Camplin*, 1 Car. & K. 746.

¹ *Rex v. Chater*, 13 Shaw's J. P. 766, *Archb. New Crim. Proced.* 306; Vol. II. § 1121, 1123.

² *Thompson v. The State*, 18 Ind. 386.

³ *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.

⁴ *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.

⁵ *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.

⁶ And see *Alexander v. The State*, 12 Texas, 540.

⁷ *Rex v. Bigley*, 1 Crawf. & Dix C. C.

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Force or Fraud. — And the doctrine as to the breaking seems to be, that a consent to it obtained by fraud¹ or by force² 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.³ 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.⁴

¹ *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 not 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*, § 812.

² *Rex v. Swallow*, 1 Russ. Crimes, 3d Eng. ed. 792; *Stat. Crimes*, § 812.

³ *The State v. Anone*, 2 Nott & McC. 27; *The State v. Sonnerkalb*, 2 Nott & McC. 280.

⁴ *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.¹ Thus, —

§ 265. **Assault and Battery — Nuisance — Way.** — An action for assault and battery,² or for the recovery of damage done by a common nuisance,³ 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.⁴ Therefore, “if A dig a trench across

¹ 12 Co. 128; *Blassingame v. Graves*, 6 B. Monr. 33; *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, § 287-289; *Chiles v. Drake*, 2 Met. Ky. 145.

² *Jones v. Clay*, 1 B. & P. 191.

³ *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*, 58 N. Y. 152; *Harvard College v. Stearns*, 15 Gray, 1. And see *Nichols v. Pixley*, 1 Root, 129.

⁴ *Low v. Knowlton*, 26 Maine, 125; *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."¹ 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.² But the damage must be special to the individual, not merely such as all sustain.³ 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.⁴

§ 266. **Judicial Discretion — (Information).** — Yet courts, when called upon for a favor, as to grant a criminal information⁵ 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.⁶ 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.⁷ 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, 78; *Rose v. Miles*, 4 M. & S. 101; *Cole v. Sprowl*, 35 Maine, 161; *McLaughlin v. Charlotte and South Carolina Railroad*, 5 Rich. 533; *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, 89; *Herron v. Hughes*, 25 Cal. 555; *Ayres v. Lawrence*, 63 Barb. 454.

¹ *Broom Leg. Max.* 2d ed. 156; *Ashby v. White*, 2 Ld. Raym. 938, 955.

² *Portland v. Richardson*, 64 Maine, 46; *Osborn v. Union Ferry*, 53 Barb. 629; *Brown v. Watson*, supra; *Benjamin v. Storr*, Law Rep. 9 C. P. 400.

³ *Lamphier v. Railroad*, 33 N. H. 495; *Johnson v. Stayton*, 5 Harring. Del. 362.

⁴ *Baxter v. Winoski Turnpike*, 22 Vt. 114; *Lansing v. Smith*, 4 Wend. 9; *Stetson v. Faxon*, 19 Pick. 147; *Wilkes v. Hungerford Market*, 2 Bing. N. C. 231, 293; *Rose v. Groves*, 6 Scott N. R. 645, 654. And see *Cook v. Bath*, Law Rep. 6 Eq. 177; *Willard v. Cambridge*, 8 Allen, 574; *Allen v. Monmouth*, 2 Beasley, 68.

⁵ See *Crim. Proced.* I. § 143.

⁶ *Rex v. Phillips*, Cas. temp. Hardw. 241; *Rex v. Fielding*, 2 Bur. 654, 2 Keny. 386; *Rex v. Sparrow*, 2 T. R. 193; *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.

⁷ *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.¹ 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.²

Statutes abridging Double Prosecution. — Likewise statutes have in some localities abridged the right of double prosecution.³

§ 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;⁴ 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."⁵ 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,⁶ as will be more fully explained in a subsequent chapter.⁷ 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.

¹ *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.

² *Jacks v. Bell*, 3 Car. & P. 316. And see *Porter v. Sellar*, 11 Harris, Pa. 424.

³ *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. 563.

⁴ *Ante*, § 11.

⁵ *Booth v. Hodgson*, 6 T. R. 405, 409.

⁶ *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. 558; *Cameron v. McFarland*, 2 Car. Law Repos. 415; *Corley v. Williams*, 1 Baileys, 588; *Hinesburgh v. Sumner*, 9 Vt. 23.

⁷ *Post*, § 708 et seq.

hensible. Where the principal offence is only a misdemeanor, the law, following the rule of not regarding small things,¹ 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.² 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.³

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;⁴

¹ Ante, § 212 et seq.

² 3 Inst. 139 et seq.; 1 Hale P. C. 372, 374; 1 Russ. Crimes, 3d Eng. ed. 46, 181; Anonymous, Sir F. Moore, 8; 1 Hawk. P. C. 6th ed. c. 59; 4 Bl. Com. 121; post, § 716 et seq.

³ 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, Loft, 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, Coxe, 118, 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 attained 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, 5 Car. & P. 323

⁴ Chowne v. Baylis, 31 Beav. 351.

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.¹

§ 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.² 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.³

§ 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;⁴ though Park, J., once submitted the question to the jury.⁵ 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 *in 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

¹ 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.

² Gimson v. Woodfull, 2 Car. & P. 41, 43; Pease v. McAloon, 1 Kerr, 111.

³ 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.

⁴ Gimson v. Woodfull, 2 Car. & P. 41; Pease v. McAloon, 1 Kerr, 111.

⁵ 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.¹

§ 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,² 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

¹ Wells v. Abrahams, Law Rep. 7 Q. B. 554. It is observed in this case, that Gimson v. Woodfull, supra, was expressly overruled in White v. Spettigue, 13 M. & W. 608. And see Ex parte Ball, 10 Ch. D. 667.
² Stat. Crimes, § 154 et seq.

of diverse solution. In some States, as Alabama,¹ and perhaps New Hampshire (where it is doubtful),² the full English doctrine is held. The Maine tribunal,³ apparently sustained by some early Massachusetts authorities,⁴ restricted the rule to robberies and larcenies; but a subsequent statute altogether removed the disability.⁵ In South Carolina,⁶ Massachusetts,⁷ Mississippi,⁸ and apparently Tennessee,⁹ the English doctrine has been utterly discarded. The Connecticut court seems to have limited it to such felonies as are punishable capitally;¹⁰ and the Georgia, to felonies at common law, in exclusion of those created by statute.¹¹ In New Jersey,¹² Virginia,¹³ North Carolina,¹⁴ Missouri,¹⁵ Michigan,¹⁶ and Texas,¹⁷ the question appears to be in doubt, with perhaps a tendency against the English doctrine.¹⁸ In Arkansas the civil suit is authorized by statute.¹⁹ It is so also in New York.²⁰

§ 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.²¹ This distinction appears to harmonize the

¹ 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, 85 Ala. 184; ante, § 267. For a partial qualification created by the construction of a statute, see Lankford v. Barrett, 29 Ala. 700.

² Grafton Bank v. Flanders, 4 N. H. 239; Pettingill v. Rideout, 6 N. H. 454.

³ Crowell v. Merrick, 19 Maine, 892; Belknap v. Milliken, 23 Maine, 381; Foster v. Tucker, 3 Greenl. 458; Boody v. Keating, 4 Greenl. 164.

⁴ Boardman v. Gore, 15 Mass. 331.

⁵ See reporter's note to Belknap v. Milliken, 23 Maine, 381.

⁶ Cannon v. Barris, 1 Hill, S. C. 372; Robinson v. Culp, 1 Tread. 231, 3 Brev. 302.

⁷ Boston and Worcester Railroad v. Dana, 1 Gray, 83.

⁸ Newell v. Cowan, 30 Missis. 492.

⁹ Ballew v. Alexander, 6 Humph. 433. And see post, § 272, note.

¹⁰ Cross v. Guthery, 2 Root, 90.

¹¹ Adams v. Barrett, 5 Ga. 404; Neal v. Farmer, 9 Ga. 555; Dacy v. Gay, 16 Ga. 203.

¹² Patton v. Freeman, Coxe, 113.

¹³ Allison v. Farmers' Bank, 6 Rand. 204; Cook v. Darby, 4 Munf. 444.

¹⁴ White v. Fort, 3 Hawks, 251; Smith v. Weaver, Taylor, 58, 2 Hayw. 108.

¹⁵ Nash v. Primm, 1 Misso. 178; Mann v. Trabue, 1 Misso. 709.

¹⁶ In Hyatt v. Adams, 16 Mich. 180, 189, 202, the question arose incidentally, and in a dictum Christianity, J., discarded the English doctrine, and Campbell, J., declined expressing any opinion upon it, because not essential to the decision of the case.

¹⁷ Mitchell v. Mims, 8 Texas, 6.

¹⁸ See also Piscataqua Bank v. Turnley, 1 Miles, 312; Plummer v. Webb, Ware, 75; Dunlop v. Munroe, 1 Cranch C. C. 586.

¹⁹ Brunson v. Martin, 17 Ark. 270.

²⁰ Van Duzer v. Howe, 21 N. Y. 531, 538; Koenig v. Nott, 2 Hilton, 823. 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.

²¹ 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*,¹ 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. Praed*, 4 Taunt. 825.
¹ *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,¹ 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,² 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 rules³ it might be well to inquire, had we not found⁴ 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,⁵ 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.⁶ It is the same, also, with misprision of felony.

§ 276. *Another Line of Argument.*—One method of argument

¹ Ante, § 267, 268.

² Ante, § 273.

³ And see *Crowell v. Merrick*, 10 Maine, 302.

⁴ Ante, § 270.

⁵ "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, 92.

⁶ 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.¹ 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.

¹ And see ante, Introduction.

CHAPTER XVII.

THE NULLITY OF EX POST FACTO LAWS.¹

§ 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.² 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.”³

Restrains Criminal Legislation, not Civil. — This provision relates

¹ See, for matter on the subject of this chapter, Stat. Crimes, § 29, 86, 180, 185, 265-267.

² 1 Bishop Mar. & Div. § 670 et seq.; *Suydam v. Receivers of New Brunswick Bank*, 2 Green Ch. 114; *New Orleans v. Cordevielle*, 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.

³ Const. U. S. art. 1, § 9, 10; Stat. Crimes, § 180, 185, 265; *Calder v. Bull*,

3 Dall. 386, 390; *United States v. Hall*, 2 Wash. C. C. 306; *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. 206, 271; *Davis v. Ballard*, 1 J. J. Mar. 563, 570; *Locke v. Danc*, 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.¹ Still it reaches somewhat beyond the domain of pure crime, as defined² 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*;³ 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.⁴ 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.⁵

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.⁶ 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.⁷ 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.⁸ And —

Place. — It may change the rules as to the venue or place of trial of such offence.⁹ So also —

Procedure. — The procedure whereby offenders are brought to punishment may, as to offences already perpetrated, equally as

¹ Story Const. § 1345; *Carpenter v. Commonwealth*, 17 How. U. S. 456; *Byrne v. Stewart*, 3 Des. 466.

² Ante, § 32.

³ *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.

⁴ *Ex parte Garland*, 4 Wal. 333; *Cummings v. Missouri*, supra.

⁵ *Elliott v. Elliott*, 35 Md. 357.

⁶ Post, § 995 et seq.; *Crim. Proced. I.* § 117 et seq.; *Lewis v. Turner*, 40 Ga. 416.

⁷ 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.

⁸ 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*, 43 Pick. 508; *Commonwealth v. Phillips*, 11 Pick. 28.”

⁹ *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.¹

§ 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.²

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.³ 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."⁴ 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

¹ 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.

² Stat. Crimes, § 266.

³ Crim. Proc. I. § 77 et seq.

⁴ Calder v. Bull, 3 Dall. 366, 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; Boeke 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;¹ 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.² 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.³ 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 done⁴ to be criminal. It is equally so "if," in the words of Cooley,⁵ "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."⁶

¹ Ante, § 280.

² Crim. Proc. I. § 1089, 1090.

³ Valesco v. The State, 9 Texas Ap. 76;

Calloway v. The State, 7 Texas Ap. 685;

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.

⁴ Falconer v. Campbell, 2 McLean, 195, 212.

⁵ Cooley Const. Lim. 266.

⁶ 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;¹ yet, where both were before, the consequence is otherwise.²

§ 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.

¹ Ross's Case, 2 Pick. 165; Rand v. Commonwealth, 9 Grat. 738; Ex parte Gutierrez, 45 Cal. 429. ² Biley'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,¹ 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;² 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.³

¹ Ante, § 204 et seq.

² 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.

³ The William Gray, 1 Puine, 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;”¹ *Actus me invito factus non est meus actus*, “an act done by me against my will is not my act;”² and the like. In this particular, criminal jurisprudence differs, as just said, from civil.³ 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.”⁴

§ 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. 206, 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. Ailday*, 8 Car. & P. 136; *Reg. v. Thurborn*, 1 Den. C. C. 887; *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, 235, 244; *Rex v. O’Brian*, 7 Mod. 878; *Stur-*

ges v. Maitland, Anthon, 158; *Cammins v. Spruance*, 4 Harring. Del. 315; *Reg. v. Phillips*, 2 Moody, 252; *The State v. Carland*, 8 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.

¹ *Broom Leg. Max.* 2d ed. 226, 232, 239, 275, 638, note; *Burrill Law Dict.*

² *Bouv. Law Dict.*; *Burrill Law Dict.*

³ *Rex v. Fell*, 1 Salk. 272; *Weaver v. Ward*, Hob. 134; *James v. Campbell*, 5 Car. & P. 372; *Müller v. Lockwood*, 5 Harris, Pa. 248; ante, § 286.

⁴ *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.¹ 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

¹ Crim. Proced. I. § 7, 492-498; post, § 346 et seq.

dwells; or in which, if residing abroad, he transacts business.² 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.³ 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.⁴ Not even, in general, is the excuse valid that he endeavored to ascertain the law and was misled by advising counsel.⁵ *Ignorantia juris non excusat* is, therefore, a rule in our jurisprudence, as in the Roman, whence it is derived.⁶

§ 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

¹ 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. Barronet, Dears.* 51.

² *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.

³ See 1 Story Eq. Jurisp. § 110 et seq.; also an article in 23 Am. Jur. 146, 371.

⁴ 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. 135; *Rex v. Soleguard*, 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. 419; *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; *Winchert v. The State*, 6 Ind. 80; *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. 695; *People v. Cook*, 39 Mich. 236. And see *Webster v. Sanborn*, 47 Maine, 471.

⁵ *Forwood v. The State*, 40 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.

⁶ 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."¹ 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.²

§ 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.³ 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.⁴ 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.⁵ Yet —

Mitigation of Punishment. — The courts in passing sentence on the prisoner sometimes make it less by reason of his ignorance of the law.⁶ And, —

Pardon. — In England, where one was convicted of a malicious

¹ Rom. ii. 15. And see ante, § 10, 11, 210, 287, 288.

² And see observations in *The State v. Boyett*, 10 Ire. 336, 343, 344; and *United States v. Fourteen Packages*, Gilpin, 235, 249, 250.

³ *The Ann*, 1 Gallis. 62; *Branch Bank of Mobile v. Murphy*, 8 Ala. 119; *Heard v. Heard*, 8 Ga. 380. And see *Oakland v. Carpentier*, 21 Cal. 642.

⁴ *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*, § 29-32.) 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.

⁵ *United States v. Fourteen Packages*, Gilpin, 235, 249.

⁶ *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.¹

§ 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.² And —

§ 298. **Malicious Mischief.** — The like doctrine prevails in malicious mischief.³ 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.⁴ 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.⁵ So, —

¹ *Rex v. Bailey*, Russ. & Ry. 1. See *Rex v. Thomas*, 1 Russ. Crimes, 3d Eng. ed. 614.

² *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.

³ Vol. II. § 998.

⁴ *Stat. 7 & 8 Geo. 4, c. 90, § 8*; *Reg. v. Langford*, Car. & M. 602, 605.

⁵ *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.¹

§ 299. **Corruption in Magistrate, &c.** — Likewise in proceedings against magistrates and other *quasi* judicial and sometimes ministerial officers, for acting corruptly in their office,² their misapprehensions of the law may be set up in answer to the charge of corruption; ³ unless, perhaps, the mistake were induced by gross carelessness or ignorance, partaking of the criminal quality.⁴

§ 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,

¹ United States v. Conner, 3 McLean, 673. And see Vol. II. § 1047. **Further Points.** — For further matter relating to the subject of this section, see Hendricks v. Andrews, 7 Wend. 162; 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. 336; Commonwealth v. Bradford, 9 Met. 268; Reg. v. Lucy, Car. & M. 511; The State v. McDonald, 4 Harring. Del. 556; and The State v. Hart, 6 Jones, N. C. 389.

² Vol. II. § 972, 976.

³ 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. 556; 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, 335; 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, 36 Iowa, 499; The State v. Powers, 75 N. C. 281. See The State v. McDonald, 2 Dev. 468; Mungcam v. Wheatley, 1 Eng. L. & Eq. 516; People v. Calhoun, 3 Wend. 420; Cutter v. The State, 7 Vroom, 125.

⁴ Rex v. Stukely, 12 Mod. 493; 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*.¹ As expressed by Gould, J. :² "Ignorance or mistake in point of fact is, in all cases of supposed offence, a sufficient excuse."³

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."⁴ 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,⁵ and plainly no mistake of fact will in a civil suit excuse the proprietor.⁶ But a conductor who, honestly and not incautiously believing one not to have paid, ejects him, is not liable criminally for the assault.⁷ Still, —

§ 302. **Limit in Criminal Law.** — Even in the criminal law, a

¹ Broom Leg. Max. 2d ed. 190; 1 Story Eq. Jurisp. § 140.

² Myers v. The State, 1 Conn. 502.

³ See 4 Bl. Com. 27; 1 Hawk. P. C. Curw. ed. p. 5, § 14, note; Commonwealth v. Drew, 19 Pick. 179, 184.

⁴ Myers v. The State, 1 Conn. 502.

And see ante, § 286, 288; post, § 306, 307; Orne v. Roberts, 51 N. H. 110.

⁵ Long v. Horne, 1 Car. & P. 610; Ker v. Mountain, 1 Esp. 27.

⁶ 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.

⁷ 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,¹ or through any other wrong which produces this result unintended as elucidated in the chapter still next subsequent,² is misled as to fact, he cannot justify his conduct on the ground of the mistake for which he is himself thus responsible.³ 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;⁴ while, by the better opinion, it will protect him where his inquiry is duly thorough and honest.⁵ 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.⁶ Hence, —

Alleging Knowledge. — In general, and subject to exceptions in special cases, the indictment need not allege the defendant's knowledge.⁷ Now, after these preliminaries, —

¹ Post, § 313 et seq.

² Post, § 325 et seq.

³ 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; Castiberry v. The State, 62 Ga. 442; Darling v. Williams, 35 Ohio State, 58.

⁴ Reich v. The State, 63 Ga. 616, 620, 621; Goetz v. The State, 41 Ind. 162.

⁵ Crabtree v. The State, 80 Ohio State,

382; Adler v. The State, 55 Ala. 16; Robinson v. The State, 63 Ind. 235; Faulks v. People, 89 Mich. 200; Moore v. The State, 65 Ind. 382; Williams v. The State, 48 Ind. 306.

⁶ 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.

⁷ 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,¹ it necessarily follows, that, whenever one is misled, without fault or carelessness,² 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,³ the same as he is innocent morally.⁴ The rule in morals is stated by Wayland to be, that, if a man

¹ Ante, § 287, 288.

² 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.

³ 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, 62 Ala. 308; Reg. v. Twose, 14 Cox C. C. 327.

⁴ Ishani 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.”¹ 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.”² This doctrine prevails likewise in the Scotch law,³ 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.⁴ One of the misapprehensions, which has had a strange effect on some of the tribunals, relates to the —

¹ Wayland Moral Science, 81.

² 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.

³ 1 Alison Crim. Law, 565; 1 Hume Crim. Law, 2d ed. 449; McDonald's Case, 1 Broun, 238.

⁴ 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. 605, 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 punish 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. 185 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. Beatty, 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, 13 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. Proceed. 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. Hartfel*, 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.¹

§ 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.² In other words, and with reference to the right of

¹ See on this question, Stat. Crimes, § 88, 123, 131-144, 355-359, 632, 664, 665, 730, 808, 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. Willmetts, 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. Nacker, 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.

² 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. 889; Yates v. People, 32 N. Y. 509; Smaltz v. Commonwealth, 3 Rush, 32; Isham v. The State, 38 Ala. 213. Contra, majority of the court, in People v. Shorter, 4 Barb. 400. And see Mo-

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.¹

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, 89 Mich. 236.

¹ 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, 467; The State v. Scott, 4 Ire. 409; United States v. Wittberber, 3 Wash. C. C. 515; Shorter v. People, 2 Const. 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; Phillips v. Commonwealth, 2 Dav. 328; Adams v. People, 47 Ill. 376; The State v. Potter, 18 Kan. 414; The State v. Bryson, Winston, No. II., 86; Dawson v. The State, 33 Texas, 491; Williams v. The State, 3 Heisk. 876; The State v. Collins, 32 Iowa, 36; 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. 453; The State v. Brown, 64 Misso. 387; 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; Gladden 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. v. People v. Cole, 4 Parker C. C. 36; Pond v. People, 8 Mich. 150; Schrier v.

People, 28 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.¹ 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.² 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;³ but the authorities are not distinct as to how far ignorance of fact may thus be shown to defeat a *civil* suit.⁴

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.

¹ 1 East P. C. 251, 273, 292, 315, 316, 318; *Rex v. Woolmer*, 1 Moody, 234; *Reg. v. Walters*, Car. & M. 164; *Stanley's Case*, J. Kel. 86; *The State v. Zeibart*, 40 Iowa, 169.

² *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.

³ *Clow v. Wright*, Brayt. 118.

⁴ *Inlay v. Sands*, 1 Caius, 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.¹ 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.²

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.³ 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.⁴

§ 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.⁵ 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.⁶ But, —

§ 309. **Opinions contrary to Law.** — Though, in general, all

¹ *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.

² *Fairclough v. Gatewood*, 4 Call, 158.

³ *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, 350. See, concerning the principles laid down in this section, *Stat. Crimes*, § 131, 132.

⁴ *Carter v. The State*, 55 Ala. 181; *Gordon v. The State*, 52 Ala. 308.

⁵ *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.

⁶ *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.¹ 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.²

¹ Post, § 344; Reynolds v. United States, 98 U. S. 145; United States v. Anthony, 11 Blatch. 200.

² Reg. v. Hicklin, Law Rep. 3 Q. B. 360. As to which see also Steele v. Branman, 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.¹

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.² 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.⁴

§ 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.

¹ 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. 58; 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.

² See 1 Story Eq. Jurisp. c. 5; and the article in 23 Am. Jur. 147, 371.

³ Ante, § 297-300.

⁴ 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.¹ 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.² “If a man,” says Archbold,³ “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;⁴ 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.⁵ In like manner, —

¹ *Sturges v. Maitland*, Anthon, 153; *Commonwealth v. Rodes*, 6 B. Monr. 171.
² *Rex v. Carr*, 8 Car. & P. 163; *Reg. v. Haines*, 2 Car. & K. 368; *Reg. 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; *Reg. v. Smith*, 2 Car. & P. 449; 1 East P. C. 264, 381; *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.

³ Archb. New Crim. Proceed. 9.

⁴ *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. 280.

⁵ *Rex v. Green*, 7 Car. & P. 166; *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.¹ . . .

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.²

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.³ 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.”⁴

§ 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.⁵ In like manner, —

¹ *Rex v. Spiller*, 5 Car. & P. 333; *Rex v. Van Butchell*, 8 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.

² 3 *Inst.* 57; *Foster*, 263. And see Vol. II. § 691.

³ 1 *Hawk. P. C.* 7th ed. c. 31, § 68. And see Vol. II. § 656 b, 693.

⁴ *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.

⁵ *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.¹ 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."² On the same principle, if a man's servant throws dirt into the street, the master may be indicted for the nuisance.³ 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.⁴

§ 317. **Continued.**—In these cases, and some others of a like sort brought to view in a previous connection,⁵ 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.⁶ 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.⁷

¹ 4 Bl. Com. 130; 1 Hale P. C. 600; 2 Hawk. P. C. Curw. ed. p. 198, § 28, 81; ante, § 218; post, § 321; Vol. II. § 1095, 1100.

² 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.

³ Turberville v. Stampe, 1 Ld. Raym. 284.

⁴ 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. 814.

⁵ Ante, § 218-221.

⁶ 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.

⁷ Miller v. Lockwood, 5 Harris, Pa. 248; The State v. Dawson, 2 Bay, 360; Horn v. Nichols, Holt, 462; Rex v. Huggins, 2 Stra. 862; 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. Willmetts, 8 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."¹ So—

Selling Liquor, producing Disorderly Conduct.—One selling liquor, and permitting it to be drunk in his store, has been held criminally for the disorderly conduct, about the store, of those to whom he made the sales.² 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.³ 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.⁴

§ 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.⁵ So,—

48 Ind. 550; Anderson v. The State, 39 Ind. 558; Anderson v. The State, 22 Ohio State, 305; Louisville, &c. Railroad v. Blair, 1 Tenn. Ch. 851; Commonwealth v. Mason, 12 Allen, 185; Reg. v. Bennett, Bell C. C. 1; 1 East P. C. 331.

¹ 1 East P. C. 265.

² The State v. Burchinal, 4 Harring. Del. 572.

³ Gage v. Shelton, 3 Rich. 242.

⁴ 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.

⁵ See 1 Hawk. P. C. Curw. ed. p. 429, § 1, 2; United States v. Shellmire, Bald. 870, 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, 159. 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.¹

§ 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.”² So, —

Murder or Manslaughter. — In felonious homicide, the killing is sometimes either murder or manslaughter, according as it was intended or careless.³

§ 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. 87.” Draft of Penal Code, p. 51.

¹ 1 Hale P. C. 507.

² 4 Bl. Com. 130; 1 Hale P. C. 600; 2 Hawk. P. C. Curw. ed. p. 196, 197, § 22, 30, 31. And see ante, § 815.

³ 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.¹ 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 discussed² 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,³ 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,

¹ Ante, § 286 et seq.

² Ante, § 313 et seq. And see *Tardiff v. The State*, 28 Texas, 169.

³ 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 wrong¹ 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.¹ Says Rutherford: "There is

¹ The State v. Ruhl, 8 Iowa, 447. See Edens 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 sinful." 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. 159, 174; Reg. v. Camplin, 1 Car. & K. 748; Commonwealth v. Call, 21 Pick. 516; 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."¹ 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.² 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;³ 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;⁴ 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.

¹ Ruth. Inst. c. 18, § 11.

² And see Isham v. The State, 38 Ala. 213, 219.

³ Rex v. Plummer, 12 Mod. 627, 628; Rex v. Jarvis, 2 Moody & R. 40; Golliber v. Commonwealth, 2 Duvall, 163. And see Yong's Case, 4 Co. 40 a; Rex v. Hunt, 1 Moody, 98; 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. 281, 245, 274.

⁴ Reg. v. Saunders, 2 Plow. 478.

and a third, finding it, takes it and dies;¹ or, if one attempting to steal poultry discharges a gun to shoot the poultry, and thereby accidentally kills a human being;² 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;³ 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,⁴—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.⁵ 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;⁶ or shoots at poultry not his own to steal it, and undesignedly sets a house on fire;⁷ or, to defraud the insurance office, lights in his own dwelling the flame which communicates unmeant to his neighbor's;⁸ 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."⁹

§ 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-

¹ 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.

² 1 East P. C. 255; Eden Penal Law, 3d ed. 227.

³ Rex v. Huggins, 2 Stra. 882, 2 Ld. Raym. 1574.

⁴ Reg. v. West, 2 Car. & K. 784.

⁵ Rex v. Blackham, 2 East P. C. 711.

⁶ 1 Hawk, P. C. Curw. ed. p. 140, § 18; Roscoe Crim. Ev. 272.

⁷ Roscoe Crim. Ev. 272; 2 East P. C. 1019.

⁸ 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.

⁹ 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.¹ 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*.² Thus Archbold says:³ "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."⁴ For illustration,—

§ 332. **To violate Game Laws — (Homicide).**—Since it is *malum prohibitum*, but not *malum in se*, for an unauthorized person to

¹ See ante, § 327, note.

² Reg. v. Pummer, 1 Car. & K. 600; Reg. v. Packard, Car. & M. 236; Commonwealth v. Dana, 2 Met. 529; Commonwealth v. Cone, 2 Mass. 132; Commonwealth v. Judd, 2 Mass. 329; 1 East P. C. 255, 257, 260; Eden Penal Law, 3d 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.

³ Archb. New Crim. Proced. 9.

⁴ 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.¹

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 seen² that it would be murder.³

§ 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;⁴ 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,⁵ 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.⁶

§ 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.⁷ 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,⁸ — it

¹ 1 East P. C. 260; Roscoe Crim. Ev. 710.

² Ante, § 328.

³ 1 East P. C. 255.

⁴ Ante, § 330.

⁵ Ante, § 212 et seq.

⁶ And see and compare *The State v. Stanton*, 37 Conn. 421, 424; *Commonwealth v. Adams*, 114 Mass. 328.

⁷ Ante, § 216.

⁸ 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 un-intending doer must be assigned to the higher or lower degree, according as his intent was more or less intensely wrong.¹ 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.² 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,³ 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 Spécial 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.⁴ 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.⁵ 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

¹ Ante, § 321; *The State v. Smith*, 32 Maine, 369.

² Ante, § 328; *Eden Penal Law*, 3d ed. 227.

³ *Roscoe Crim. Ev.* 272; 2 East P. C. 1019.

⁴ See post, § 342.

⁵ *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;¹ 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.² 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.³ 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.⁴ But this does not contravene any prior doctrine.

¹ 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.

² *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. Pemberton*, 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.

³ Ante, § 327.

⁴ *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.¹ 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.² 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

¹ Ante, § 10, 11.

² *Rex v. Cox*, Russ. & Ry. 362; *Reg. v. Hill*, 2 Moody, 80; *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, 8 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. Edwards*, 5 Mich. 22; *Reg. v. Hamp*, 6 Cox C. C. 167. See *Reg. v. Doddridge*, 8 Cox C. C. 385.

is to demolish the house, the offence is committed in consequence of this inferior intent.¹ 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.² 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.”³ 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.⁴

§ 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;⁵ or, for obstructing a road, that he opened a better one;⁶ or, for the nuisance of erecting a wharf on public property, that the erection was beneficial to the public;⁷ or, for uttering a forged bill, that he intended to provide for its payment;⁸ or, for passing a counterfeit bank-note, that he promised to take it back if it proved not to be genuine.⁹

Intent fairly deducible.—In these cases, the forbidden intent must, of course, to establish the crime, be fairly deducible from the facts and proofs.¹⁰

¹ *Rex v. Batt*, 6 Car. & P. 329; *Reg. v. Howell*, 9 Car. & P. 437; *Rex v. Price*, 5 Car. & P. 510.

² *Reg. v. Bowen*, Car. & M. 149; *Commonwealth v. Martin*, 17 Mass. 359; *Rex v. Shadbolt*, 5 Car. & P. 504.

³ *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.

⁴ *United States v. Keen*, 5 Mason, 453.
⁵ *Rex v. Ward*, 4 A. & E. 334, overruling *Rex v. Russell*, 6 B. & C. 586. 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.

⁶ *Commonwealth v. Belding*, 13 Met. 10; Vol. II. § 1272.

⁷ *Respublica v. Caldwell*, 1 Dall. 150.

⁸ *Reg. v. Hill*, 2 Moody, 30.

⁹ *Perdue v. The State*, 2 Humph. 494; Vol. II. § 598.

¹⁰ *Reg. v. Price*, 9 Car. & P. 729; *Rex 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,¹ the further intent to deprive the owner of his ownership therein must be added.² 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.³ In these and other like cases,⁴ 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,⁵ forbids, there need be no other evil intent.⁶ As already stated,⁷ 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.

¹ *Rex v. Crump*, 1 Car. & P. 658; *Rex v. Dickinson*, Russ. & Ry. 429; *McDaniel v. The State*, 8 Sm. & M. 401.

² *Reg. v. Godfrey*, 8 Car. & P. 563; *Rex v. Wilkinson*, Russ. & Ry. 470; *The State v. Hawkins*, 8 Port. 481.

³ *Rex v. Dobbs*, 2 East P. C. 513; 2 East P. C. 509, 514; *J. Kel.* 47; *Anonymous*, Dalison, 22.

⁴ *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. 528; *Reg. v. Morris*, 9 Car. & P. 89.

⁵ Ante, § 294.

⁶ *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; *Brittain 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.

⁷ 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.¹ 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,² 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,³ 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."⁴ 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,⁵ this provision.⁶ 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

¹ And see Bishop First Book, § 87 et seq. 145; United States v. Reynolds, 1 Utah, 226; ante, § 169, note.

² Ante, § 294.

³ Specht v. Commonwealth, 8 Barr, 312; Reynolds v. United States, 98 U. S.

⁴ 1 Hume Crim. Law, 2d ed. 25.

⁵ Stat. Crimes, § 239, 240.

⁶ 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.¹ Still, —

Intent to Disobey. — Where a man knows² 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,³ it is, as already intimated,⁴ sufficient that he simply intends to do the thing which the statute forbids.⁵ A will to disobey a legislative command, or otherwise to violate the law, is always, in legal contemplation, evil,⁶ however it may be in theology or morals.⁷ 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.⁸ Nor can one excuse himself by showing that he did it in sport.⁹

¹ 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.

² The State v. Maloney, 12 R. I. 251.

³ Crim. Proced. I. § 522, 523.

⁴ Ante, § 343, 344.

⁵ The State v. Gould, 40 Iowa, 872; 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.

⁶ Reg. v. Walker, Law Rep. 10 Q. B. 355, 13 Cox C. C. 94; United States v. Evans, 1 Cranch C. C. 149.

⁷ Wayman v. Commonwealth, 14 Bush, 466; Stage Horse Cases, 15 Abb. Pr. n. s. 51.

⁸ United States v. Anthony, 11 Blatch. 200; Minor v. Happersett, 53 Misso. 58.

⁹ Hill v. The State, 63 Ga. 578.