CHAPTER XXIII.

NECESSITY AND COMPULSION.[1]

§ 346. **Unavoidable Act not Indictable.** — "No action," says Rutherforth, "can be criminal, if it is not possible for a man to do otherwise. An unavoidable crime is a contradiction; whatever is unavoidable is no crime; and whatever is a crime is not unavoidable." [2] If, therefore, one seizes the hand of another in which is a weapon, and, in spite of resistance, kills a third person with it, the first only is guilty.[3] And always an act done from compulsion or necessity is not a crime.[4] To this proposition the law knows no exception.

§ 347. **Details of the Doctrine.** — But while the doctrine thus stated is plain, and to establish its truth requires no further illustration, something as to detail becomes important. The law of self-defence and the defence of one's property will be explained further on;[5] but —

Save one's Life — Property — (Treason). — Whatever it is necessary for a man to do, to save his life, is, in general, to be considered as compelled.[6] If one, therefore, joins with rebels from fear of present death, he is not a traitor while the constraint remains.[7]

[1] In connection with this chapter, consult Crim. Proced. I. § 493 et seq.

[2] Ruth. Inst. c. 18, § 9; Reg. v. Dunnett, 1 Car. & K. 425; The Generous, 2 Dods. 322, 323.

[3] 1 East P. C. 225.

[4] 1 Plow. 19; Tate v. The State, 5 Blackf. 78; Reg. v. Bamber, 5 Q. B. 279, Dav. & M. 367.

[5] Post, § 836 et seq.

[6] 1 Russ. Crimes, 3d Eng. ed. 660, 661; Oliver v. The State, 17 Ala. 587.

[7] 1 East P. C. 70; Rex v. Gordon, 1 East P. C. 71; Respublica v. McCarty, 2 Dall. 86. And see 1 Russ. Crimes, 3d Eng. ed. 664, 665. So, in the Scotch law, "a person is not guilty of treason, who, being in a part of the country that is commanded by rebels, yields them, against his will, supply of money or arms and provisions; having no means of declining compliance, and being in the reasonable fear of military execution if he refused." 1 Hume Crim. Law, 2d ed. 50; 1 Alison Crim. Law, 627. "Nay," says the latter writer, "the same will hold without any treasonable insurrection, if an ordinary mob, or any unlawful assembly of persons, compel any individual, by threats and violence, to accompany them on any unlawful expedition, provided he did not yield too easily to intimidation, but held out as long as in such circumstances can be expected from a man of ordinary resolution." 1 Alison Crim. Law, 673; 1 Hume Crim. Law, 2d ed. 51.

But an apprehension, however well grounded, of having property wasted or destroyed; or of suffering any other mischief not endangering the person; or even, it has been said, apprehension of personal injury less than will deprive of life; is not a justification of a traitorous act.[1]

§ 348. **Killing Assailant — Innocent Person to save own Life.** — One attacked by a ruffian may kill him, if he cannot otherwise save his own life.[2] Yet, "according to Lord Hale," says Russell,[3] "a man cannot ever excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life if he do not comply: so that, if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.[4] But upon this it has been observed,[5] that, if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity; though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder." [6] Still, more recently, Lord Denman laid down the broad doctrine, "that no man from fear of consequences to himself has a right to make himself a party to committing mischief on mankind." [7]

§ 349. **Taking Goods to save Life.** — It is the doctrine generally accepted among our text-writers, that, if one under an emergency however extreme supplies the demand of nature for food or clothing from another's possessions, he commits larceny.[8] But surely if to save his own life he may join himself to traitors, or take the life of another, he may take another's goods.[9] Yet, for a man to be justified, his case must extend beyond mere poverty

[1] Rex v. McGrowther, 1 East P. C. 71; Respublica v. McCarty, 2 Dall. 86.

[2] 4 Bl. Com. 188; People v. Doe, 1 Mich. 451.

[3] 1 Russ. Crimes, 3d Eng. ed. 664.

[4] 1 Hale P. C. 51, 434. And see 4 Bl. Com. 30; 1 Broom Leg. Max. 2d ed. 8. There are cases in which one of two innocent parties has no right to prefer his own life to that of the other. United States v. Holmes, 1 Wal. Jr. 1.

[5] 1 East P. C. 294.

[6] 1 Russ. Crimes, 3d Eng. ed. 664.

[7] Reg. v. Tyler, 8 Car. & P. 616.

[8] 4 Bl. Com. 31; 1 Hale P. C. 54, 565; Dalt. Just. c. 151, § 5; 2 East P. C. 698, 699.

[9] And see Broom Leg. Max. 2d ed. 8; Barrow v. Page, 5 Hayw. 97.

however severe, and be such as could not often arise in this country; because the laws make provision for the support of the poor, even to the relief of an immediate want.[1]

§ 350. **Necessity varying with Circumstances — (The Test).** — It is plain that what would justify the doing of one thing as necessary might not that of another. The special facts of each case must be considered. The test would seem to be, whether, under the circumstances, the person was morally free in doing what he did, or whether the doing was produced by constraint of his will. Thus, —

§ 351. **Vessel in Stress of Weather — (Breach of Embargo — Revenue Laws).** — If, during an embargo, a vessel is by stress of weather compelled to put into a foreign port, and there sell her cargo, for the preservation of the lives and property on board, she will not be adjudged guilty of a breach of the Embargo Act.[2] So where, in Virginia (anterior to the establishment of our national Constitution), a tempest forced a vessel from Hampton Roads to Warwick before an entry was made at the custom-house at Hampton, this was held to be no breach of the State revenue laws; it further appearing, that immediately afterward the entry was made, the duties were secured, and a permit was obtained.[3] And if a merchant ship from a foreign port is wrecked on our coast, the goods are not liable to forfeiture, though landed without a permit.[4] For, although revenue laws are in their nature rigid and

[1] Grotius, who, with some other writers, holds that such taking is not theft, puts the doctrine thus: "For, among theologians also, it is a received opinion, that, in such a necessity, if any one take what is necessary to his life from any other's property, he does not commit theft: of which rule the reason is, not that which some allege, that the owner of the property is bound to give so much to him that needs it, out of charity, but this, that all things must be understood to be assigned to owners with some such benevolent exception of the right thus primitively assigned," — a reason, which, if we receive it as good, is still not in conflict with the one stated in our text. He adds some "cautions" against carrying "this liberty too far." Among other things he says, "that we must first endeavor in every way to avoid this necessity in some other manner; as, by applying to the magistrate, or by trying whether we cannot obtain the use of things from the owner by entreaty," and, when all is over, if "it is possible, restitution should be made." Grotius de Jure Belli et Pacis, I. 2, 7-9, Whewell's Translation, i. 238-240. **Necessary Labor — Lord's Day.** — As to the necessity which will justify laboring on the Lord's day, to save a growing crop from destruction and preserve life, see The State *v.* Goff, 20 Ark. 289; Vol. II. § 959.

[2] The William Gray, 1 Paine, 16. And see United States *v.* Brig James Wells, 3 Day, 296, 7 Cranch, 22; Anderson *v.* The Solon, Crabbe, 17.

[3] Stratton *v.* Hague, 4 Call, 564.

[4] The Gertrude, 3 Story, 68. And see Ripley *v.* Gelston, 9 Johns. 201; Peisch *v.* Ware, 4 Cranch, 347; Trueman *v.* Casks of Gunpowder, Thacher Crim. Cas. 14.

unelastic, they "must," in the graceful language of Lord Stowell, "yield to that to which every thing must bend, — to necessity."[1]

Compelled to stop in Street. — And a city ordinance, forbidding any one to "suffer" a vehicle to "stop in any street" for more than twenty minutes, is not violated when the stopping is involuntary.[2] Again, —

Money seized in a Rebellion. — If one has received public money, which he has undertaken to pay over to the government, yet if a rebellion arises and grows to be a public war, and, without his fault or negligence, the rebel authorities seize and appropriate to themselves this money, he is excused.[3]

§ 352. **Necessity urgent and without Fault.** — The necessity, to excuse, must be real and urgent, and not created by the fault or carelessness[4] of him who pleads it.[5] "Where the law," observes Story, J., "imposes a prohibition, it is not left to the discretion of the citizen to comply or not; he is bound to do every thing in his power to avoid an infringement of it. The necessity which will excuse him for a breach must be instant and imminent, it must be such as leaves him without hope by ordinary means to comply with the requisitions of the law. It must be such, at least, as cannot allow a different course without the greatest jeopardy of life and property. He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient, and the most for the interest of the parties concerned. He is, on the contrary, bound to seek the port of safety which first presents, if it be one where he may go without violation of the law. In a word, there must be, if not a physical, at least a moral, necessity to authorize the deviation. Under such circumstances the party acts at his peril; and, if there be any negligence or want of caution, any difficulty or danger which ordinary intrepidity might resist or overcome, or any innocent course which ordinary skill might adopt and pursue, the party cannot be held guiltless, who, under such circumstances, shelters himself behind the plea of necessity."[6] "I do not mean," said

[1] The Generous, 2 Dods. 322, 323. And see Baptiste *v.* De Volunbrun, 5 Har. & J. 86.

[2] Commonwealth *v.* Brooks, 99 Mass. 434.

[3] United States *v.* Thomas, 15 Wal 337.

[4] Ante, § 216 et seq., 303, 318 et seq.

[5] 1 East P. C. 255, 277; Roscoe Crim. Ev. 570; The Joseph, 8 Cranch, 451 Reg. *v.* Dunnett, 1 Car. & K. 425.

[6] The Argo, 1 Gallis. 150, 157; s. p. The New York, 3 Wheat. 59.

Lord Stowell, "all the endeavors which the wit of man, as it exists in the acutest understanding, might suggest, but such as may reasonably be expected from a fair degree of discretion, and an ordinary knowledge of business."[1]

Evidence Clear — Act not exceed Emergency. — The evidence of the necessity must be clear and conclusive.[2] And the act must proceed no further than the emergency absolutely requires.[3]

§ 353. **Varying with Enormity of Crime.** — Some of the foregoing illustrations of necessity are taken from cases *quasi* criminal or civil. Perhaps, in purely criminal cases of the more aggravated sort, the rule may not be entirely the same. And the proposition is reasonable, that the greater the crime the greater must be the necessity to excuse it.[4]

§ 354. **Excuse for Delay of Trial — (Overriding Statute).** — It was held in Pennsylvania, that, though the law authorized a prisoner to demand his trial at the second term after being indicted, one infected with small-pox could not avail himself of this right, because of the necessity of protecting people against a contagious and deadly disease. And, "*per curiam*, there is no doubt that necessity, either moral or physical, may raise an invariable exception to the letter of the *habeas corpus* act. A court is not bound to peril life in an attempt to perform what was not intended to be required of it."[5]

Qualifying Form of Allegation. — So necessity may qualify the form of the allegations in an indictment.[6]

§ 355. **Command — (Military Officer — Parent — Master — Principal).** — The command of a superior to an inferior, as of a military officer to a subordinate,[7] or of a parent to a child,[8] will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent;[9]

[1] The Generous, 2 Dods. 322, 324.
[2] Brig James Wells *v.* United States, 7 Cranch, 22; The Generous, 2 Dods. 322, 324; The Josefa Segunda, 5 Wheat. 338.
[3] Broom Leg. Max. 2d ed. 9.
[4] Ante, § 350.
[5] Commonwealth *v.* Jailer, 7 Watts, 366.
[6] Crim. Proced. I. § 493 et seq.
[7] United States *v.* Jones, 3 Wash. C. C. 209, 220; Commonwealth *v.* Blodgett, 12 Met. 56; United States *v.* Carr, 1 Woods, 480. And see Harmony *v.* Mitchell, 1 Blatch. 549, 13 How. U. S. 115.
[8] Broom Leg. Max. 2d ed. 11; post, § 367 et seq.
[9] Hays *v.* The State, 13 Misso. 246; The State *v.* Bryant, 14 Misso. 340; Commonwealth *v.* Drew, 3 Cush. 279; Klifield *v.* The State, 4 How. Missis. 304; Schmidt *v.* The State, 14 Misso. 137; The State *v.* Bell, 5 Port. 365; The State *v.* Bugbee, 22 Vt. 32; Curtis *v.* Knox, 2 Denio, 341; Brown *v.* Howard, 14 Johns. 119; Commonwealth *v.* Hadley, 11 Met. 66.

but in all these cases the person doing the wrongful thing is guilty, the same as though he had proceeded self-moved. And if a servant executes a lawful direction in an unlawful manner, he is responsible.[1]

Married Women — Persons acting under Legal Process. — The partial exception, in favor of women under coverture obeying their husbands, will be treated of in the next chapter. And perhaps persons acting under authority of legal process, and thereby protected, may be regarded as in some sense within the exception.[2]

[1] Naish *v.* East India Co., 2 Comyns, 462, 469.
[2] Broom Leg. Max. 2d ed. 69.

CHAPTER XXIV.

THE HUSBAND'S PRESUMED OR ACTUAL COERCION OF THE WIFE.

§ 356. **Doctrine Artificial.** — The doctrine of this chapter rests, in the main, upon mere artificial reasoning. Yet it is not quite destitute of other foundation. For, in fact, affection and fear in the wife sometimes operate as a real constraint on her will.

§ 357. **Doctrine in General Terms.** — A married woman, or *feme covert*, — under *coverture* of her husband, — has not lost by the marriage her general capacity for crime. Yet as the law has cast upon her a certain duty to him, of obedience, of affection, and of confidence,[1] it has compensated her by the indulgence that, if through constraint from his will she carries her obedience to the excess of doing unlawful acts, she shall not suffer for them criminally. This consideration for the weaker sex is unknown in Scotland,[2] and is probably peculiar to the common law, often reproached, in other respects, for depriving wives of their rights.

Limits of the Doctrine. — The precise limits of the doctrine are, at some points, a little uncertain; but the following propositions are believed to be reasonably well supported by the authorities.

§ 358. First. *Actual constraint*, short of what is mentioned in the last chapter, *imposed by a husband on his wife, will relieve her from the legal guilt of any crime whatever, committed in his presence*:[3] —

Supposed Exceptions — (Treason — Murder — Robbery). — From this proposition the offences of treason and murder, and some add robbery,[4] would appear from observations of judges and text-

[1] Commonwealth *v.* Lewis, 1 Met. 151.

[2] 1 Alison Crim. Law, 668.

[3] The State *v.* Parkerson, 1 Strob. 169; 1 Russ. Crimes, 3d Eng. ed. 18–25. In Arkansas, this is so by statute. But, under the statute, the coercion must be proved, or be presumable from the circumstances; the mere presence of the husband will not excuse the wife. Freel *v.* The State, 21 Ark. 212; Edwards *v.* The State, 27 Ark. 493.

[4] That robbery furnishes no exception, see People *v.* Wright, 38 Mich. 744; Miller *v.* The State, 25 Wis. 384.

writers to be excepted.[1] The reason usually assigned is the enormity of the offences. But this reason seems unsatisfactory in principle; and, looking for authority, Mr. Greaves has observed, that he finds "no *decision* which warrants the position."[2] Therefore the true view probably is to disregard this distinction; and to accept, in place of it, the one, better sustained, to be stated in our section immediately after the next.

§ 359. Secondly. *Whatever, of a criminal nature, the wife does in the presence of her husband, is presumed to be compelled by him*;[3]

[1] 1 Hawk. P. C. Curw. ed. p. 4, § 11; Commonwealth *v.* Neal, 10 Mass. 152; Rex *v.* Knight, 1 Car. & P. 116, note; Rex *v.* Stapleton, Jebb, 93; and the references in the next note.

[2] See the two notes of this able English editor in 1 Russ. Crimes, 3d Eng. ed. p. 18, 25. In the second note he says: "Before Somervile's Case, 26 Eliz., and Somerset's Case, A.D. 1615, I find no exception to the general rule, that the coercion of the husband excuses the act of the wife. See 27 Ass. 40; Stamf. P. C. 26, 27, 142; Pulton de Pace Regis, 130; Br. Abr. Coron. 108; Fitz. Abr. Coron. 130, 160, 199. But after those cases I find the following exceptions in the books: Bac. Max. 57, excepts treason only. Dalton, c. 147, treason and murder, citing for the latter Mar. Lect. 12 (which I cannot find, perhaps some reader of some Inn of Court). 1 Hale P. C. p. 45, 47, treason, murder, homicide; and p. 434, treason, murder, and manslaughter. Kelyng, 31, an *obiter dictum*, murder only. Hawk. b. 1, c. 1, § 11, treason, murder, and robbery. Bl. Com. Vol. I. p. 444, treason and murder; Vol. IV. p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without an authority for so doing; and, on the contrary, in Reg. *v.* Cruse, 8 Car. & P. 541, a case is cited, where Burrough, J., held that the rule extended to robbery. [For an intimation that it does not extend to robbery, see Rex *v.* Buncombe, 1 Cox C. C. 183.] It seems long to have been considered that the mere presence of the husband was a coercion (see 4 Bl. Com. 28), and it was so contended in Reg. *v.* Cruse; and Bac. Max. 56, expressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will, and in the next page he says: 'If husband and wife join in committing treason, the necessity of obedience does not excuse the wife's offence, *as it does in felony*.' Now, if this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somervile's Case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers follow Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somervile's, and Somerset's Case, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion."

[3] Rex *v.* Price, 8 Car. & P. 19; Davis *v.* The State, 15 Ohio, 72; The State *v.* Nelson, 29 Maine, 329; Uhl *v.* Commonwealth, 6 Grat. 706; Reg. *v.* Cruse, 8 Car. & P. 541, 2 Moody, 53; Reg. *v.* Laugher, 2 Car. & K. 225; Commonwealth *v.* Trimmer, 1 Mass. 476; Commonwealth *v.* Neal, 10 Mass. 152; Martin *v.* Commonwealth, 1 Mass. 347; Com

while not even a command from him will excuse her, unless she does the act in his presence :[1] —

What is the Presence. — For a married woman to be in the presence of her husband within this rule, it is not necessary she should be in the same room with him; but she must be within the range of his personal and present influence, — "near enough," it was said in one case, "to act under his immediate influence and control."[2]

Not Entire Act in Presence — (Escape — Uttering Counterfeit). — And if an act is completed in the presence of the husband, though begun elsewhere, it is within the rule. Therefore, when "Elizabeth Ryan, better known by the name of Paddy Brown's wife," had in England been convicted under 16 Geo. 2, c. 31, for conveying an implement of escape to her husband in prison, she was deemed to have acted under his coercion, rendering her conviction wrong; having procured the instrument by his direction.[3] Here she was absent until she delivered to him the instrument in, of course, his presence. And where a wife went from house to house uttering base coin; and her husband accompanied her, but remained outside; it was held, that her act must be presumed to have proceeded from his coercion.[4] In this case, however, she was all the while either actually or constructively in his presence.

§ 360. **How on the Authorities — In Principle.** — The doctrine that the wife can rely on the husband's coercion only in respect of acts done in his presence has not always been in the minds of the judges, though perhaps never denied by them. But plainly it must be correct; for surely a wife out of her husband's presence is sufficiently free from his influence to be answerable for

monwealth *v.* Eagan, 103 Mass. 71; The State *v.* Williams, 65 N. C. 398; J. Kel. 31. "Felons came to the house of Richard Day, and Margery his wife; the wife knew them to be felons, but the husband did not, and both of them received them and entertained them, but the wife consented not to the felony. And it was adjudged, that this made not the wife accessory." 3 Inst. 108. See also McKeowen *v.* Johnson, 1 McCord, 578.

[1] Rex *v.* Morris, Russ. & Ry. 270; Rex *v.* Hughes, 1 Russ. Crimes, 3d Eng. ed. 21, 2 Lewin, 229; Commonwealth *v.* Butler, 1 Allen, 4; Commonwealth *v.* Feeney, 13 Allen, 560; The State *v.* Potter, 42 Vt. 495. And see Reg. *v.* Hill, 3 New Sess. Cas. 348, 1 Den. C. C. 453, Temp. & M. 150, 13 Jur. 545; Reg. *v.* Smith, Dears. & B. 553, 8 Cox C. C. 27; Reg. *v.* Cohen, 11 Cox C. C. 99.

[2] Commonwealth *v.* Burk, 11 Gray, 437; Commonwealth *v.* Welch, 97 Mass. 593; Commonwealth *v.* Munsey, 112 Mass. 287, 289.

[3] Note to Rex *v.* Knight, 1 Car. & P 116.

[4] Connolly's Case, 2 Lewin, 229.

whatever of crime she does, even supposing the general doctrine to be founded in just principle.

§ 361. Thirdly. *The proposition that coercion is presumed from the mere presence of the husband does not apply to certain crimes by reason of their peculiar nature :* —

What within this Exception — (Treason — Murder — Robbery — Bawdy House, &c.). — The offences within this exception are those which show so much malignity as to render it improbable a wife would be constrained by her husband, without the separate operation of her own will, into their commission;[1] and those which, while of less magnitude, women are supposed peculiarly to participate in; so that, in these cases, something more is required than the mere presence to establish the coercion. Of the aggravated offences are treason, probably murder, possibly robbery, and it may be that the list should be even more extended.[2] Of the offences peculiar to the female sex is the keeping of brothels and other disorderly houses.[3]

§ 362. Fourthly. *The presumption that a wife acts, in her husband's presence, under his coercion, is only prima facie, — liable to be rebutted by evidence :*[4] —

Limits of this Doctrine. — If the testimony merely shows that the two acted together in a crime, she, though the more busy

[1] Ante, § 358.

[2] Reg. *v.* Cruse, 2 Moody, 53, 8 Car. & P. 541; Rex *v.* Stapleton, Jebb, 93; J. Kel. 31; Rex *v.* Knight, 1 Car. & P. 116, note; Commonwealth *v.* Neal, 10 Mass. 152; Reg. *v.* Manning, 2 Car. & K. 887, 903. And see ante, § 358 and note.

[3] Rex *v.* Dixon, 10 Mod. 335; Reg. *v.* Williams, 10 Mod. 63, 1 Salk. 384; The State *v.* Bentz, 11 Misso. 27; 1 Hawk. P. C. Curw. ed. p. 5, § 12, and the authorities there cited. **How Decisions regarded.** — It must be acknowledged that the cases cited to this section will appear to lawyers who look at decisions only according to the letter of the language employed by the judges, as hardly sustaining the text. But such is an imperfect way of looking at them. Each case should be contemplated in the light of the whole subject to which it relates, of all analogous subjects, and of subsequent discoveries and improvements in legal science; while the language of the judges should be taken as qualified by the facts under discussion. **Liquor Selling.** — In Commonwealth *v.* Murphy, 2 Gray, 510, it was held that the wife who sells intoxicating liquor without license, in her husband's absence, is not presumed to act under his coercion. And see, as to this, Rex *v.* Crofts, 7 Mod. 397, 2 Stra. 1120. See also Commonwealth *v.* Neal, 10 Mass. 152; Martin *v.* Commonwealth, 1 Mass. 347; Commonwealth *v.* Trimmer, 1 Mass. 476.

[4] 1 Russ. Crimes, 3d Eng. ed. 22; Rex *v.* Price, 8 Car. & P. 19; Rex *v.* Stapleton, 1 Crawf. & Dix C. C. 163; The State *v.* Parkerson, 1 Strob. 169; Roscoe Crim. Ev. 955; Rex *v.* Hughes, 2 Lewin, 229; Wagener *v.* Bill, 19 Barb. 321; Uhl *v.* Commonwealth, 6 Grat. 706; Reg. *v.* Torpey, 12 Cox C. C. 45, 2 Eng. Rep. 180; Commonwealth *v.* Eagan, 103 Mass. 71; The State *v.* Williams, 65 N. C. 398

one, is to be acquitted.[1] But if he was a cripple, confined to his bed, therefore incapable of coercing her;[2] or, if in fact she was not only the active one, but acting from her own free and uncontrolled will,[3] — then, although he was present, she is to be convicted.

§ 363. Fifthly. From the foregoing propositions it follows, that, whatever the offence may be, the wife, like any other person, *may be proceeded against jointly with her husband, in the same indictment; and she can rely on the coercion only when the proofs are adduced at the trial:*[4] —

How the Indictment. — The indictment need not even in form negative the coercion.[5] Of course, also, she may be indicted without her husband.[6]

Husband for Wife's Act. — Or, if the wife commits the criminal act by command of the husband, the latter may be indicted for it.[7]

Wife indicted as Single. — If the wife is indicted alone as a single person, or if she and a man are jointly indicted as single, she can rely on coercion in defence, but she must satisfy the jury of her marriage.[8]

§ 364. Sixthly. *The legal relation between husband and wife makes it impossible for her to commit some offences:* —

Limits of Doctrine — (Exercising Trade — Neglect of Apprentice). — For example, she cannot, in England, be convicted jointly with her husband for exercising a trade, not being qualified;[1] because in law the exercise of it is his. If she is qualified, the qualification passes to him, and the exercise is still his.[2] So if a wife, as well as husband, wilfully neglects to give the husband's apprentice sufficient food, resulting in death, he only can be convicted of manslaughter; because, as we have seen,[3] there must be a legal duty in these cases to provide the food; and this duty the law imposes on the husband only, not at all on the wife.[4] Perhaps in some circumstances she will be liable on other principles; for example, if the husband should put into his wife's care food and a young person dependent on him for it, and she should cause this person's death by neglecting to administer it, she would undoubtedly be liable.[5]

[1] Rex v. Price, 8 Car. & P. 19; Rex v. Knight, 1 Car. & P. 116; Commonwealth v. Trimmer, 1 Mass. 476; Anonymous, 2 East P. C. 559; Rex v. Tolfree, 1 Moody, 243; Reg. v. Matthews, 1 Den. C. C. 596, Temp. & M. 837; Rex v. Archer, 1 Moody, 143.

[2] Reg. v. Pollard, 1 Russ. Crimes, 3d Eng. ed. 22, cited in Reg. v. Cruse, 2 Moody, 53.

[3] Uhl v. Commonwealth, 6 Grat. 706; Rex v. Dicks, 1 Russ. Crimes, 3d Eng. ed. 19. See note to Rex v. Knight, 1 Car. & P. 116.

[4] The State v. Nelson, 29 Maine, 329; Rex v. Stapleton, 1 Crawf. & Dix C. C. 163; Rex v. Thomas, Cas. temp. Hardw. 278; Rex v. Chedwick, 1 Keble, 585, pl. 50; The State v. Bentz, 11 Misso. 27; Commonwealth v. Murphy, 2 Gray, 510; Rex v. Morris, 2 Leach, 4th ed. 1096; The State v. Montgomery, Cheves, 120; The State v. Potter, 42 Vt. 495; Reg. v. Boober, 4 Cox C. C. 272; Commonwealth v. Tryon, 99 Mass. 442.

[5] The State v. Nelson, 29 Maine, 329.

[6] Commonwealth v. Lewis, 1 Met. 151; Rex v. Hanson, Say. 229; Rex v. Crofts, 7 Mod. 397.

[7] Williamson v. The State, 16 Ala. 431, 436; Mulvey v. The State, 43 Ala. 316; Commonwealth v. Barry, 115 Mass. 146.

[8] Rex v. Hassall, 2 Car. & P. 434; Reg. v. McGinnes, 11 Cox C. C. 391; Reg. v. Woodward, 8 Car. & P. 561; Reg. v. Torpey, 12 Cox C. C. 45, 2 Eng. Rep. 180.

§ 365. **Accessory after Fact.** — So, as a wife has no legal right to separate from her husband, she can never be made an accessory after the fact to his felony, through harboring him with knowledge of it.[6] The same is the Scotch law,[7] where the doctrine of marital coercion does not prevail.[8] Likewise, —

Forfeiture for Absence. — As the wife must follow and dwell with her husband, her estate is not subject to forfeiture under an absentee act.[9]

§ 366. **Proceedings necessarily against Both.** — Also there may be cases in which, though the wife is liable, the husband must be proceeded against jointly with her. "The principle," a learned judge once observed, "is said to be general, that, for fines and forfeitures incurred by the act of the wife for which the husband is liable, either separately or conjointly with his wife, he must be made a party to the judgment, and equally subject to arrest and imprisonment to enforce the payment."[10] Yet, —

Wife alone — (Purely Criminal — Liquor Selling). — A *feme covert* may be convicted alone, under a penal statute, for selling gin; because, though she cannot pay damages, she is "as capable of forbearing the crime as a man." And Lee, C. J., observed: "I

[1] See Stat. Crimes, § 196 and note.

[2] Reg. v. Atkinson, 2 Ld. Raym. 1248.

[3] Ante, § 217; Vol. II. § 643, 659.

[4] Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 490.

[5] See Rex v. Saunders, 7 Car. & P. 277. And see Vol. II. § 661.

[6] 1 Russ. Crimes, 3d Eng. ed. 24; Reg. v. Manning, 2 Car. & K. 887, 903.

[7] 1 Alison Crim. Law, 669.

[8] Ante, § 357.

[9] Martin v. Commonwealth, 1 Mass. 347.

[10] Saffold, J., in Rather v. The State, 1 Port. 132, 137; 1 Hawk. P. C. Curw. ed. p. 5, § 13. See, however, The State v. Montgomery, Cheves, 120.

o not know of any case where there is a prosecution against a *eme covert*, for a crime upon the breach of an act for which there s a pecuniary penalty inflicted, and for default of payment cor- ioral punishment, that the husband is liable." [1]

[1] Rex v. Crofts, 7 Mod. 397. See also Commonwealth v. Murphy, 2 Gray, 510. nte, § 368.

CHAPTER XXV.

INFANCY AS INCAPACITATING FOR CRIME.

§ 367. **Infants, who.** — All persons under the age of full legal capacity, fixed by the common law at twenty-one years in both males and females, are termed infants.

Generally capable — Command of Parent. — Those who have attained what the law deems sufficient maturity in years and understanding, are capable of committing crimes. Nor can they plead in justification the constraint of a parent, as married women can that of the husband.[1]

§ 368. **At what Age capable — (Seven — Fourteen).** — The period of life at which a capacity for crime commences is not susceptible of being established by an exact rule, which shall operate justly in every possible case. But, on the whole, justice seems best promoted by the existence of some rule. Therefore, at the common law, a child under seven years is conclusively presumed incapable of committing any crime.[2] Between seven and fourteen, the law also deems the child incapable; but only *prima facie* so; and evidence may be received to show a criminal capacity.[3] The question is, whether there was a guilty knowledge of wrong-doing.[4] Over fourteen, infants, like all other persons

[1] Ante, § 355; People v. Richmond, 29 Cal. 414. See The State v. Learnard, 41 Vt. 585.

[2] Broom Leg. Max. 2d ed. 282; 4 Bl. Com. 23; 1 Russ. Crimes, 3d Eng. ed. 2; Marsh v. Loader, 14 C. B. N. S. 535. Such a child cannot commit a nuisance even on its own land, People v. Townsend, 3 Hill, N. Y. 479; nor be a vagrant, Rex v. Inhabitants of King's Langley, 1 Stra. 631.

[3] The State v. Goin, 9 Humph. 175; Rex v. Owen, 4 Car. & P. 236; Rex v. Groombridge, 7 Car. & P. 582; The State v. Pugh, 7 Jones, N. C. 61; The State v. Guild, 5 Halst. 163; Godfrey v. The State, 31 Ala. 323; The State v. Doherty, 2 Tenn. 80; Commonwealth v. Mead, 10 Allen, 398; The State v. Learnard, 41 Vt. 585; Reg. v. Vamplew, 3 Fost. & F. 520; People v. Davis, 1 Wheeler Crim. Cas. 230. And see Reg. v. Manley, 1 Cox C. C. 104. Contra, that the burden of proof is on the infant, The State v. Arnold, 13 Ire. 184.

[4] Rex v. Owen, 4 Car. & P. 236; 4 Bl. Com. 23; Broom Leg. Max. 2d ed. 283; The State v. Learnard, supra; The State v. Fowler, 52 Iowa, 103. And see post, § 370.

are *prima facie* capable; and he who would set up their incapacity must prove it.[1]

§ 369. **Special Offences.** — But, as we have seen in respect of married women,[2] there may be offences which, by reason of the civil disqualifications of infancy, no minor can commit, whatever his general capacity for crime. The number of these is small.

False Pretences — Treason. — A minor, for instance, may obtain goods by a criminal false pretence.[3] So he may be guilty of treason, and thereby forfeit his estate.[4]

Obsolete Distinctions. — The old books have some other distinctions, probably not to be received at the present day.[5]

§ 370. **Between Seven and Fourteen, again — (Confessions).** — As to proof of capacity, between seven and fourteen, it is said: "The evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction."[6] Also, observes Lord Hale, "the infant is not to be convict upon his confession."[7] Yet evidently the presumption of incapacity decreases with the increase of years. There is a vast difference between a child a day under fourteen, and one a day over seven. And children bordering on fourteen have been convicted, it is believed properly, on their confessions.[8]

§ 371. **Continued.** — The cases are numerous, in the older books, in which children of very immature years have been convicted. "Thus," says Blackstone, "a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil. And there was an instance in the last century where a boy of eight years old was tried at Abingdon for firing two barns; and,

[1] 1 Russ. Crimes, 3d Eng. ed. 2; The State *v.* Handy, 4 Harring. Del. 566; Irby *v.* The State, 32 Ga. 496. In Texas the respective ages are by statute nine and thirteen. Wusnig *v.* The State, 33 Texas, 651; McDaniel *v.* The State, 5 Texas Ap. 475. And the death penalty cannot be inflicted on an infant below seventeen. Ake *v.* The State, 6 Texas Ap. 398, 415. In Illinois, the ages are ten and fourteen. Angelo *v.* People, 96 Ill. 209.

[2] Ante, § 364.

[3] People *v.* Kendall, 25 Wend. 399.

[4] Boyd *v.* Banta, Coxe, 266.

[5] See 1 Russ. Crimes, 3d Eng. ed. 1, 2; 4 Bl. Com. 23.

[6] 4 Bl. Com. 24. And see ante, § 368.

[7] 1 Hale P. C. 27.

[8] Rex *v.* Wild, 1 Moody, 452; The State *v.* Aaron, 1 Southard, 231; The State *v.* Guild, 5 Halst. 163; The State *v.* Bostick, 4 Harring. Del. 563; s. p. 4 Bl. Com. 24.

it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly. Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing of this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment."[1] So also a negro-slave boy, between ten and eleven years old, was, in Alabama, convicted of the murder of his master's child.[2]

§ 372. **Continued.** — But the case of a very young child, capable still in law of committing crime by reason of age, should receive a careful attention by the jury, before conviction. A mere appearance of shrewdness or general intelligence may exist in a mind too immature to incur legal guilt. And, although we may well suppose there are instances in which a child under fourteen should be punished by the tribunals as criminal, clearly the age of seven years, as the age of possible capacity, is quite too young for punishment to be given at the hand of the law; though it should be given at the hand of the parent, and the latter, rather than the former, be made to suffer the consequences of its neglect.[3]

§ 373. **Crimes depending on Physical Capacity.** — There are some things which depend on the physical capacity; and thus, in matrimonial law, a boy under fourteen, or a girl under twelve, cannot contract a perfectly valid marriage.[4] Even if puberty in fact commenced at an earlier period, the evidence of it will not be received.[5] Therefore —

Rape, &c. — A boy under fourteen cannot commit a rape, or the like offence of carnally abusing a girl under ten years of age, whatever be in fact his physical capabilities.[6] In Ohio, this doc-

[1] 4 Bl. Com. 23, 24.

[2] Godfrey *v.* The State, 31 Ala. 323. See, for a case in which a girl under fourteen seems to have been wrongly acquitted, Crim. Proced. II. § 687 *a*, note.

[3] And see Louisville, &c., Canal *v.* Murphy, 9 Bush, 522; Chicago, &c., Railroad *v.* Becker, 76 Ill. 25. See ante, § 368, note.

[4] 1 Bishop Mar. & Div. § 143, 147.

[5] 1 Bishop Mar. & Div. § 146.

[6] Reg. *v.* Jordan, 9 Car. & P. 118; Reg. *v.* Brimilow, 9 Car. & P. 366, 2 Moody 122; Reg. *v.* Philips, 8 Car. & P.

rine is rejected; the court permitting the presumption of incapacity, in cases of rape, to be overcome by evidence.[1] And some of the New York judges have adopted the Ohio rule.[2]

36; Rex v. Eldershaw, 3 Car. & P. 396; Rex v. Groombridge, 7 Car. & P. 582; Commonwealth v. Green, 2 Pick. 380. And see The State v. Handy, 4 Harring. Del. 566.

[1] Williams v. The State, 14 Ohio, 222. And see O'Meara v. The State, 17 Ohio State, 515; Moore v. The State, 17 Ohio State, 521.

[2] People v. Randolph, 2 Parker C. C. 174. And see Vol. II. § 1117.

CHAPTER XXVI.

WANT OF MENTAL CAPACITY.

§ 374. **Law, not evidence, for this chapter.** — The subject of mental incapacity embraces both law and evidence. In these volumes we treat only of the law; the evidence is considered in "Criminal Procedure."[1]

§ 375. **Doctrine defined.** — Since a criminal intent is an essential element in every crime,[2] a person destitute of the mental capacity to entertain this intent cannot incur legal guilt.[3]

Names and Classifications. — Names have been given to different forms of mental incapacity; such as idiocy, lunacy, and the like. And the word insanity is not unfrequently employed in the large sense, as including the whole. But for the purpose of this chapter the distinctions they indicate are unimportant, however useful they may be in other inquiries into the infirmities of the mind.[4]

[1] Crim. Proced. II. § 664–687 *b*.

[2] Ante, § 205, 287.

[3] "In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose. And if his reason and mental powers are so deficient that he has no will, no conscience or controlling mental power; or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated; he is not a responsible moral agent, and is not punishable for criminal acts." Shaw, C. J., in Commonwealth v. Rogers, 7 Met. 500, 501. And see Thomas v. The State, 40 Texas, 60, 63; People v. Kleim, Edm. Sel. Cas. 18.

[4] Lord Coke says: "There are four manners of *non compos mentis*: 1. Idiot, or fool natural; 2. He who was of good and sound memory, and by the visitation of God has lost it; 3. *Lunaticus, qui gaudet lucidis intervallis*, and sometimes is of good and sound memory, and sometimes *non compos mentis*; 4. By his own act, as a drunkard." These divisions are to some extent recognized at the present day; but they are embarrassing, for they constantly call the attention away from the one great question which must necessarily control every case — namely, whether the person was mentally capable of entertaining the criminal intent — to special theories of medical science. Classification is not in all things helpful; and we may doubt whether any classification of mental incapacity, however just and accurate in itself, will aid legal practitioners and juries regarding this defence. Lord Coke, in the case from which the above words are quoted, says, that a person *non compos mentis* cannot commit petit treason, murder, or felony, because "no felony or murder can be committed without a felonious intent and purpose." "But," he adds, "in some cases, *non compos mentis* may commit high treason; as, if he kills or offers to kill the king, it is

§ 376. **Subject both Simple and Complicated.** — The doctrine of insanity as above stated — namely, that it is a lack of the mental capacity to entertain a criminal intent — is plain and axiomatic, neither requiring nor admitting argument. But there are great difficulties and perplexities in its application to particular cases. The consequence is, that, in our books of the law, discussions as to the application of the doctrine have swollen to enormous proportions, while the doctrine itself is often lost out of sight.

Degree of Incapacity. — There are degrees both of incapacity and of capacity. And, as the law does not regard small things,[1] the mind may be weak, ill formed, or diseased — in other words, insane — in a degree not relieving from criminal responsibility.[2] On the other hand, in a mind irresponsible because of insanity, reason and other normal phenomena may appear, inadequate in degree, or otherwise too imperfect, to subject the unfortunate being to the heavy pains provided for wilful wrong-doing.[3]

high treason, for the king *est caput et salus reipublicæ, et a capite bona valetudo transit in omnes;* and, for this reason, their persons are so sacred that none can offer them any violence." Beverley's Case, 4 Co. 123 *b*, 124 *b*. At the present day, no exception like this to the general doctrine is known. It prevails in all criminal causes.

[1] Ante, § 212 et seq.

[2] Commonwealth *v.* Mosler, 4 Barr, 264; The State *v.* Stark, 1 Strob. 479; Lord Ferrer's Case, 19 Howell St. Tr. 886, 947; Hadfield's Case, 27 Howell St. Tr. 1281, 1286, 1287, 1312, 1323; United States *v.* McGlue, 1 Curt. C. C. 1; Hopps *v.* People, 31 Ill. 385; The State *v.* Shippey, 10 Minn. 223; The State *v.* Jones, 50 N. H. 369; People *v.* Griffen, Edm. Sel. Cas. 126; People *v.* Montgomery, 13 Abb. Pr. N. S. 207; The State *v.* Richards, 39 Conn. 591; The State *v.* Lawrence, 57 Maine, 574; United States *v.* Holmes, 1 Cliff. 98; People *v.* Best, 39 Cal. 690; 1 Russ. Crimes, 3d Eng. ed. 9, 13. It will interest the reader to consult, on this question, the trial, for forgery, of Charles B. Huntington, edited by Roberts & Warburton, New York, 1857. The principal defence was insanity. The medical witnesses seemed to understand, that, if any particle of insane delusion, however slight, was found in the mental operations of the accused, he ought, therefore, to be acquitted as insane. The judges, on the other hand, erred on some other points quite as much. In the case of Commonwealth *v.* Mosler, cited above, Gibson, C. J., speaking of general insanity, observed: "It must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will, and making the commission of the act, in his apprehension, a duty of overruling necessity. The most apt illustration of the latter is the perverted sense of religious obligation which has caused men sometimes to sacrifice their wives and children." p. 266. Again: "The law is, that, whether the insanity be general or partial, the degree of it must have been so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." p. 267.

[3] "A man may be mad on all subjects; and then, though he may have glimmerings of reason, he is not a responsible agent." Gibson, C. J., in Commonwealth *v.* Mosler, supra.

Insane compared with Immature Mind. — To relieve this difficulty, Lord Hale suggests: "The best measure that I can think of is this, — such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."[1] But if we admit, to the full extent, the abstract accuracy of this test, we still derive from it little aid; because of the radically different workings of an insane mature mind, and a sane immature one.[2] At the same time, there are circumstances in which this test may be very profitably applied.[3]

[1] 1 Hale P. C. 30.

[2] Ray Med. Jurisp. Insan. 3d ed. § 8.

[3] **1. Freeman's Case, and what it suggests.** — I cannot but think, that, if the court and jury by whom William Freeman was, in 1846, convicted of the murder of John G. Van Nest, had applied to the case this old test, they, while professing reverence for the old tests, and holding in disfavor the new, might have seen their way to an acquittal, instead of a conviction, of one of the most clearly insane persons ever put on trial for his life. And as this is perhaps the most important case of a modern date relating to this subject, and as sufficient time has now elapsed since the insanity of the prisoner was established by a post-mortem examination to render probable the hope that the temporary passions are subsided, I propose to make a statement of it, with some comments.

2. The prisoner was of mixed negro and Indian blood, the former predominating. In early life he had been practically uncared for, and, growing up neglected in education, had been sent by the courts to the State prison and had served out his sentence of five years for stealing a horse, of which offence he was wholly innocent. He left the prison with a deep conviction — termed by his counsel an insane delusion, and by the prosecuting officer an error of judgment to which discharged convicts are subject — that he was entitled to get, from somebody, pay for his time spent in prison under the wrongful sentence.

3. In pursuance of this delusion, or this error of judgment, he applied to magistrates for warrants against those, not naming or knowing them, who had put him into prison; he called upon the owner of the horse alleged to have been stolen by him, and indistinctly intimated something about pay, and with much feeling mentioned the subject of pay to some other persons. Not getting, of course, any pay, he came to another delusion, or error of judgment, namely, that there was no law for him.

4. This led to a third delusion, or error, which was, that by *killing about*, as he expressed it, he might, after a while, get pay; or, at least, he thought this to be a work which he had to do. So he procured a club and a knife, and started out one evening to do his work. He met a man on the road, hesitated whether to attack him, but concluded not to begin then; went to one or two houses, but made up his mind not to attack there; came at last to the house of Mr. Van Nest, killed him, his wife, wife's mother, and an infant of two years, wounded a hired man, received a disabling wound in his own hand, went to the stable and took out a horse and fled, — all in an incredibly short time. His idea in fleeing seems to have been to protect himself from molestation while his wounded hand should heal, so that he might resume the work. The horse was an old one, and soon broke down; so he stabbed the horse, and took another one.

5. Continuing his flight, and attempting to sell this other horse, he was arrested; but he denied the homicide, until, being confronted with the dead bodies and the living witnesses, he acknowledged all. From this time until he died, he was open and truthful; stat

§ 377. **Nature of the Adjudged Cases — How viewed.** — In this epartment of the law, as in every other, we arrive at the legal doc-

g the facts, as far as he was able, to rerybody who talked with him. And ere was no pretence, that he undertook feign insanity. The arrest was made less than twenty-four hours after the omicide was committed

6. On one point, the testimony conirred; namely, that the intellect of this isoner was very weak. Though the edical witnesses were in conflict on the ain question, the most hostile agreed ith his own that his intellect was but ttle above that of the brute; and one these hostile witnesses, a leading and ost determined one, answered to the risoner's counsel, on cross-examination, follows: —

"*Q.* You say he is ignorant; what is e degree of his intelligence?

"*A.* He appears to have but little.

"*Q.* What is the degree of his intelct?

"*A.* It is difficult to tell by any exminations that were made there in the il. He was there to be tried for life; ppressed with the weight of his crimes; norant and deaf, to be sure, but with ery motive to conceal and deceive. is intellect is of a low grade, but how uch he has, precisely, cannot well be etermined under the disadvantages of is situation.

"*Q.* From what you discover, can ou compare his intellect to that of any ther being?

"*A.* I should not think he has as uch intellect as an ordinary child of urteen years of age. In some respects, e would hardly compare with children two or three years.

"*Q.* With a child of what age would ou compare him in respect to knowldge?

"*A.* With a child two or three years ld." Hall's Trial of Freeman, p. 348.

To illustrate this great imbecility and norance, it may be mentioned, that, ough the prisoner knew and could call y name the letters of the alphabet; and hough, notwithstanding this, he could ot read a word; yet he really believed e could read, would take a book in his hand and say over words and sounds which were not words, just like an infant two years old. He could with difficulty count to between twenty and thirty; but, when he reached the end of his knowledge, he would count right on wrongly, not imagining he was not right. He thought he once saw Jesus Christ in the Sabbath school. And this dead flat of ignorance and stupidity was enlivened by no green mound of intelligence and wisdom. He seldom or never asked a question, related nothing without prompting, and seemed entirely indifferent to his fate, even not to know the nature of the peril in which he stood; though, when the keeper, one night, forgot to bring him the bed which should separate him from the cold stone floor of his cell, whereto he was chained, he could call for it; and he could ask, whenever he needed, his visitors for tobacco.

7. I cannot speak for his personal appearance, for I never saw him; but all the witnesses for the defence spoke of a constant idiotic smile upon his face, and of a peculiar way in which he stood and held his head, as circumstances nearly, if not quite, conclusive. The witnesses for the prosecution did not read these signs in this way, neither did the judges and the jury.

8. The question of his insanity was referred to two successive juries, first, a jury to try whether he had mind enough to be tried; secondly, a jury to try the main issue. Both found against the plea of insanity; and the bench of judges concurred, and passed sentence of death.

9. Before this sentence was executed, a writ of error, founded on some rulings in point of law, was obtained from the Supreme Court, and in this latter tribunal the verdict was set aside and a new trial ordered. Thereupon the judge of the higher court, who was to preside at the new trial, visited the prisoner in jail; and, in consequence of what there appeared of his mental condition, refused to proceed with the trial. In a few months, this miserable being died; and no man, I presume, except one dissent

trine by the twofold process of comparing together the cases adjudged on the specific questions, and of searching through other

ing doctor, who could not let go his grasp upon the judgment he had pronounced at the trial, will now dispute, that the post-mortem examination of the brain, taken in connection with the testimony at the trial, establishes this as a marked case of clear and indubitable insanity.

10. Indeed, at the trial, those particular medical witnesses who had such experience in insanity as to render their testimony of special value were clear in the opinion, that the prisoner was insane. **Hence, Experts in Insanity.** — We may conclude, that medical men are unsafe experts in questions of insanity, except where, in addition to their medical reading, they have had considerable practical experience with the insane.

11. **Prejudiced Public.** — Another fact to be noted is, that, in this case, an unreasoning outside pressure of excitement was bearing hard against the legal tribunal, and demanding the blood of the prisoner. Hence, **Continuance.** — We may conclude, that, in all such cases, the judges should yield to such applications for continuance as will enable judge and jury alike to proceed in their duties without embarrassment from such pressure.

12. **Duty of Lawyers.** — Moreover, there is derivable from this case a lesson of duty and of interest, which it may be well for practising lawyers to consider. This poor, demented, accused person was defended by the gentleman — that is, as leading counsel — who [at the time this note was written] holds the office of Secretary of State of the United States. He was subjected to no little abuse because he undertook the defence of this penniless colored man. In his own mind he was clear that the man was insane; and he dared to do his duty. Soon afterward, the providence of God, taking away the client, vindicated the advocate. And although I do not deem that the holding of office, even the highest, where office is sought and won by means too often resorted to in this country, should be looked upon as an honor; yet, as the public sentiment now is, it is so regarded; and we may here see how the discharge of a duty did not interfere with the obtaining of a coveted honor. In a notice in the prefatory part of the second volume of this work, as it appeared in the second edition, I spoke of the obloquy voluntarily incurred by the late Mr. Choate, in bringing forward this defence of insanity in behalf of a prisoner whom, for aught I know, he deemed in his heart to have been a responsible being. The lawyers defending Freeman put their justification on the ground of a clear conviction of the truth of the plea of insanity. If Mr. Choate was himself not clearly convinced of the truth of the plea interposed by him in the case to which I have thus alluded, but was convinced that there was such semblance of truth in it as to render its presentation proper, his justification stands on higher ground. Every accused person has the right to have all proper defences made for him; and the lawyer who refuses through fear of public obloquy violates honor and a high behest of duty. And see Crim. Proced. I. § 309, 310.

13. **Public Insanity.** — Finally, let me observe, that, to a species of public insanity, yet not of a kind which excuses for crime, known sometimes by the term *negrophobia*, should probably this strange conviction of Freeman, in the blaze of the light of the nineteenth century, be more than to any thing else attributed. The reader of the trial will perceive, that, throughout the testimony, there seems to run in the minds of the witnesses an idea of the existence of an indefinable something which should hold negroes responsible when acting under a less amount of mind than would constitute the standard of responsibility in white men. And, on the other hand, there were gentlemen summoned upon the jury who were challenged to the favor by the prosecuting officer, though they were not set aside, on the ground that they belonged to a class of persons who were supposed to hold opinions which would lead them to show special favor to black men because of their color

titles for principles to control this one. In looking through other titles of the criminal law, we have learned, that, in every crime, there must be the element of a criminal intent; and, coming to this title, we have discovered the doctrine of insanity to be, that there is no crime where the mind is incapable of entertaining the criminal intent.[1] But, on the question of fact, which in each case of alleged insanity is to be decided, whether or not the accused person was mentally capable of entertaining the criminal intent,[2] the judges have endeavored to assist the juries; in doing which, they have often blended their sound law with erroneous views of the phenomena of insanity. For in former times, and even in comparatively modern, the diseases and imperfections of the mind were little understood by the medical faculty, still less by the community at large,[3] as indeed there yet remains much to be learned. And the minds of the judges necessarily shared the misapprehensions existing in minds not judicial. Thus, —

§ 378. **Infant, Brute, Wild Beast.** — In 1742, on a criminal trial for malicious shooting, Tracy, J., after laying down to the jury the law of insanity substantially in accordance with modern doctrines, proceeded to mingle with it views of fact which would be universally deemed erroneous now. "It must," he said, "be a man that is totally deprived of his understanding and memory, and did not know what he was doing, more than an infant, a brute, or a wild beast; such a one was never the object of punishment; therefore he left to the jury the consideration, whether the condition the prisoner was proved to be in showed that he knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did; and, as it was admitted on the part of the prisoner that he was

The delusion of the prosecuting officer, who supposed there was such a class in the community, is one of the marks of this species of insanity, which, at the time of the trial, existed everywhere throughout our country. This *negrophobia* insanity, like the insanity known heretofore in New England as the Salem Witchcraft, — an insanity in which the delusion is even more in the accuser than in the accused, — is one of the blood-tracks to which all Time will hereafter point with horror. We are now [when this note was originally written] among what I hope will prove to be near the closing scenes of a great civil war, which could never have been conjured up — or, if it had been, would have been speedily closed — but for this universal *negrophobia* insanity, prevailing over our whole country, South and North alike. In these public delusions, we may learn something concerning the delusions which affect individual minds.

[1] Ante, § 375, 376.

[2] The State *v.* Jones, 50 N. H. 369.

[3] Ray Med. Jurisp. Insan. 3d ed. § 1.

not an idiot, and, as a lunatic, he might have lucid intervals, the jury was to consider what he was at the day when he committed the fact in question. There were many circumstances about buying the powder and the shot, his going backward and forward; and, if they believed he had the use of his reason and understood what he did, then he was not within the exemption of the law, but was as subject to punishment as any other person." [1] It is now believed, that a man may act without the concurrence of a responsible will, though he is not raving, though he knows what he is about, and lays and executes plans with great shrewdness and sagacity.

§ 379. **Varieties of Forms of Insanity.** — It should also be remembered, that the phases and manifestations of insanity are in number little less than infinite.[2] No reason indeed appears why they may not be even more numerous, certainly more difficult to be understood, than the qualities and phenomena of sound minds; and our assurance may well be humbled when we reflect, that what is called the learned world, much more the mass of humankind, still gropes darkly on the borders of intellectual and moral science. Hence, —

Language of the Judges. — In examining the cases, not only must we take into the account any misapprehensions of the judges as

[1] Arnold's Case, 16 Howell St. Tr. 695, 764, 765. I have copied the above observations from Shelford on Lunacy, 459, 460, where the words of the judge are slightly abridged.

[2] A glance at the following classification of insanity, adopted by Dr. Ray, with the reflection that the several subdivisions necessarily run into one another, and also divide themselves indefinitely, will serve to impress us with its vast variety and extent: —

- INSANITY
  - Defective development of the faculties.
    - IDIOCY
      1. Resulting from congenital defect.
      2. Resulting from an obstacle to the development of the faculties, supervening in infancy.
    - IMBECILITY
      1. Resulting from congenital defect.
      2. Resulting from an obstacle to the development of the faculties, supervening in infancy.
  - Lesion of the faculties subsequent to their development.
    - MANIA
      - Intellectual
        1. General.
        2. Partial.
      - Affective
        1. General.
        2. Partial.
    - DEMENTIA
      1. Consecutive to mania, or injuries of the brain.
      2. Senile, peculiar to old age.

to phenomena of insanity, but we must interpret their words in the light of the particular facts in evidence, with reference to which, and not as enunciations of general doctrine, they were spoken. Considerations like these, we have seen,[1] are important in the examination of all judicial decisions; and they are peculiarly pertinent to those on this subject. Especially in looking at what is said to a jury should we remember, that judges do not lay down abstract doctrines to juries, but directions applicable to the evidence in review.

§ 380. **Monomania.** — There are those who, reasoning from the proposition that the mind is a unit, or that every part receives support from every other, and all the parts constitute together one harmonious whole, have inferred, perhaps truly, that, when one faculty is deficient, or is impaired by disease, or impelled by it into unnatural action, the whole mind suffers.[2] But, admitting this to be so, still the general derangement may not in all cases be sufficient to fall within the cognizance of the law, which does not notice small things.[3] Therefore judicial decisions have proceeded on the idea, that monomania is a reality in science; in other words, that a person may be insane and irresponsible as to one subject, while sane and responsible on another.[4]

Intermittent Insanity. — The judgments of the courts have proceeded also on the opinion, that general insanity may be intermittent, rendering the sufferer responsible for his acts at one time, but irresponsible at another.[5]

§ 381. **How Insanity defined.** — It follows from the foregoing views, that, in the criminal law, insanity is any defect, weakness, or disease of the mind rendering it incapable of entertaining the criminal intent which constitutes one of the elements in every crime. Beyond this, —

[1] Ante, § 361, note; 1 Bishop Mar. & Div. § 63.

[2] See Ray Med. Jurisp. Insan. 3d ed. § 242, 244, 245, 247.

[3] Ante, § 212 et seq.

[4] Freeman *v.* People, 4 Denio, 9; Martin's Case, Shelford Lun. 465; Hadfield's Case, 27 Howell St. Tr. 1281, 1314. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson, C. J., in Commonwealth *v.* Mosler, 4 Barr, 264. The law is the same in Scotland. 1 Alison Crim. Law, 647. Such also is practically the doctrine of medical men. Ray Med. Jurisp. Insan. 3d ed. § 106, 135, 227.

[5] Reg. *v.* Renshaw, 11 Jur. 615, 616; Lord Ferrer's Case, 19 Howell St. Tr. 886, 946, 947; Hadfield's Case, 27 Howell St. Tr. 1281, 1310; 1 Beck Med Jurisp. 10th ed. 756–762.

Test of Insanity. — Many attempts have been made to discover, what has been assumed to exist, a form of words termed a test of insanity, which, put into the hands of jurors, can be used by them as a sort of legal yardstick, to measure the evidence and determine whether or not the prisoner had a sufficient length of mental alienation to escape responsibility for his act. But the test has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist. At the same time, the courts, in instructing juries upon the facts of particular cases, have uttered many helpful words, which, though just in law when illumined by the special facts, have been taken up by men not lawyers, set to facts of a different sort, and shown to be, in the new light, abundantly absurd.

§ 382. **How, in Reason, as to Test.** — It is undoubtedly too vague, in general, for a judge simply to say to a jury unacquainted with the law, that they are to acquit the prisoner if they find him incapable of entertaining a criminal intent; because, at least, the nature of the particular evil intent required is to be taken into the account, and this they are entitled to have explained to them. In reason, therefore, the charge of the judge to the jury should show the intent required in the particular instance, and the bearing of the testimony upon it. And what will be proper in one offence and with reference to one set of proofs may be quite erroneous when, with reference to another offence, or even to the same, the proofs are of a different sort. Consequently, —

§ 383. **Question of Fact.** — In some late cases, it has been laid down, that whether, in a particular instance, the act alleged to be a crime proceeded from a sane or insane mind, is a pure question of fact for the jury, not of law for the court; as, for example, it is a question of fact for the jury, and not of law for the court, whether there is such a disease as dipsomania, and whether the act in question was the product of this disease or of a sound mind.[1] It is not in this form that the majority of our courts instruct juries; yet, in principle, the law is and must be so, while still in practice the directions to the jurors should extend to various explanations differing with the particular cases.

[1] The State *v.* Pike, 49 N. H. 399; Bradley *v.* The State, 31 Ind. 492; The State *v.* Jones, 50 N. H. 369; The State *v.* Johnson, 40 Conn. 136. And see 4 Law Rev. 236; Stevens *v.* The State, 31 Ind. 485.

§ 383 *a*. **Separating Law and Fact.** — Plainly, in these cases of insanity, as in all others, the charge of the judge to the jury[1] should so separate fact and law that they may perceive clearly what it is which they are required to decide. Hence it is of the highest importance in these discussions to distinguish the one from the other. Now, —

Scotch Form. — Quite in accord with the form of charge approved in the last section is that of the modern practice of the Scotch courts. Thus in a case in 1874 the Lord Justice-Clerk said to the jury: "The question is one of fact, that matter of fact being whether, when he committed this crime, the prisoner was of unsound mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense. Was he, in your opinion, a man of sound mind on the 25th of May?" And further on he said: "It is entirely imperfect and inaccurate to say, that, if a man has a conception intellectually of moral or legal obligation, he is of sound mind. Better knowledge of the phenomena of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane, and yet may know well enough that an act which he does is forbidden by law. Probably a large proportion of those who occupy our asylums are in that position. It is not a question of knowledge, but of soundness of mind. If a man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act simply because it is forbidden, or not to do it because it is enjoined. If a man has a sane appreciation of right and wrong, he is certainly responsible; but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead."[2] Still, —

§ 383 *b*. **With us.** — Among English and American lawyers in general, the tendency is very strong toward an adherence to old forms of charging the jury, adopted at times when the facts of insanity were very imperfectly understood. And there are those who appear to go so far as to hold, that, assuming one to be

[1] Crim. Proced. I. § 976–982.

[2] Miller's Case, 8 Couper, 16, 17, 18.

under a disease of the mind which, while he has the intellectual perception of right and wrong, and knows an act to be forbidden and punishable by law, deprives him of all rational capacity to adjust his conduct to the law and avoid doing it, still, should he do it, he is punishable the same as though he were sane.[1] The degrees of confidence and the forms of words with which this sort of doctrine is expressed differ. If any thing more is meant than that the speaker does not believe such cases truly exist, these utterances cannot be sound in law. It is not deemed to be within the scope of a legal treatise to discuss this class of questions of fact. But whether such fact exists or not, many or most experts in modern times deem that it does, and no judge can avoid the duty of laying down the law applicable to whatever the evidence *tends to prove*, whether the proof is really adequate or not.[2] For the purpose of the present discussion, therefore, we are compelled to assume the reality of this sort of insane mind, and inquire what is the law applicable thereto. Now, we have seen,[3] that, by established doctrine, about which there can be no possible dispute in any one of our States or in any civilized country, if a sane man, knowing the wrongfulness of a forbidden act, is impelled to do it by a power he cannot resist, he is exempt from punishment. So that the man pleading insanity is either sane or insane; if sane, and compelled by a power within or without him which he cannot resist, he is not to be punished; if insane, and thus impelled, *a fortiori* the law is the same. There cannot be, and there is not, in any locality or age, a law punishing men for what they cannot avoid. Looking, next, more minutely to the actual course of things among us, —

§ 384. **Common Form of Doctrine.** — It is not in all the cases absolutely clear what, of the language addressed to a jury, is meant for pure law, and what of it is for mere practical suggestion. But, either as the one or the other, the jury in the greater number of the cases are in substance directed to consider, whether, when the prisoner committed the act, he was in a state to comprehend his relations to others, the nature of the thing done, and its criminal character against, what he is presumed to

[1] Flanagan *v.* People, 52 N. Y. 467; The State *v.* Shippey, 10 Minn. 223; Anderson *v.* The State, 42 Ga. 9; Brinkley *v.* The State, 58 Ga. 296; The State *v.* Pratt, 1 Houst. Crim. 249; cases cited post, § 387; and some of the cases cited post, § 384. And see Cunningham *v.* The State, 56 Missis. 269.

[2] Crim. Proced. I. § 978.

[3] Ante, § 346, *et seq.*

know, the law of the land;[1] or, in another form of words which are regarded as in effect the same, whether, in what he did, he was of capacity to be conscious of doing wrong;[2] or, in still

[1] "The law of the land" seems to express the precise legal idea, according to the English judges. Opinion on Insane Criminals, 8 Scott N. R. 595. Yet, as a practical consideration, they add: "If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." Ib. p. 602. Lord Lyndhurst in one case employed the words, "offence against the laws of God and nature." Rex v. Offord, 5 Car. & P. 168; s. p. Mansfield, C. J., in Bellingham's Case, 1 Collinson Lun. 636, Shelford Lun. 462; also McAllister v. The State, 17 Ala. 434. The opinion of the English judges, above referred to, was given in answer to questions proposed to them by the House of Lords, growing out of a discussion relative to the acquittal of McNaghten. It embraces several interesting points on the law of insanity. Besides the report in Scott N. R., as above, it may be found in a note to Reg. v. Higginson, 1 Car. & K. 129, 130, also McNaghten's Case, 10 Cl. & F. 200.

[2] The reader may consult, besides the last note, the following cases: The State v. Spencer, 1 Zab. 196; Roberts v. The State, 3 Kelly, 310; Reg. v. Oxford, 9 Car. & P. 525; Commonwealth v. Rogers, 7 Met. 500; McNaghten's Case, 10 Cl. & F. 200; Rex v. Offord, 5 Car. & P. 168; Freeman v. People, 4 Denio, 9; People v. Pine, 2 Barb. 566, 572; Commonwealth v. Mosler, 4 Barr, 264; Reg. v. Renshaw, 11 Jur. 615, 616; Reg. v. Higginson, 1 Car. & K. 129; Parker's Case, 1 Collinson Lun. 477, Shelford Lun. 460; Bowler's Case, 1 Collinson Lun. 673, note, Shelford Lun. 461; Martin's Case, Shelford Lun. 465; McAllister v. The State, 17 Ala. 434; The State v. Huting, 21 Misso. 464; United States v. Shults, 6 McLean, 121; People v. Sprague, 2 Parker C. C. 43; United States v. McGlue, 1 Curt. C. C. 1; Loeffner v. The State, 10 Ohio State, 598; Fisher v. People, 23 Ill. 283; People v. Hurley, 8 Cal. 390; Bovard v. The State, 30 Missis. 600; People v. Coffman, 24 Cal. 230; Willis v. People, 32 N. Y. 715; The State v. Windsor, 5 Harring. Del. 512; People v. McDonell, 47 Cal. 134; Dove v. The State, 3 Heisk. 348; People v. Griffen, Edm. Sel. Cas. 126; People v. Kleim, Edm. Sel. Cas. 13; People v. Coffman, 24 Cal. 230; The State v. Haywood, Phillips, 376; The State v. Brandon, 8 Jones, N. C. 463; Reg. v. Davies, 1 Fost. & F. 69; Flanagan v. People, 52 N. Y. 467; People v. Montgomery, 13 Abb. Pr. N. S. 207; Macfarland's Case, 8 Abb. Pr. N. S. 57, 89; Cole's Case, 7 Abb. Pr. N. S. 321; Wagner v. People, 4 Abb. Ap. Dec. 509, 511; Willis v. People, 5 Parker C. C. 621; Reg. v. Townley, 3 Fost. & F. 830; Reg. v. Burton, 3 Fost. & F. 772; The State v. Lawrence, 57 Maine, 574; Humphreys v. The State, 45 Ga. 190; Spann v. The State, 47 Ga. 553; People v. Best, 39 Cal. 690; Loyd v. The State, 45 Ga. 57; Reg. v. Vaughan, 1 Cox C. C. 80; The State v. Thomas, 1 Houst. Crim. 511, 525. In the Illinois case of Hopps v. People, 31 Ill. 385, 391, 392, Breese, J., observed: "A safe and reasonable test in all cases would be, that, whenever it should appear from the evidence that at the time of doing the act the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act; and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them."

other language, whether he could distinguish between right and wrong with reference to what he was doing.[1] Qualifications and variations of the modes of expression appear in the cases cited below, but the meaning and even the forms of words of most of them are embodied in these epitomizations. And some of these cases recognize the propriety of further and qualifying instructions according to the circumstances.

§ 385. **Identical Act.** — The inquiry is directed to the particular thing done, and not to any other; because, as we have seen,[2] a man may be responsible for some things, while not for others.[3] Of course, also, —

Time. — It relates to the time of the transaction, not to any other time.[4] These questions are distinguishable from those which concern the proof; for, —

Evidence. — To ascertain the state of the mind at a given period, we may inquire into its condition both before and after,[5] — in relation to a particular subject, its condition as to other subjects.

§ 386. **Concerning the Right-and-Wrong Test.** — No doubt every prisoner found insane by the test mentioned in the section before the last should be acquitted. But a medical writer, who seems well to comprehend his subject, has said: "It may be asserted, as the result of observation and experience, that, in all lunatics, even in the most degraded idiots, whenever manifestations of

[1] Some of the foregoing cases, also The State v. Brown, 1 Houst. Crim. 539; The State v. Pratt, 1 Houst. Crim. 249; The State v. Danby, 1 Houst. Crim. 166; The State v. Mewherter, 46 Iowa, 88.

[2] Ante, § 380, 382.

[3] Roberts v. The State, 3 Kelly, 310; Freeman v. People, 4 Denio, 9; Kinne v. Kinne, 9 Conn. 102, 105.

[4] Jones v. The State, 13 Ala. 153; Hadfield's Case, 27 Howell St. Tr. 1281, 1353; Hales v. Petit, 1 Plow. 253, 260 People v. Pine, 2 Barb. 566; The State v. Stark, 1 Strob. 479; Reg. v. Renshaw, 11 Jur. 615, 616; Commonwealth v. Rogers, 7 Met. 500, 502; The State v. Spencer, 1 Zab. 196; The State v. Huting, 21 Misso. 464; Shultz v. The State, 13 Texas, 401; The State v. Vann, 82 N. C. 631; Clark v. The State, 8 Texas Ap. 350; Crim. Proced. II. § 667.

[5] Freeman v. People, 4 Denio, 9; Jones v. The State, 13 Ala. 153; Dickinson v. Barber, 9 Mass. 225; Grant v. Thompson, 4 Conn. 203; Kinne v. Kinne, 9 Conn. 102; McLean v. The State, 16 Ala. 672; People v. March, 6 Cal. 543; McAllister v. The State, 17 Ala. 434; Wheeler v. The State, 34 Ohio State, 394; Crim. Proced. II. § 674.

any mental action can be educed, the feeling of right and wrong may be proved to exist."[1] And all agree, that, since the intellect is only a part of the mind of man which impels to action, the disease called insanity need not necessarily abide solely in the understanding.[2] At all events, whether this is really so or not, we are for the reason already given[3] compelled to assume it to be so for the purpose of this discussion. Now, —

Continued. — In a case wherein, beyond controversy, the mental disease or imperfection extends only to the intellectual powers, and there is no pretence of any want of control by the party over his actions, — no proof tending to show any insanity except the partial, which veils simply the understanding and not the whole man, — this right-and-wrong test, thus seen to be the more common form of putting the question to the jury, is correct in legal theory and practically not misleading. For, it should be borne in mind, in all issues the charge to the jury should disclose the law applicable to whatever facts the evidence tends to establish, not to any which it does not.[4] But —

§ 387. **Irresistible Impulse — Moral Insanity.** — The medical writers, it is understood, are in substantial accord on the further proposition, that the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled onward by a power to him irresistible.[5] Whether or not such is truly the case must, in the nature of things, be a pure question of fact, it cannot be of law.[6] The judge, looking at a prisoner, could not lay it down as of law to the jury, that, when he did the forbidden act, he was in this condition. But if it could not be the law of the case that he was, equally and consequently it could not be that he was not. However positively in the judge's opinion he was not, the judicial assurance would be simply of a fact, not of a legal doctrine. If evidence tending to prove that such was the prisoner's condition is offered in any case before any court, the judge cannot help dealing with it. He must either exclude or receive it. He cannot say, "I, as judge,

[1] Bucknill on Criminal Lunacy, 59. And see ante § 383 *a*.

[2] See on this point, the article before referred to, 4 Law Rev. 236.

[3] Ante, § 383 *b*.

[4] Crim. Proced. I. § 978, 980, 980 *b*.

[5] 1 Beck Med. Jurisp. 10th ed. 723 724; Ray Med. Jurisp. Insan. 3d ed. § 17 18, 22.

[6] Ante, § 383 and the cases there cited.

know the fact, and am certain it is otherwise than you contend; hence, assuming the fact not to be as you allege, I reject the tendered proofs." No court, on any question, rules in this way. If, on the other hand, the fact which the evidence tends to prove could not, were it established, alter the conclusion of law, the court may rule it out as irrelevant. But we have seen that, by the fundamental principles of our jurisprudence, this fact, if it exists, is relevant; it is a perfect defence.[1] Nor has any court the authority, whatever the private view of the incumbent of the bench, to exclude evidence of any fact which the law has made a complete defence. Now, to go back and repeat, —

Continued. — There are cases which either in terms deny the existence of this species of insanity, thus in violation of all analogies transmuting a mere question of fact into one of law; or hold, on the other hand, that, assuming it to exist, it furnishes no excuse for an act otherwise criminal. In this latter view the doctrine is, that, if a man is conscious of doing what the law forbids, he is criminally responsible, whether he has power over his conduct or not.[2] But, as already said, it is a principle fundamental in reason, in our jurisprudence, and in every other, that, in the language of Rutherforth, "whatever is unavoidable is no crime."[3] Judges who, every day, are laying it down to juries, that men are not punishable for what they are unable to avoid, cannot be supposed to be eating their words and saying they are, when speaking to this class of questions. These cases, therefore, must be accepted as the mere distinct opinions of the judges, that every man who sees a thing to be wrong has the power to avoid doing it. Let us assume these opinions to be right, and those of the experts and other witnesses to be wrong, still it follows from the foregoing discussions that the jury, and not the court, is to settle the question for each particular case;[4] and, if the law's appointed triers err, the judge is not responsible. Still —

Responsibility for Inability. — It should not be lost sight of that, assuming the existence of the defendant's inability to control his own conduct, it is sometimes of a sort for which the law holds him answerable; as, —

[1] Ante, § 383 *b*.

[2] Ante, § 383 *b*; Flanagan *v.* People, 52 N. Y. 467; In re Forman, 54 Barb. 274; The State *v.* Brandon, 8 Jones, N. C 463; Loyd *v.* The State, 45 Ga. 57; Spann *v.* The State, 47 Ga. 553; Reg. *v.* Burton, 3 3 Fost. & F. 772; Reg. *v.* Haynes, 1 Fost. & F. 666; Reg. *v.* Barton, 8 Cox'C. C. 275.

[3] Ante, § 346 et seq., 383 *b*.

[4] Ante, § 383, 383 *a*.

Passion — Drunkenness. — If one allows his passions to be excited to a frenzy,[1] or voluntarily puts his mind out of temporary balance by intoxicating drinks,[2] he is answerable to the criminal law for what he does in this condition. But, —

Controlling Disease. — If he is free from moral blame; and, in the language of Lord Denman, "if some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible."[3] And the question for the jury, under such a state of the proofs, when the court permits, as it ought, the proofs to be introduced, should be so framed as to comprehend this view.[4] Descending more to detail, —

[1] Willis *v.* People, 5 Parker C. C. 621; The State *v.* Graviotte, 22 La. An. 587; Cole's Case, 7 Abb. Pr. N. S. 321; The State *v.* Stickley, 41 Iowa, 232; Guetig *v.* The State, 66 Ind. 94; People *v.* Finley, 38 Mich. 482. See for a sort of limit to the doctrine The State *v.* Draper, 1 Houst. Crim. 291, 301.

[2] Post, § 400 et seq.; Bradley *v.* The State, 31 Ind. 492; The State *v.* Hundley, 46 Misso. 414; People *v.* Bell, 49 Cal. 485; Colbalth *v.* The State, 2 Texas Ap. 391; The State *v.* Coleman, 27 La. An. 691; The State *v.* Thompson, 12 Nev. 140; Fisher *v.* The State, 64 Ind. 435; The State *v.* Hurley, 1 Houst. Crim. 28; The State *v.* Thomas, 1 Houst. Crim. 511. And see Reg. *v.* Leigh, 4 Fost. & F. 915; The State *v.* Hart, 29 Iowa, 268; The State *v.* Johnson, 40 Conn. 136; Roberts *v.* People, 19 Mich. 401.

[3] Reg. *v.* Oxford, 9 Car. & P. 525, 546. And see The State *v.* Coleman, 27 La. An. 691.

[4] Commonwealth *v.* Rogers, 7 Met. 500, 502; Roberts *v.* The State, 3 Kelly, 310; Stevens *v.* The State, 31 Ind. 485; Bradley *v.* The State, 31 Ind. 492, 509. In a Kentucky case, it was justly deemed, as it has been in others, that this defence of moral insanity is liable to abuse, therefore that the court should use great caution in presenting to the jury the legal principles by which it is regulated. And the judge added, that, "before this species of insanity can be admitted to excuse crime, it must be shown to exist in such violence as to render it impossible for the party to do otherwise than yield to its promptings." But the court below having, in matter of law, instructed the jury "not to acquit upon such moral insanity unless it had manifested itself in former acts of similar character or like nature of the offence charged," this was held to be wrong; and for this error a new trial was granted the defendant. Scott *v.* Commonwealth, 4 Met. Ky. 227, 228, 230. See also Smith *v.* Commonwealth, 1 Duv. 224; Andersen *v.* The State, 43 Conn. 514. And see some sensible views, and a collection of cases, in Taylor Med. Jurisp. In a Michigan case, Campbell, C. J., said: "The court in regard to insanity charged that the respondent would be blameless in law, 1, if by reason of insanity he was not capable of knowing he was doing wrong, or 2, if he had not power to resist the temptation to violate the law. This was correctly charged. The law has no theories on the subject of insanity. It holds every one responsible who is *compos mentis*, or a free agent, and every one irresponsible who is *non compos mentis*, or not having control of his mind." This, it is perceived, quite accords with the Scotch view, as stated ante, § 383 *a*, and that of the New Hampshire and some other of our own courts, ante § 388; and that of reason, as explained in the foregoing sections. People *v.* Finley, 38 Mich. 482, 483. And see The State *v.* West, 1 Houst. Crim. 371; The State *v.* Brown, 1 Houst. Crim. 539, 557. The late Prof. Mittermaier, a German jurist of the highest eminence, says, in respect to insanity generally: "The true principle is to look to the personal character of the individual, to the grade of his mental powers

§ 388. **Special Forms of Irresistible Impulse.** — According to medical views, which have found some legal recognition, this irresistible impulse is not always general, but sometimes is limited to a particular class of actions; as, for example, in —

"Homicidal Insanity." — "There is," said Gibson, C. J., "a *moral* or *homicidal* insanity, consisting of an irresistible inclination to kill, or to commit some other particular offence. There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance. The doctrine which acknowledges this mania is dangerous in its relations, and can be recognized only in the clearest cases. It ought to be shown," but, in reason, this suggestion can be accepted only in the way of caution for the jury, "to have been habitual, or at least to have evinced itself in more than a single instance."[1]

§ 389. **Difficulties of Subject.** — This subject of insanity is, in its practical, legal aspects, attended with great difficulties. Men of sane mind know themselves but imperfectly, and they comprehend others less than themselves; nor is there language to convey, in exact form, even the little knowledge we possess of the sane mind. When, therefore, we undertake to investigate the phenomena of insanity, to discuss them, and to deduce from the principles of the law the legal rules to govern them, we are embarrassed with difficulties which should make us cautious, and restrain us from any extensive laying down of doctrines for unseen future cases.[2] Therefore, —

to the notions by which he is governed, to his views of things, and, finally, to the course of his whole life, and the nature of the act with which he is charged. A person who commits a criminal act may be perfectly well acquainted with the laws and their prohibitions, and yet labor under alienation of mind. He may know that homicide is punished with death, and yet have no freedom of will." Translation 22 Am. Jur. 311, 317, 1 Beck Med. Jurisp. 10th ed. 765, note.

[1] Commonwealth *v.* Mosler, 4 Barr, 264, 267, in which the same learned judge further observed of homicidal insanity: "The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary to show, by clear proofs, either its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency, developed in previous cases, becoming in itself a second nature." See also, as to homicidal mania, Sanchez *v.* People, 4 Parker C. C. 535. And see the last note.

[2] Dr. Ray has well observed: "No cases subjected to legal inquiry are more

§ 390. **Proceed cautiously.** — Judges, counsel, and juries cannot proceed too carefully in their investigation of cases of alleged insanity. They may well restrict their theories to the particular facts in issue; and, though they accept the aid of experts, they should remember that, in questions of this delicate nature, even experts are liable to err. The memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals.[1] We think ourselves wiser upon this subject than were our fathers; undoubtedly we are; but there is wisdom yet to be acquired. In the days of darkness, it was perhaps better that insane men should suffer death than be permitted to go at large. And until we learn truly to distinguish between sanity and insanity, some must, on the one hand, suffer as criminals when they ought rather to be under treatment for disease; and, on the other hand, persons truly guilty will sometimes escape punishment under the plea of insanity.

§ 391. **Suggestions to aid Inquiry after the Fact.** — Perhaps the following suggestions will aid inquirers: All men are erring. Mere error, therefore, does not relieve from punishment. All men have vicious propensities. Therefore a mere propensity to do evil does not excuse the doer. All men are only in a limited degree deterred from wrong-doing by fear of its consequences. The mere fact, therefore, that one was not afraid of punishment, when doing an act, does not show him to have been insane. All men are more or less regardless of the demands of conscience. So the mere fact that a prisoner showed a hardened heart does not prove him insane.[2] But all sane men act with a certain uniformity of plan, varying and winding it may be in some respects, yet uniform in its manifestations of the mind; all are under some restraint concerning every question before them; all derive their knowledge of visible things from what is tangible to their outward senses; all love the friends who sincerely do them good; all manifest affection, under ordinary circumstances, for their offspring; all control themselves under the pressure of motives

alculated to puzzle the understandings f courts and juries, to mock the wisdom f the learned, and baffle the acuteness f the shrewd, than those connected with uestions of imbecility;" and, he might have added, insanity generally. See Ray Med. Jurisp. Insan. 3d ed. § 104.

[1] And see the observations of Gilpin, C. J., in The State *v.* Danby, 1 Houst. Crim. 166, 171, 172.

[2] Loyd *v.* The State, 45 Ga 57.

sufficient; all obey, in short, certain laws which we recognize as belonging to the mind of a sane man. When, therefore, a person is found acting, either at times or habitually, contrary to these known laws, we say that he is more or less insane. But, —

Sufficiently Insane. — As we have already seen,[1] mere admitted insanity, palpable to the acute understanding, without reference to its degree, does not in law excuse the act. It must have attained the law's standard of magnitude.[2] And from this proposition we are led to a frequent error of the medical writers and experts on this subject. Often they assume it to be the law, that, if one is insane to however minute a degree, he is therefore to go unwhipped of justice; and hence, in part, their conplaint, that men whom they pronounce insane are subjected by the courts to punishment. If, while they deal thus unjustly with the law, the courts do not always pay entire respect to their views, they should not complain.[3]

§ 392. **Insane Delusion.** — Delusion is, with many, a favorite test of insanity. It was established as a test in the famous case of Hadfield.[4] There are even judges who will not admit that there is any other test.[5] It excuses on the ground of a mistake of fact, already discussed.[6] If, then, a man under an aberration of mind even in one particular only, believes a thing to exist, — as, that another in his presence has designs upon his life, and is about to make the attack, — and he acts as he would be justified in doing if what he believes were real, in this instance kills the man to save his own life, he commits no crime.[7] Evidently the doctrine thus laid down is safe in almost any state of the proofs. But, —

[1] Ante, § 376, 380.

[2] The State *v.* Geddis, 42 Iowa, 264; Cunningham *v.* The State, 56 Missis. 269; Warren *v.* The State, 9 Texas Ap. 619; Webb *v.* The State, 5 Texas Ap. 596; Patterson *v.* People, 46 Barb. 625; The State *v.* Danby, 1 Houst. Crim. 166; The State *v.* Pratt, 1 Houst. Crim. 249.

[3] And see observations of Campbell, C. J., in People *v.* Finley, 38 Mich. 482, 483, 484.

[4] Hadfield's Case, 27 Howell St. Tr. 1281.

[5] Willis *v.* People, 5 Parker C. C. 621; In re Forman, 54 Barb. 274; Reg. *v.* Townley, 3 Fost. & F. 839. And see Reg. *v.* Davies, 1 Fost. & F. 69; Reg. *v.* Law, 2 Fost. & F. 836.

[6] Ante, § 301 et seq.

[7] McNaghten's Case, 10 Cl. & F. 200; Opinion on Insane Criminals, 8 Scott N. R. 595; Commonwealth *v.* Rogers, 7 Met. 500; Cunningham *v.* The State, 56 Missis. 269. In Commonwealth *v.* Rogers, the court add the following illustration to the one given in the text: "A common instance is where he fully believes that the act he is doing is done by the

§ 393. **Insufficiency of Thing delusively believed.** — Should the mental aberration be admitted to extend only to the particular delusion in evidence, while all the other functions of the mind were unimpaired, the further rule would be, that, if the defendant insanely believed something which, were it true, would not legally justify his act, — as, in the language of the English judges, "if his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, — he would be liable to punishment."[1] This branch of the doctrine should be cautiously received; for delusion of any kind is, of itself, strongly indicative of a generally diseased mind. And doubtless in some if not most of the instances, it does in fact extend beyond the precise point we have supposed, whether perceptibly to the casual eye or not. Hence, —

§ 394. **Delusion simple.** — In the case of Hadfield, — acquitted, as insane, of the high treason of shooting at the king, — though there was evidence of something like general insanity, his principal delusion was, "that," in the language of his counsel, Mr. Erskine, "he had constant intercourse with the Almighty Author of all things; that the world was coming to a conclusion; and that, like our blessed Saviour, he was to sacrifice himself for its salvation." And so he became impressed with the insane delusion, "that he *must be destroyed*, but *ought not to destroy himself;*" to bring about which result, he committed the act, intending to be arrested and executed. It seems not to have been a subject of inquiry in this case, whether, if the facts had been as delusively believed, they would have legally justified the act; but, in the able speech of Mr. Erskine, often commended for its just views,[2] the question is presented as turning, both in this

immediate command of God; and he acts under the delusive but sincere belief, that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of nature." Shaw, C. J. p. 503.

[1] Opinion on Insane Criminals, 8 Scott N. R. 595, 603; McNaghten's Case, 10 Cl. & F. 200; Bovard *v.* The State, 30 Missis. 600; The State *v.* Mewherter, 46 Iowa, 88.

[2] "The great speech of Mr. Erskine in defence of Hadfield has shed new light upon the law of insanity. So conclusive was that celebrated argument, that it is now looked upon by the profession as authority. In the records of forensic eloquence, ancient and modern, nothing is to be found surpassing Erskine's defence of Hadfield, for condensation, perspicuity, and strength of reasoning, as well as for beauty of illustration, and purity of style." Nisbet, J., in Roberts *v.* The State, 3 Kelley, 310, 330.

case and in others which he brings forward by way of illustration, upon delusion simply, without reference to the nature of the ideal facts, as being sufficient or not, if true, to justify the otherwise criminal deed.[1] And in a modern Scotch case, the learned Lord Justice-Clerk said to the jury: "It does not appear that anybody ever doubted the soundness of the prisoner at the bar. There is evidently no doubt as to his sanity amongst those who were coming in constant contact with him. That does not bring you to a conclusion, but it is nine-tenths, as I have said, towards the conclusion to which you will have to come. There is a further step which you must take, and it is here that the great difficulty and importance of the case lies. There are states of mind which indicate unsoundness or insanity, which do not manifest themselves in ordinary life, but only on particular occasions, and in relation to special subjects. These are very exceptional instances. But if a man is clearly proved to labor under insane delusions, he is not of sound mind. Now, that the prisoner here labored under a strong delusion about his mother is certain; and the question for you is, was it an insane delusion? On that matter you have heard the medical evidence, and the account of the idea he entertained, that his mother and the doctor were in league to give him medicines to induce him to become a Roman Catholic. That part of the case impressed me very much; because that is an idea which no sane man could hold. . . . If you think that the delusion under which he thus labored was an insane delusion, then the man's mind was not sound, and you will rightly acquit him on that ground; the more so, that the delusion led directly to the act. The self-mutilation which occurred afterwards is also an indication of disturbed intellect." And thereupon the jury acquitted the defender as insane.[2]

Connected with Criminal Act. — While the learned judge, in this case, pertinently directed the jury's attention to a connection between the insane delusion and the criminal fact, he does not say it was absolutely essential. It doubtless was not. Yet with us it has been laid down in a general way, and we may deem the ordinary rule to be so, that, if the insane delusion has refer-

[1] Hadfield's Case, 27 Howell St. Tr. 1281. And see, on this subject, Martin's Case, Shelford Lun. 465.

[2] Macklin's Case, 3 Couper, 257, 260, 261.

ence to something wholly unconnected with the crime, it does not excuse.[1]

§ 395. **Progressive Developments.** — It is impossible to anticipate all future queries. The diseases of the flesh are ever changing, while remaining in some prominent respects the same; so will be the diseases of the mind, — those shadows which appear in the advancing light. But the fundamental doctrines of the common law are reasonably stable, and they are adapted as well to the future with its changes as to the present and past.

Deaf and Dumb. — A person deaf and dumb is not therefore as of course insane; and, on his capacity sufficiently appearing, he may be tried and convicted for crime.[2] In a case of one who had never been to a school for mutes, the learned court laid down the doctrine in general terms to be, that *prima facie* a deaf and dumb person is to be regarded as incompetent; and "it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him, and had a knowledge and consciousness that the act he was doing was criminal, and would subject him to punishment." And, in this instance, the prisoner was acquitted under circumstances in which he plainly would not have been if endowed with hearing and speech.[3]

§ 396. **Criminal Liability and Civil, distinguished.** — The reader should not blend the insanity of the criminal law with that of the civil department. They are different in their natures, depending in some respects on diverse considerations. A person may be insane as to the one while not as to the other.[4] So likewise, —

Capacity for Crime, and to be tried, distinguished. — The question discussed in this chapter is not the same which arises preliminarily to the trial; namely, whether the prisoner is mentally capable of making his defence. If he is not, the court cannot go

[1] The State *v.* Gut, 13 Minn. 341, 368.

[2] Commonwealth *v.* Hill, 14 Mass. 207; Reg. *v.* Whitfield, 3 Car. & K. 121; Reg. *v.* Berry, 1 Q. B. D. 447, 13 Cox C. C. 189.

[3] The State *v.* Draper, 1 Houst. Crim. 291, 302.

[4] Reg. *v.* Oxford, 9 Car. & P. 425; Hadfield's Case, 27 Howell St. Tr. 1281, 1290, 1311, 1314. See The State *v.* Gardiner, Wright, 392, 399; Webb *v.* The State, 5 Texas Ap. 596; Warren *v.* The State, 9 Texas Ap. 619; Ray Med. Jurisp. Insan. 3d ed. § 8.

on with the case;[1] or, if he becomes insane after the trial commences, he can neither be sentenced, nor, if sentenced, punished, while his insanity continues.[2]

[1] Freeman *v.* People, 4 Denio, 9; Reg. *v.* Goode, 7 A. & E. 536; Rex *v.* Pritchard, 7 Car. & P. 303; Rex *v.* Dyson, 1 Lewin, 64; Jones *v.* The State, 13 Ala. 153; People *v.* Ah Ying, 42 Cal. 18; The State *v.* Patton, 12 La. An. 288; Reg. *v.* Berry, 1 Q. B. D. 447; Crim. Proced. II. § 666–668.

[2] Freeman *v.* People, 4 Denio, 9; Jones *v.* The State, 13 Ala. 153; Shelford Lun. 467; Bonds *v.* The State, Mart. & Yerg. 143; The State *v.* Brinyea, 5 Ala. 241; People *v.* Lake, 2 Parker C. C. 215; Spann *v.* The State, 47 Ga. 549; The State *v.* Vann, 84 N. C. 722.

CHAPTER XXVII.

DRUNKENNESS AS EXCUSING THE CRIMINAL ACT.

§ 397. **The Doctrine stated.** — We have seen, that, if a man in tending one wrong accidentally accomplishes another, he is punishable for what is done, though not intended; except in cases where a specific intent, in distinction from mere general malevolence or carelessness, is an essential element in the particular crime. That doctrine, explained in a previous chapter,[1] is the doctrine of this chapter also. The law deems it wrong for a man to cloud his mind, or excite it to evil action, by the use of intoxicating drinks; and one who does this, then, moved by the liquor while too drunk to know what he is about, performs what is ordinarily criminal, subjects himself to punishment; for the wrongful intent to drink coalesces with the wrongful act done while drunk, and makes the offence complete. This is the principle; the previous chapter, therefore, may profitably be consulted in connection with this one. Yet the judges, in deciding the cases, have not always had the principle in their minds; consequently the decisions show some zigzag lines of doctrine, and it is necessary we should trace them in detail.

§ 398. **How the Chapter divided.** — We shall consider, I. The General Doctrine; II. Limitations of the Doctrine.

I. *The General Doctrine.*

§ 399. **Mere Private Drunkenness not Indictable.** — Mere private intoxication, with no act beyond, is not indictable at the common law.[2] There are various old English statutes, early enough

[1] Ante, § 323 et seq.

[2] The State *v.* Deberry, 5 Ire. 371; The State *v.* Waller, 3 Murph. 229; O'Hanlon *v.* Myers, 10 Rich. 128. See Smith *v.* The State, 1 Humph. 396; Hutchison *v.* The State, 5 Humph. 142.

in date to be common law with us, making drunkenness punishable or finable,[1] yet they seem not to have been regarded as of common-law force in this country. Still, —

Supplies Criminal Intent. — The common law has always regarded drunkenness as being, in a certain sense, criminal. Since, therefore, a man who intends one wrong and does another of the indictable sort is punishable,[2] even where the wrong intended would not be so if actually done,[3] voluntary drunkenness supplies in ordinary cases the criminal intent. Thus, —

§ 400. **Continued — No Excuse for Crime.** — When a man voluntarily becomes drunk, there is the wrongful intent; and if, while too far gone to have any further intent, he does a wrongful act, the intent to drink coalesces with the act done while drunk, and for this combination of act and intent he is liable criminally. It is, therefore, a legal doctrine, applicable in ordinary cases, that voluntary intoxication furnishes no excuse for crime committed under its influence.[4] It is so even when the intoxication is so extreme as to make the person unconscious of what he is doing,[5] or to create a temporary insanity.[6] For example, —

[1] For example, see Stats. 4 Jac. 1, c. 5; 21 Jac. 1, c. 7. For discussions of the offences of drunkenness, being a common drunkard, and the like, under American statutes, see Stat. Crimes, § 967–981.

[2] Ante, § 327.

[3] Ante, § 330.

[4] Kenny *v.* People, 31 N. Y. 330; People *v.* Pine, 2 Barb. 566, 570; The State *v.* Bullock, 13 Ala. 413; The State *v.* John, 8 Ire. 330; The State *v.* Stark, 1 Strob. 479; The State *v.* Turner, Wright, 20, 30; United States *v.* Cornell, 2 Mason, 91, 111; Rex *v.* Ayes, Russ. & Ry. 166; Burrow's Case, 1 Lewin, 75; Rennie's Case, 1 Lewin, 76; Pearson's Case, 2 Lewin, 144; United States *v.* Forbes, Crabbe, 558; Schaller *v.* The State, 14 Misso. 502; Pennsylvania *v.* McFall, Addison, 255, 257; Respublica *v.* Weidle, 2 Dall. 88; United States *v.* Drew, 5 Mason, 28; Whitney *v.* The State, 8 Misso. 165; Pirtle *v.* The State, 9 Humph. 663; Haile *v.* The State, 11 Humph. 154; Cornwell *v.* The State, Mart. & Yerg. 147; Swan *v.* The State, 4 Humph. 136; Tyra *v.* Commonwealth, 2 Met. Ky. 1; Golden *v.* The State, 25 Ga. 527, 533; Golliher *v.* Commonwealth, 2 Duvall, 163; Reg. *v.* Gamlen, 1 Fost. & F. 90; Outlaw *v.* The State, 35 Texas, 481. And see Hamilton *v.* Grainger, 5 H. & N. 40; Reed *v.* Harper, 25 Iowa, 87; Broom Leg. Max. 2d ed. 13. Lord Coke says: "Although he who is drunk is for the time *non compos mentis*, yet this drunkenness does not extenuate his act or offence, nor turn to his avail; but it is a great offence in itself, and therefore aggravates his offence, and doth not derogate from the act which he did during that time, and that as well in cases touching his life, his lands, his goods, as any other thing that concerns him." Beverley's Case, 4 Co. 123 *b*, 125 *a*. And see Commonwealth *v.* Hart, 2 Brews. 546. It is not, however, strictly true that drunkenness aggravates a crime; it simply furnishes no excuse. McIntyre *v.* People, 38 Ill. 514.

[5] People *v.* Garbutt, 17 Mich. 9. And see Henslie *v.* The State, 3 Heisk. 202.

[6] People *v.* Lewis, 36 Cal. 531. And see Real *v.* People, 42 N. Y. 270; post, § 406.

§ 401. **Supplies Malice in Homicide.** — The common law divides indictable homicides into murder and manslaughter; but the specific intent to kill is not necessary in either. A man may be guilty of murder without intending to take life, or of manslaughter without so intending, or he may purposely take life without committing any crime. And the doctrine is, that the intention to drink may fully supply the place of malice aforethought; so that, if one voluntarily becomes so drunk as not to know what he is about, and then with a deadly weapon kills another, he commits murder, the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder, much less extract from it altogether its indictable quality.[1] Again, —

§ 402. **Cruelty to Animals.** — Evidence of intoxication will not avail a defendant charged with cruelty to his horse.[2]

§ 403. **Views of European Jurists — Question in Principle.** — Many European jurists view drunkenness more leniently, as to crimes committed under its influence, than the common law, thus explained, regards it.[3] So likewise does Paley, in his "Moral and Political Philosophy."[4] In legal principle, the question turns on another; namely, whether drunkenness is to be esteemed

[1] Reniger *v.* Fogossa, 1 Plow. 1, 19; Beverley's Case, 4 Co. 123; United States *v.* Cornell, 2 Mason, 91, 111; Haile *v.* The State, 11 Humph. 154; Pirtle *v.* The State, 9 Humph. 663; Pennsylvania *v.* McFall, Addison, 255, 257; Rex *v.* Carroll, 7 Car. & P. 145; Rex *v.* Ayes, Russ. & Ry. 166; The State *v.* Bullock, 13 Ala. 413; The State *v.* John, 8 Ire. 330; Rex *v.* Meakin, 7 Car. & P. 297; Mercer *v.* The State, 17 Ga. 146; People *v.* Fuller, 2 Parker C. C. 16; People *v.* Robinson, 1 Parker C. C. 649; Carter *v.* The State, 12 Texas, 500; Commonwealth *v.* Hawkins, 3 Gray, 463; People *v.* Robinson, 2 Parker C. C. 235; People *v.* Hammill, 2 Parker C. C. 223; The State *v.* Harlow, 21 Misso. 446; The State *v.* Mullen, 14 La. An. 570; McIntyre *v.* People, 38 Ill. 514; Fiery *v.* People, 54 Barb. 319, 2 Keyes, 424; The State *v.* Johnson, 41 Conn. 584. There are, in the books, a few cases which seem to lend countenance to the idea that in special circumstances drunkenness may reduce a killing, which else would be murder, to manslaughter. Consult McIntyre *v.* People, 38 Ill. 514; Shannahan *v.* Commonwealth, 8 Bush, 463 (overruling Smith *v.* Commonwealth, 1 Duvall, 224, and Blimm *v.* Commonwealth, 7 Bush, 320); Kriel *v.* Commonwealth, 5 Bush, 362; Curry *v.* Commonwealth, 2 Bush, 67. It is believed, however, that the doctrine of the text is not unsound in legal principle, while it is sustained by the mass of the authorities. But, in connection with it, the reader should bear in mind what is laid down, post, § 409, 410, 414, 415.

[2] The State *v.* Avery, 44 N. H. 392.

[3] See an able article by Mittermaier, translated from the German, and published at Edinburgh, as No. 10 of the Cabinet Library of Scarce and Celebrated Law Tracts, and in the American Jurist, Vol. xxiii. p. 290.

[4] Paley Phil. b. 4, c. 2.

malum in se, or only an innocent mistake. Our jurisprudence deems it the former, hence its conclusion.[1]

II. *Limitations of the Doctrine.*

§ 404. **Whence derivable — How the Decisions.** — From a consideration of the reasons whence the general doctrine proceeds, as shown under our last sub-title, its limitations will appear. And they are in exact accord with the better modern adjudications; but there are decisions, particularly of the earlier dates, pronounced by judges who did not have the true limitations in their minds. Let us, therefore, trace out adjudication and principle a little further.

§ 405. **Drunkenness not Voluntary.** — It follows from what has already been said, that, "if a party be made drunk by stratagem, or the fraud of another," or the unskilfulness of his physician, "he is not responsible."[2] Since the drunkenness is without his fault, it cannot supply the criminal intent.

§ 406. **Insanity from Drunkenness.** — Again, the law holds men responsible for the immediate consequences of their acts, but not ordinarily for those more remote. If, therefore, one drinks so deeply, or is so affected by the liquor, that, for the occasion, he is oblivious or insane, he is still punishable for what of evil he does under the influence of the voluntary drunkenness.[3] But, if the habit of drinking has created a fixed frenzy or insanity, whether permanent or intermittent, — as, for instance, delirium tremens,[4] — it is the same as if produced by any other cause, excusing the act.[5] For whenever a man loses his understanding,

[1] Ante, § 330–332.

[2] Parke, J., in Pearson's Case, 2 Lewin, 144; 1 Russ. Crimes, 3d Eng. ed. 7; 1 Hale P. C. 32; People *v.* Robinson, 2 Parker C. C. 235; Choice *v.* The State, 31 Ga. 424.

[3] Ante, § 399, 400; People *v.* Pine, 2 Barb. 566, 570; United States *v.* Drew, 5 Mason, 28; United States *v.* Clarke, 2 Cranch C. C. 158; United States *v.* McGlue, 1 Curt. C. C. 1; Bennett *v.* The State, Mart. & Yerg. 133; Cornwell *v.* The State, Mart. & Yerg. 147; Carter *v.* The State, 12 Texas, 500; People *v.* Bell, 49 Cal. 485; The State *v.* Hundley, 46 Misso. 414.

[4] 1 Bishop Mar. & Div. § 131; United States *v.* McGlue, 1 Curt. C. C. 1; Macconehey *v.* The State, 5 Ohio State, 77.

[5] United States *v.* Drew, 5 Mason, 28; Burrow's Case, 1 Lewin, 75; Rennie's Case, 1 Lewin, 76; Commonwealth *v.* Green, 1 Ashm. 289, 302; United States *v.* Forbes, Crabbe, 558; Cornwell *v.* The State, Mart. & Yerg. 147; The State *v.* Dillahunt, 3 Harring. Del. 551; The State *v.* McGonigal, 5 Harring. Del. 510; Bailey *v.* The State, 26 Ind. 422; Roberts *v.* People, 19 Mich 401; The State *v.* Hundley, supra; Cluck *v.* The State, 40 Ind. 263; Bradley *v.* The State, 31 Ind

as a settled condition, he is entitled to legal protection, equally whether the loss is occasioned by his own misconduct or by the dispensation of Providence.[1]

§ 407. **Dipsomania.** — Writers on medical jurisprudence inform us, that drunkenness, and indeed other causes, sometimes beget a disease called *dipsomania*, which overmasters the will of its victim, and irresistibly impels him to drink to intoxication.[2] Such a case stands, in principle, on a like ground with one of moral insanity, considered in a previous chapter.[3] We may presume that there are courts which will not permit that defence to be introduced; but other courts have allowed it, and have held, that the questions whether there is such a disease, and whether the act was committed under its influence, are not questions of law, but of fact for the jury.[4] Still, looking at such an inquiry as a mere search after facts, it is obvious that, to distinguish a case of this sort from one of mere inordinate appetite may be difficult, requiring of judges and jurors great caution.

§ 408. *Cases requiring Specific Intent:* —

Not supplied by Drunkenness.—It is plain, that, when the law requires, as it does in some offences, a specific intent in distinction from mere general malevolence to render a person guilty,[5] the intent to drink, and drunkenness following, cannot supply the place of this specific intent.[6] Thus, —

§ 409. **Murder of first Degree.** — Drunkenness, we have seen,[7] does not incapacitate one to commit either murder or manslaughter at the common law; because, to constitute either, the specific intent to take life need not exist, but general malevolence is sufficient. But where murder is divided by statute into two degrees, and to constitute it in the first degree there must be the specific intent to take life,[8] this specific intent does not in fact exist, and the murder is not in this degree, where one, not meaning to commit a homicide, becomes so drunk as to be incapable of intending to do it; and then, in this condition, kills a man.

492; Boswell *v.* Commonwealth, 20 Grat. 860.

[1] Bliss *v.* Connecticut and Pass. Railroad, 24 Vt. 424; Bailey *v.* The State, 26 Ind. 422; Choice *v.* The State, 31 Ga. 424; Lanergan *v.* People, 50 Barb. 266.

[2] Ray Med. Jurisp. Insan. 3d ed. § 441–447.

[3] Ante, § 387.

[4] Ante, § 383; The State *v.* Pike, 49 N. H. 399; The State *v.* Johnson, 40 Conn. 136.

[5] Ante, § 297, 298, 320, 335, 342.

[6] Reg. *v.* Monkhouse, 4 Cox C. C. 55; Roberts *v.* People, 19 Mich. 401. See post, § 412.

[7] Ante, § 401.

[8] Vol. II. § 728.

In such a case, the courts hold that the offence of murder is only in the second degree.[1]

§ 410. **Continued.** — This doctrine does not render it impossible for one to commit murder in the first degree while drunk. If he resolves to kill another, then drinks to intoxication, and then kills him, the murder is in the first degree; because, in this case, he did specifically intend to take life.[2] And a man, though drunk, may not be so drunk as to exclude the particular intent.[3] Drunkenness short of the extreme point, therefore, will not reduce the murder to the second degree.[4]

§ 411. **Larceny.** — Analogous to murder in the first degree is larceny. A mere intentional trespass on another's goods does not constitute it; but, to this, the specific intent to steal must be added.[5] And, though drunkenness does not necessarily disqualify a man to commit this offence; yet, if, without the intent to steal, he becomes so drunk as to be incapable of entertaining it, then, in this condition, he takes another's goods, and relinquishes them before the intent could come upon him, or returns them the instant his restored mind has cognizance of the possession of them, there is no larceny.[6]

§ 412. **Passing Counterfeit Money.** — In like manner, a man passing counterfeit money is not liable criminally, if too drunk

[1] Pirtle *v.* The State, 9 Humph. 663; Haile *v.* The State, 11 Humph. 154; Gwatkin *v.* Commonwealth, 9 Leigh, 678; Swan *v.* The State, 4 Humph. 136; The State *v.* Bullock, 13 Ala. 413; Pigman *v.* The State, 14 Ohio, 555; Cornwell *v.* The State, Mart. & Yerg. 147; People *v.* Hammill, 2 Parker C. C. 223; People *v.* Robinson, 2 Parker C. C. 235; Kelly *v.* The State, 3 Sm. & M. 518; People *v.* Belencia, 21 Cal. 544; Keenan *v.* Commonwealth, 8 Wright, Pa. 55, 57; People *v.* Williams, 43 Cal. 344; Kelly *v.* Commonwealth, 1 Grant, Pa. 484; People *v.* Batting, 49 How. Pr. 392; Commonwealth *v.* Hart, 2 Brews. 546; People *v.* King, 27 Cal. 507; The State *v.* Johnson, 41 Conn. 584; Rafferty *v.* People, 66 Ill. 118; Jones *v.* Commonwealth, 25 Smith, Pa. 403. See O'Brien *v.* People, 48 Barb. 274.

[2] Smith *v.* Commonwealth, 1 Duvall, 224. And see The State *v.* Gut, 13 Minn. 341.

[3] Kenny *v.* People, 31 N. Y. 330.

[4] Keenan *v.* Commonwealth, 8 Wright, Pa. 55.

[5] Ante, § 320, 342; Vol. II. § 840.

[6] I have thus stated the doctrine with care, as it rests in legal principle, and substantially in the authorities. But some of the cases, on this question, are indistinct and unsatisfactory, and perhaps some are adverse. The following are the cases before me, whether for or against what I have set down in the text. The State *v.* Schingen, 20 Wis. 74; The State *v.* Bell, 29 Iowa, 316; Henslie *v.* The State, 3 Heisk. 202; Rogers *v.* The State, 33 Ind. 543; Rex *v.* Pitman, 2 Car. & P. 423; Commonwealth *v.* French, Thacher Crim. Cas. 163; O'Herrin *v.* The State, 14 Ind. 420; Dawson *v.* The State, 16 Ind. 428, 429; Commonwealth *v.* Finn, 108 Mass. 466; The State *v.* Hart, 29 Iowa, 268. And see, as illustrative, People *v.* Harris, 29 Cal. 678.

to know it is counterfeit, or, consequently, to entertain the intent to defraud.[1]

On what Principle. — In the Tennessee court, Reese, J., well expressed the principle, thus: "When the nature and essence of a crime are made, by law, to depend upon the peculiar state and condition of the criminal's mind at the time, and with reference to the act done, drunkenness, as a matter of fact affecting such state and condition of the mind, is a proper subject for consideration and inquiry by the jury. The question in such case is, What is the mental *status?*"[2]

§ 413. **Attempt.** — An indictable attempt is committed only when the intent is specific; namely, to do the particular thing which constitutes the substantive crime.[3] If, therefore, one is too drunk to entertain such specific intent, he cannot become guilty of the offence of attempt, however culpable, in a general way, he may be for his drunkenness.[4]

§ 414. *Cases not requiring a Specific Intent, wherein still the*

[1] Pigman *v.* The State, 14 Ohio, 555; United States *v.* Roudenbush, 1 Bald. 514.

[2] Swan *v.* The State, 4 Humph. 136, 141; s. p. Kelly *v.* The State, 3 Sm. & M. 518; Reg. *v.* Cruse, 8 Car. & P. 541, 546; Haile *v.* The State, 11 Humph. 154; Pirtle *v.* The State, 9 Humph. 663; Reg. *v.* Moore, 3 Car. & K. 319. In United States *v.* Roudenbush, supra (at p. 517), Baldwin, J., observed to the jury: "Intoxication is no excuse for crime when the offence consists merely in doing a criminal act, without regarding intention. But when the act done is innocent in itself, and criminal only when done with a corrupt or malicious motive, a jury may, from intoxication, presume that there was a want of criminal intention; that the reasoning faculty, the power of discrimination between right and wrong, was lost in the excitement of the occasion. But if the mind still acts, if its reasoning and discriminating faculty remains, a state of partial intoxication affords no ground of a favorable presumption in favor of an honest or innocent intention, in cases where a dishonest and criminal intention would be fairly inferred from the commission of the same acts when sober. The simple question is, Did he know what he was about? The law depends on the answer to this question. . . . If you shall believe, that, when he received these notes at Shive's he was in such a state of intoxication as not to know what he was giving, or what he was receiving in exchange, then you may say that he did not receive them as known counterfeits; and, before you can find him guilty, will require, besides proof of his passing them as true, proof of his knowledge that they were false." And see ante, § 408.

[3] Post, § 728–730.

[4] Reg. *v.* Doody, 6 Cox C. C. 463; Reg. *v.* Stopford, 11 Cox C. C. 643; Mooney *v.* The State, 33 Ala. 419; The State *v.* Garvey, 11 Minn. 154. And see The State *v.* Bullock, 13 Ala. 413; Reg. *v.* Cruse, 8 Car. & P. 541, 546. Some courts, indeed, have held, contrary to the general and better doctrine, that, for instance, there may be an indictable assault with intent to commit murder, where the intent to kill does not in fact exist, but the act would have been murder had death ensued. Under this view of the law of attempt, drunkenness cannot, as under the other, be made ground of acquittal. See also Nichols *v.* The State, 8 Ohio State, 435.

precise state of the Prisoner's Mind is under special circumstances important: —

Drunkenness in these Cases. — The doctrines, under the present head, are those which have already been discussed in this chapter. It is proposed simply to bring to view some applications of them.

Reducing to Manslaughter. — Not conflicting with what is laid down in a previous section,[1] it is pretty well settled that there are circumstances in which evidence of intoxication may properly be received to reduce a homicide to manslaughter. Some judges seem not willingly to yield this point;[2] but the better opinion is, that if, for instance, the question is, whether the killing arose from a provocation which was given at the time, or from previous malice, evidence of the prisoner's having been too drunk to carry malice in his heart may be admitted. And the consideration is not to be withheld from the jury, that his drunkenness may render more weighty the presumption of his having yielded to the provocation, rather than to the previous malice; because of the fact, that the passions of a drunken man are more easily aroused than those of a sober one. This doctrine differs from the untenable one, that drunkenness excuses or palliates passion or malice.[3] So intoxication is relevant to the question, whether

[1] Ante, § 401.

[2] See Commonwealth *v.* Hawkins, 3 Gray, 463; and other cases cited ante, § 401.

[3] The State *v.* McCants, 1 Speers, 384; Rex *v.* Thomas, 7 Car. & P. 817; Rex *v.* Meakin, 7 Car. & P. 297; Haile *v.* The State, 11 Humph. 154; Kelly *v.* The State, 3 Sm. & M. 518; Pearson's Case, 2 Lewin, 144; Smith *v.* Commonwealth, 1 Duvall, 224; Golliher *v.* Commonwealth, 2 Duvall, 163; 3 Greenl. Ev. § 6. But see Rex *v.* Carroll, 7 Car. & P. 145, overruling Rex *v.* Grindley, 1 Russ. Crimes, 3d Eng. ed. 8. And see The State *v.* John, 8 Ire. 330; Pirtle *v.* The State, 9 Humph. 663; People *v.* Robinson, 2 Parker C. C. 235; People *v.* Hammill, 2 Parker C. C. 223. In Haile *v.* The State, supra, the doctrine was stated as follows: "When the question is, can drunkenness be taken into consideration in determining whether a party be guilty of murder in the second degree, the answer must be, that it cannot; but, when the question is, what was the actual mental state of the perpetrator at the time the act was done? — was it one of deliberation and premeditation? — then it is competent to show any degree of intoxication that may exist, in order that the jury may judge, in view of such intoxication, in connection with all the other facts and circumstances, whether the act was premeditatedly and deliberately done. The law often implies malice from the manner in which the killing was done, or the weapon with which the blow was stricken. In such case, it is murder, though the perpetrator was drunk. And no degree of drunkenness will excuse in such case, unless by means of drunkenness an habitual or fixed madness is caused. The law, in such cases, does not seek to ascertain the actual state of the perpetrator's mind; for, the fact from which malice is implied having been proved, the law presumes its existence

expressions used by a prisoner sprang from a deliberate, evil purpose, or were the mere idle words of a drunken man.[1] This evidence, moreover, assists in determining whether a defendant acted under the belief that his property or person was about to be attacked.[2]

§ 415. **Continued.** — In New York, intoxication is deemed pertinent to the question, whether and how far an act was done in the heat of passion, and in general explanation of the defendant's conduct; but it will not reduce a killing, which in a sober person would be murder, to manslaughter.[3]

§ 416. **Conclusion.** — This question of drunkenness will necessarily present itself in new forms and under new complications as the light and facts of our jurisprudence travel on. And the safe course for counsel and judges is to adhere, in these cases, to those principles which govern the intent, as well when the party is not drunk as when he is. Thus the law will be kept harmonious, and the most exact justice of which it is capable will be administered in these special cases where intoxication intervenes.

and proof in opposition to this presumption is irrelevant and inadmissible. Hence a party cannot show that he was so drunk as not to be capable of entertaining a malicious feeling. The conclusion of law is against him." Opinion by Green, J. See also an article in 16 Law Reporter, 552. And see Rogers *v.* People, 3 Parker C. C. 632; Jones *v.* The State, 29 Ga. 594.

[1] Rex *v.* Thomas, 7 Car. & P. 817; People *v.* Eastwood, 4 Kernan, 562.

[2] Marshall's Case, 1 Lewin, 76; Reg. *v.* Gamlen, 1 Fost. & F. 90. And see Eastwood *v.* People, 3 Parker C. C. 25, 56.

[3] People *v.* Rogers, 18 N. Y. 9. And see People *v.* Eastwood, 4 Kernan, 562, 564; Golden *v.* State, 25 Ga. 527; The State *v.* Cross, 27 Misso. 332.

CHAPTER XXVIII.

THE CAPACITY OF CORPORATIONS FOR CRIME.

§ 417. **Corporation, what.** — A corporation, viewed in reference to the present inquiry, is a collection of persons, or a single individual, endowed by law with a separate existence as an artificial being; differing legally from a man unincorporate in this, that it covers only a part of his circle of action and responsibility.[1] To determine what part and how much it covers, we look at its particular nature and objects, and the terms of the act of incorporation.

Entertaining Criminal Intent. — Can this artificial being entertain a criminal intent? It is said, in an old case, that a corporation is not indictable, but its individual members are.[2] And this is correct as to some things. As to others, corporations have always been held to be indictable.

§ 418. **Continued.** — Even in civil affairs, the powers of these artificial beings are limited; but, since the capacity to act is given them by law, no good reason appears why they may not intend to act in a criminal manner. And mere intentional wrong acting, we have seen,[3] is all that is necessary in a class of criminal cases. Thus, —

§ 419. **Ways — (Towns — Railroad and Turnpike Companies).** — Towns and parishes, being corporations of a particular kind, are indictable for nuisance in not repairing the highways and bridges which their duty requires them to repair.[4] So also are railroad[5] and turnpike[6] companies. And, generally, —

[1] "A corporation is a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." Angell & Ames Corp. § 1.

[2] Anonymous, 12 Mod. 559.

[3] Ante, § 343–345.

[4] Grant on Corp. 283; The State *v.* Barksdale, 5 Humph. 154; The State *v.* Murfreesboro', 11 Humph. 217; Rex *v.* Hendon, 4 B. & Ad. 628. See Smoot *v.* Wetumpka, 24 Ala. 112; Vol. II. § 1281.

[5] Reg. *v.* Birmingham and Gloucester Railway, 2 Gale & D. 236, 9 Car. & P. 469, 6 Jur. 804, 8 Q. B. 223.

[6] Waterford and Whitehall Turnpike *v.* People, 9 Barb. 161.

Neglects. — When the law casts upon any corporation an obligation of such a nature that the neglect of it would be indictable in an individual, the corporation neglecting it may be indicted.[1]

§ 420. **Misfeasance — (Obstruction of Way, &c.).** — But while the courts everywhere hold corporations to be thus indictable for non-feasance, it is by some denied that they are for misfeasance.[2] Accordingly, in Maine, an indictment was adjudged not to lie against a corporation for the nuisance of erecting a dam across a river;[3] and, in Virginia, for obstructing a highway.[4] But the contrary is established in England; and there, if an incorporated railway company obstructs a highway, — as, for example, by laying a track over it on a line not conformable to the act of incorporation, — criminal proceedings are maintainable for the nuisance. "Many occurrences may be easily conceived," said Denman, C. J., "full of annoyance and danger to the public, and involving blame in some individual or corporation, of which the most acute person could not clearly define the cause; or ascribe them with more correctness to mere negligence in preventing safeguards, or to an act rendered improper by nothing but the want of safeguards."[5] This English doctrine prevails also in New Jersey,[6] Massachusetts,[7] Vermont,[8] and Tennessee,[9] and evidently it is the better doctrine in principle.[10]

[1] See the previous notes, also Grant on Corporations, 283; People *v.* Albany, 11 Wend. 539; Lyme Regis *v.* Henley, 3 B. & Ad. 77, 92, 98; Angell & Ames Corp. § 394. And see Reg. *v.* Birmingham and Gloucester Railway, 1 Gale & D. 457, 5 Jur. 40.

[2] The State *v.* Great Works Milling and Man. Co., 20 Maine, 41; Commonwealth *v.* Swift Run Gap Turnpike, 2 Va. Cas. 362; The State *v.* Ohio and Mississippi Railroad, 23 Ind. 362. See The State *v.* Burlington, 36 Vt. 521.

[3] The State *v.* Great Works Milling and Man. Co., supra. In such a case, an indictment would lie, the court said, against the individual members committing the act.

[4] Commonwealth *v.* Swift Run Gap Turnpike, supra.

[5] Reg. *v.* Great North of England Railway, 9 Q. B. 315, 10 Jur. 755, 16 Law J. N. S. M. C. 16; Rex *v.* Medley, 6 Car. & P. 292; Angell & Ames Corp. § 395. In England it is even held, that a corporation may be made a defendant in the civil action for assault and battery. Eastern Counties Railway *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 Law J. N. S. Exch. 196.

[6] The State *v.* Morris and Essex Railroad, 3 Zab. 360.

[7] Commonwealth *v.* New Bedford Bridge, 2 Gray, 339.

[8] The State *v.* Vermont Central Railroad, 27 Vt. 103, 30 Vt. 108.

[9] Louisville and Nashville Railroad *v.* The State, 3 Head, 523.

[10] See also, as lending support to this doctrine, Wartman *v.* Philadelphia, 9 Casey, 202; Whitfield *v.* Southeastern Railroad, 1 Ellis, B. & E. 115; Benson *v.* Manufacturing Co., 9 Met. 562. And see Commonwealth *v.* Ohio and Pennsylvania Railroad, 1 Grant, Pa. 329; The State *v.* Cincinnati Fertilizer Co., 24 Ohio State, 611; Two Sicilies *v.* Wilcox, 1 Sim. N. S. 332.

§ 421. **Limit to Indictability for Non-feasance.** — To render a corporation indictable for a non-feasance, it must have the power of acting; the same rule applying here as to an individual. Thus, —

Railway controlled by Receiver. — If the affairs of a railway corporation are under the sole management of a receiver appointed by the Court of Chancery, over whose acts the corporation has no control, it is not liable to a criminal prosecution for the nuisance of obstructing a highway by stopping thereon its trains; because, said Bennett, J., "no man or corporation should be made criminally responsible for acts which he has no power to prevent."[1]

§ 422. **Limit to Indictability for Misfeasance.** — Not every act of misfeasance is indictable in a corporation which would be in an individual. It must come within the scope of corporate duty.[2] Therefore, —

Treason — Felony — Perjury — Assault — Riot, &c. — In a case cited a little way back,[3] Denman, C. J., said: "Some dicta occur in the old cases, 'A corporation cannot be guilty of treason or of felony.' It might be added, 'of perjury, or offences against the person.'[4] The Court of Common Pleas lately held, that corporations might be sued in trespass; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation which, as such, has no such duties, cannot be guilty in these cases; but it may be guilty, as a body corporate, of commanding acts to be done to the nuisance of the community at large." So it is said, that a corporation cannot be guilty of an assault, or riot, or other crime involving personal violence, or any felony.[5]

§ 423. **How these Limits in Principle.** — But, in principle, the

[1] The State *v.* Vermont Central Railroad, 30 Vt. 108.

[2] See ante, § 417.

[3] Reg. *v.* Great North of England Railway, 9 Q. B. 315, 326.

[4] But see ante, § 420, note.

[5] Reg. *v.* Birmingham and Gloucester Railway, 2 Gale & D. 286, 9 Car. & P. 469, 6 Jur. 804, 3 Q. B. 223; Orr *v.* Bank of United States, 1 Ohio, 36. "A corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . . They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney." Case of Sutton's Hospital, 10 Co. 28, 32 *b*. See, however, a note to the last section, in which it appears that a corporation may commit assault and battery.

limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation, and the extent of its powers in the special matter. And, though a corporation cannot be hung, there is no reason why it may not be fined, or suffer the loss of its franchise, for the same act which would subject an individual to the gallows.

§ 424. **Individual Members Indictable.** — Though a corporation is indictable for a particular wrong, still the individual members and officers who participate in it may be also for the same act.[1] But they are not so liable in all cases in which the corporation is.[2] This question is governed by principles sufficiently explained elsewhere in the present volume.

[1] Reg. *v.* Great North of England Railway, 9 Q. B. 315, 327; Kane *v.* People, 3 Wend. 363; Edge *v.* Commonwealth, 7 Barr, 275; Kimbrough *v.* The State, 10 Humph. 97; Rex *v.* Gaul, Holt, 363; The State *v.* Conlee, 25 Iowa, 237. See also Sloan *v.* The State, 8 Blackf. 361; Kane *v.* People, 8 Wend. 203; Rex *v.* Kingston, 8 East, 41.

[2] The State *v.* Barksdale, 5 Humph. 154. And see Vol. II. § 1270, 1282.

CHAPTER XXIX.

BY WHAT WORDS THE INTENT IS IN LEGAL LANGUAGE INDICATED.

§ 425. **Inadequacy of Language.** — Human language originated in the wants of men at a period when they had not learned to think, but their ideas were indefinite. And it has been *perfected* (if that is the right word) by constant use in the conveyance of more vague thoughts than exact ones. Certain scientific terms have been made precise in meaning when scientifically employed; and this is so, to some extent, in legal science.[1] But though the language of the common law is in a high sense cultivated, and many of its words have acquired fixed meanings, there are not separate ones to designate every differing form of the criminal intent. Thus, —

§ 426. **Intent in Larceny.** — To constitute larceny, there must be the specific intent to deprive the owner of his ownership in the thing taken; but to express this intent, the language has no single word. So it employs a circumlocution. And the form which usage has established as adequate, is, to say that the defendant "feloniously did steal, take, and carry away" the thing.[2] By force of constant use and adjudication this circumlocution, in the paucity of our language, has been made to answer the purpose, and he would be a bold pleader who should dare now to attempt the substitution of another.

Other Forms of Intent. — But there are some other forms of the criminal intent which can be more shortly and aptly expressed. The principal single words are the following.

§ 427. **Felonious.** — This word, standing singly, rather designates the grade of the crime — that it is "felony" in distinction from misdemeanor — than any particular form of the felonious intent. Yet, in a sort of general sense, it points to the intent which enters into a felony.[3]

[1] Stat. Crimes, § 269.

[2] Crim. Proced. II. § 697.

[3] Crim. Proced. I. § 522, 533–537.

Wilful — Malicious. — The appropriate place for these words is in criminal pleading, where they are established too firmly to be uprooted.[1] They are too vague in meaning to be often employed in discussions of the law itself, except by one who has no distinct ideas to convey, and who wishes to appear learned when he is not. Naturally, therefore, they are not unfrequently found in statutes.

§ 428. **Wilful.** — "Wilfully" sometimes means little more than plain intentionally, or designedly.[2] Yet it is more frequently understood to extend a little further, and approximate the idea of the milder kind of legal malice; that is, as signifying an evil intent without justifiable excuse.[3] And Shaw, C. J., once remarked in a Massachusetts case, that, "in the ordinary sense in which it is used in statutes, it means not merely 'voluntarily,' but with a bad purpose;"[4] in other words, it means corruptly.[5]

§ 429. **Malice — Malice Aforethought.** — "Malice," "malicious," "maliciously," are words more purely technical in their legal use than "wilfully."[6] "Malice aforethought" is a technical phrase employed in indictments; and, with the word "murder," distinguishes the felonious killing called murder from what is called manslaughter.[7] In opinions of courts and other law writings we frequently meet with language from which it might be inferred that the word "malice" alone signifies the same thing as "malice aforethought;"[8] but the better use makes a distinction, and assigns to the former a meaning somewhat less intense in respect of wickedness than to the latter.[9] Malice, in legal phrase, is

[1] Bouv. Law Dict., Malice, Wilfully; Rex *v.* Richards, 7 D. & R. 665; Rex *v.* Stevens, 5 B. & C. 246.

[2] Bouv. Law Dict., Wilfully; Reg. *v.* Holroyd, 2 Moody & R. 339; Commonwealth *v.* Bradford, 9 Met. 268; Harrison *v.* The State, 37 Ala. 154.

[3] The State *v.* Abram, 10 Ala. 928; Carpenter *v.* Mason, 4 Per. & D. 439, 12 A. & E. 629; McCoy *v.* The State, 3 Eng. 451; Chapman *v.* Commonwealth, 5 Whart. 427, 429.

[4] Commonwealth *v.* Kneeland, 20 Pick. 206, 220.

[5] The State *v.* Gardner, 2 Misso. 23; Reg. *v.* Ellis, Car. & M. 564; United States *v.* Railroad Cars, 1 Abb. U. S. 196; The State *v.* Preston, 34 Wis. 675. See Trimble *v.* Commonwealth, 2 Va. Cas. 143; Smith *v.* Wilcox, 47 Vt. 537; The State *v.* Townsell, 3 Heisk. 6.

[6] Ante, § 427.

[7] 1 Chitty Crim. Law, 243; Bouv. Law Dict., Malice Aforethought; Rex *v.* Nicholson, 1 East P. C. 346. But see, as to Arkansas, Anderson *v.* The State, 5 Pike, 444. And see Crim. Proced. II. § 497–502, 544–549.

[8] 4 Bl. Com. 198, 199; 3 Greenl. Ev. § 144; Beauchamp *v.* The State, 6 Blackf. 299; Commonwealth *v.* Green, 1 Ashm. 289, 296.

[9] Reg. *v.* Griffiths, 8 Car. & P. 248; Anonymous, s. c. 2 Moody, 40. And see Wright *v.* The State, 9 Yerg. 342. As to the meaning of the words "malice aforethought," see Reg. *v.* Tyler, 8 Car. & P. 616, 620; United States *v.* Cornell, 2 Mason, 60, 91; The State *v.* Will, 1 Dev. & Bat. 121, 163; Beauchamp *v.* The State, 6 Blackf. 299; The State *v.* Simmons, 3 Ala. 497; Vol. II. § 672 et seq.

never understood to denote general malevolence, or unkindness of heart, or enmity toward a particular individual; but it signifies rather the intent from which flows any unlawful and injurious act, committed without legal justification.[1] A Massachusetts case decides that the word "maliciously," in the statute against malicious mischief, is not sufficiently defined as "the wilfully doing of any act prohibited by law, and for which the defendant had no lawful excuse;" but it means more.[2] And the words "wilful and malicious" cover together a broader meaning than the word "wilful" alone.[3] Sometimes malice is a mere inference of law from facts proved.[4] Hence the distinction between expressed and implied malice.[5]

[1] Commonwealth *v.* Snelling, 15 Pick. 337; The State *v.* Crawford, 2 Dev. 425, 428, 429; Commonwealth *v.* Green, 1 Ashm. 289, 296; Bromage *v.* Prosser, 4 B. & C. 247, 255; Dexter *v.* Spear, 4 Mason, 115; Commonwealth *v.* Bonner, 9 Met. 410; The State *v.* Doig, 2 Rich. 179; Reg. *v.* Tivey, 1 Den. C. C. 63; Rex *v.* Salmon, Russ. & Ry. 26; Respublica *v.* Teischer, 1 Dall. 335; Rex *v.* Reynolds, Russ. & Ry. 465; Rex *v.* Hunt, 1 Moody, 93; Griffin *v.* Chubb, 7 Texas, 603, 615; 2 Greenl. Ev. § 453. And see Taylor *v.* The State, 4 Ga. 14; McGurn *v.* Brackett, 33 Maine, 331; The State *v.* Pierce, 7 Ala. 728; Dozier *v.* The State, 26 Ga. 156; United States *v.* Taylor, 2 Sumner, 584.

[2] Commonwealth *v.* Walden, 3 Cush. 558. And see Stat. Crimes, § 434, 435, 437; Reg. *v.* Pembliton, Law Rep. 2 C. C. 119, 12 Cox C. C. 607; Reg. *v.* Upton, 5 Cox C. C. 298.

[3] The State *v.* Alexander, 14 Rich. 247.

[4] Worley *v.* The State, 11 Humph. 172; Commonwealth *v.* Green, 1 Ashm. 289, 296; Beauchamp *v.* The State, 6 Blackf. 299; The State *v.* Town, Wright, 75; 1 East P. C. 371.

[5] Anthony *v.* The State, 13 Sm. & M. 263; Bromage *v.* Prosser, 4 B. & C. 247, 255, 256; Vol. II. § 675.

BOOK V.

THE ACT WHICH MUST COMBINE WITH THE EVIL INTENT TO CONSTITUTE CRIME.

CHAPTER XXX.

THE GENERAL NATURE OF THE REQUIRED ACT.

§ 430. **Act and Intent Combining.** — In a previous chapter[1] was considered the doctrine that only by a combination of act and intent is crime constituted. No amount of intent alone is sufficient; neither is any amount of act alone: the two must combine.[2]

§ 431. **The Sort of Act.** — Also, in the foregoing discussions, some further preliminary views relating to the act have appeared. There must be an act, else the public, which prosecutes, has not suffered, and has no occasion to complain,[3] — it must be of a nature injuring the public, in distinction from an individual, or such a private injury as the public protects the individual against, for public reasons,[4] — and, finally, it must be sufficient in amount of evil to demand judicial notice.[5]

What for this Chapter. — It is proposed, in this chapter, to present some further general views of the act required in crime. We shall look at it more in detail in chapters further on.

§ 432. **Conspiring as an Act.** — If two or more[6] persons conspire to do a wrong, this conspiring is an act rendering the transaction a crime, without any step taken in pursuance of the conspiracy.[7]

[1] Ante, § 204 et seq.

[2] And see Chatfield *v.* Wilson, 28 Vt. 49; Morgan *v.* Bliss, 2 Mass. 111; Taylor *v.* Alexander, 6 Ohio, 144; Bancroft *v.* Blizzard, 13 Ohio, 30. These are civil cases; yet, viewed together, they admirably illustrate the doctrine of the text.

[3] Ante, § 204, 406.

[4] Ante, § 230–254.

[5] Ante, § 212–214, 223–229.

[6] Commonwealth *v.* Manson, 2 Ashm. 31; The State *v.* Tom, 2 Dev. 569.

[7] Commonwealth *v.* Judd, 2 Mass. 329, 337; Commonwealth *v.* Tibbetts, 2 Mass. 536, 538; Commonwealth *v.* Warren, 6 Mass. 74; People *v.* Mather, 4 Wend. 229; The State *v.* Cawood, 2 Stew. 360; The State *v.* Buchanan, 5 Har. & J. 317; Collins *v.* Commonwealth, 3 S. & R. 220;

Statutes have modified this rule in some of the States; as, in New York, where under the Revised Statutes the result is stated to be, that, "in all cases, except agreements to commit felony upon the person of another, or to commit arson or burglary, the indictment must contain a charge of one or more overt acts, one or more of which must be proved upon the trial to have been done to effect the object of the conspiracy."[1]

§ 433. **Neglect viewed as Act.** — There are cases in which men are indictable for what the law calls neglect.[2] A neglect is in the legal sense an act. It is a departure from the order of things established by law, — a checking of action. It is like a man's standing still while the company to which he is attached moves along, when we say, he leaves the company. On this principle, —

Continuing Nuisance. — One under legal obligation to remove a nuisance is indictable when he suffers it to continue.[3]

§ 434. **Injurious Nature of Act.** — An act may be in itself evil, or evil in consequence only of its tendency. And though the state does not punish a mere intent to do wrong, not developed into any thing done to the public injury, it often holds indictable an act which is indifferent in its nature, but of evil tendency, and prompted by an evil motive.[4] If a man were to go upon his own land, and, as a trial of skill, discharge loaded fire-arms at a mark, this would be in no sense harmful; but if, with the intention to take the life of a human being, he aimed his gun at a man, and the charge accidentally hit the mark instead of the man, a grave offence would be committed; though the thing accomplished was in both the supposed instances the same.

§ 435. **Attempt.** — Therefore, if a man intends to commit a particular crime, and does an act toward it, but is interrupted, or some accident intervenes, so that he fails to accomplish what he meant, he is still punishable. This is called a criminal attempt.[5]

Morgan *v.* Bliss, 2 Mass. 111, 112; O'Connell *v.* Reg., 11 Cl. & F. 155, 9 Jur. 25; Commonwealth *v.* Eastman, 1 Cush. 189; Commonwealth *v.* McKisson, 8 S. & R. 420; Sydserff *v.* Reg., 11 Q. B. 245; People *v.* Richards, 1 Mich. 216; The State *v.* Ripley, 31 Maine, 386; Reg. *v.* Turvy, Holt, 364; The State *v.* Noyes, 25 Vt. 415; Vol. II. § 192.

[1] People *v.* Chase, 16 Barb. 495, 498; Vol. II. § 192. And see People *v.* Mather, 4 Wend. 229, 259; The State *v.* Norton, 3 Zab. 33.

[2] See ante, § 313 et seq.

[3] Indianapolis *v.* Blythe, 2 Ind. 75.

[4] "The intent may make an act, innocent in itself, criminal." Rex *v.* Scofield, Cald. 397, 400, by Lord Mansfield and by Buller, J. And see the cases cited ante, § 204, 206; also the chapter beginning at § 323.

[5] Post, § 723 et seq.

And by this name "attempt" every act of this sort, which the courts hold to be indictable, is, with us, known.[1] But, —

Endeavor short of Attempt (Procuring Dies for Counterfeiting). — In England, an indictable endeavor, not proximate to the substantive crime intended, appears not to be termed attempt. Thus the English judges sustained an indictment at the common law for simply procuring dies to make counterfeit half-dollars of the currency of Peru. The statute would have been violated only on the making of the coin; and they considered, that the mere procuring of the dies was not an act sufficiently proximate to this offence to constitute an attempt. Still they held it to be a sufficient wrong to be indictable. Said Jervis, C. J.: "This is not an indictment for an attempt to commit the statutable offence, as was the case in Regina *v.* Williams.[2] No doubt, if that were the case, this conviction must have failed, for here there has been no direct attempt to coin; but this is an indictment founded on the criminal intent, coupled with an act. I will not attempt to lay down any rule as to what is such an act done in furtherance of a criminal intent as will warrant an indictment for a misdemeanor, for I do not see the line precisely myself; but it is not difficult to say, that the act done in this case is one which falls within it. If a man intends to commit murder, the walking to the place where he purposes to commit it would not be a sufficient act to evidence the intent, to make it an indictable offence; but in this case no one can doubt, that the procuring of the dies and machinery was necessarily connected with the offence, and was for the express purpose of the offence, and could be used for no other purpose." And Parke, B., observed: "Had the prisoner, with the intent to coin, merely gone to Birmingham with the object of procuring the dies for coining, and had not procured them, the act, I agree, would have been too remote from the criminal purpose to have been the foundation of a criminal charge. An attempt to commit a felony is not the only misdemeanor connected with it. It is a misdemeanor to do any act sufficiently proximate to the offence, with the intent of committing it. Now, I do not see for what lawful purpose the dies and apparatus could have been made. The case of statutory attempts to commit felonies is very different; there, to support

[1] Post, § 724.

[2] Reg. *v.* Williams, 1 Den. C. C. 39.

the conviction, proof must be given of an attempt to do the very criminal act."[1]

§ 436. **Magnitude of Act — Proximity to Injury Intended.** — Here we come to one of the illustrations of the doctrine, that our law, in the criminal department the same as in the civil, does not take cognizance of things trifling and small.[2] Two questions concerning the act are always to be considered together, — first, whether it is of the sort which the criminal law takes cognizance of; secondly, whether, being such, it has proceeded far enough for the law's notice. And it must proceed more or less far — be nearer or less near to the end meant — according as it is more or less intensely criminal in its nature.

§ 437. **Substantive Offences in Nature of Attempt.** — There are some things which in law are technically substantive offences, while truly they are, in whole or in part, attempts only; and they fall within the principle of attempts. For example, —

Uttering Forgery — (No Fraud accomplished). — If a statute forbids the putting off of a forged bank-note, with intent to defraud the bank; and one with this intent puts off the note to an agent of the bank employed, unknown to him, to detect offenders, and so not imposed upon, — he commits the offence; because the law leaves it unimportant whether or not a fraud is effected, provided it is attempted, and the putting off is complete.[3] And, —

Burglary. — If a man in the night-time breaks into a dwelling-house, intending to commit therein some act which in law is felony, he is guilty of burglary, whether he succeeds in doing what he meant or not.[4] Likewise, —

Perjury. — Perjury appears to be regarded as an attempt (to subvert justice in a judicial proceeding); for a man commits this offence who testifies to what he believes to be false, or what he knows nothing about,[5] though it turns out to be true.[6] So —

[1] Reg. *v.* Roberts, 33 Eng. L. & Eq. 553, Dears. 539, 25 Law J. N. s. M. C. 17. The language of the judges, quoted in the text, is copied from the English Law & Equity report, differing verbally from the report of Dearsly.

[2] Ante, § 212–214, 223–229.

[3] Rex *v.* Holden, 2 Taunt. 334, Russ. & Ry. 154, 2 Leach, 4th ed. 1019; Vol. II. § 605. And see, as illustrative, Cassels *v.* The State, 4 Yerg. 149; Wright *v.* The State, 5 Yerg. 154.

[4] The State *v.* Wilson, Coxe, 439; Commonwealth *v.* Newell, 7 Mass. 245; Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex *v.* Knight, 2 East P. C. 510; Anonymous, Dalison, 22; Vol. II. § 90, 109–113.

[5] People *v.* McKinney, 8 Parker C. C. 510.

[6] Rex *v.* Edwards, 2 Russ. Crimes, 3d Eng. ed. 597, and the other authorities there cited; 1 Hawk. P. C. Curw. ed. p. 433, § 6; Vol. II. § 1043, 1044.

Treason. — It is not essential, in treason, that the treasonable purpose be successful; therefore, if letters to an enemy are intercepted, they may still constitute a sufficient overt act.[1]

§ 438. **Injurious Nature of Act, continued.** — But, unless the act is within some exceptional principle, as in the cases just stated, it must be in its own nature criminal, or tending to mischief, or prohibited by law; and no offence is committed when one, supposing himself to be executing some evil design, yet mistaking facts, accomplishes neither the wrong meant nor any thing else of a publicly injurious nature.[2] Thus, —

Robbery — (Fear, or not). — To constitute a robbery, if there is no violence, actual or constructive,[3] the party beset must yield through fear; and, when his fears are not excited, but his secret motive for parting with his money is to prosecute the offender, this crime is not committed.[4] But if there is an assault which would furnish a reasonable ground for fear, the robbery is complete, though the person assaulted relinquishes his money for the purpose of bringing to punishment the wrong-doer.[5] In like manner, —

False Pretences — (Collecting Debt — Pretence without Effect). — Under the statutes against false pretences, it is not indictable to induce one by the pretence to pay what he justly owes; because he is not thereby legally injured.[6] And nothing is a false pretence which has no tendency to, and does not, induce a man to part with his goods; since it neither harms nor tends to harm.[7]

§ 439. **What the Aim of this Discussion.** — The purpose of these illustrations is to help us to some general views, not to furnish that complement of doctrine which alone can be the safe guide for the practitioner: as, when we would examine a city, to become familiar with its streets, its buildings, and its people, we first look upon it from some eminence, and there gain a general

[1] Rex *v.* Jackson, 1 Crawf. & Dix C. C. 149. And see Rex *v.* Gordon, 2 Doug. 590; 1 East P. C. 58.

[2] And see ante, § 204, 330.

[3] 1 Russ. Crimes, 3d Eng. ed. 875, 879, 891, 892.

[4] Rex *v.* Fuller, Russ. & Ry. 408; Reane's Case, 2 East P. C. 734, 2 Leach, 4th ed. 616, 1 Russ. Crimes, 3d Eng. ed. 890; Rex *v.* Jackson, 1 Russ. Crimes, 3d Eng. ed. 892, 1 East P. C. Addenda xxi.; Vol. II. § 1174, 1176.

[5] Norden's Case, Foster, 129, 1 Russ. Crimes, 3d Eng. ed. 880, 891, 892.

[6] People *v.* Thomas, 3 Hill, N. Y. 169; Rex *v.* Williams, 7 Car. & P. 354; Vol. II. § 466.

[7] Commonwealth *v.* Davidson, 1 Cush. 33; Rex *v.* Dale, 7 Car. & P. 352; The State *v.* Little, 1 N. H. 257, 258; Vol. II. § 433–436, 461–464.

idea of its situation, magnitude, and larger aspect; then, descending, take our more exact observations, relying, for positive knowledge, mostly on the latter. One or two more illustrations of the doctrine of the last section may be helpful to this end.

§ 440. **Treason — (Mistaking Friends for Enemy).** — Even in treason, which, we have seen,[1] is an offence in the nature of an attempt, if a man intending to go over to the enemy mistakes some troops of his own country for the enemy's, and goes to them, he does not become thereby a traitor.[2] So, —

Stealing Letters not Subject of Larceny. — Under the English statutes against larceny of letters from the post-office, — construed to apply only to those deposited in the ordinary way, — if a letter is dropped in for the purpose of detecting a suspected carrier, and this carrier steals it, supposing it to have come in the usual course, he is not guilty.[3] Also, —

Resisting Officer without Warrant. — It appears, that, where one is justified in resisting an officer by reason of his having no warrant or an imperfect one, the justification is effectual equally whether the person resisting knew the fact or not.[4] Likewise, —

Perjury when Proceedings Invalid. — Perjury cannot be committed when the proceedings in court, in connection with which the false oath is taken, have no legal validity, but are simply void.[5]

§ 441. **Shooting in Ignorance of Justifying Fact.** — In England, a constable was indicted under a statute for shooting at a man with intent to do him grievous bodily harm. The man was committing what would be a misdemeanor if a first offence, or a felony if a second: in the former alternative, the shooting would be unlawful; in the latter, lawful. In fact, this was a second offence, but the constable did not know it, therefore the judges held him to be guilty of the statutory crime.[6] This decision cannot be reconciled with the principle, believed to be sound, and sustained by various cases already cited in this chapter, that a defendant

[1] Ante, § 437.

[2] Respublica *v.* Malin, 1 Dall. 33.

[3] Reg. *v.* Rathbone, 2 Moody, 242, Car. & M. 220; Reg. *v.* Gardner, 1 Car. & K. 628. As to the statutes of the United States on this subject, see United States *v.* Foye, 1 Curt. C. C. 364. And see Vol. II. § 904, note, par. 5.

[4] See Foster, 311 et seq.; 1 East P. C. 325 et seq.

[5] Rex *v.* Cohen, 1 Stark. 511.

[6] Reg. *v.* Dadson, 2 Den. C. C. 35, Temp. & M. 385, 14 Jur. 1051, 1 Eng. L. & Eq. 566.

may rely on any fact which justifies him in law, though he was ignorant of it when the transaction occurred. If one should go out and take the life of a wild monster, believed by him to be human, but a scientific examination should disclose that it was not, — would he be guilty of murder? No lawyer probably would so hold.[1]

§ 442. **Conclusion.** — If these general views concerning the nature of the act seem, at some places, to be indefinite, they are as exact as the adjudications at present existing will enable a writer to make them, and perhaps as exact as in the nature of things they can ever be made. The complications of human affairs are vast, and it is not possible that, in a brief chapter, the products of all their changeful forms — as well those which are to arise as those which have already transpired — should be, in perfect outline, presented.

[1] And see, for further illustrative matter, Rex *v.* Ady, 7 Car. & P. 140; Reg. *v.* James, 2 Den. C. C. 1, 12, note; Rex *v.* Lovel, 2 Moody & R. 39. Also, The Abby, 5 Rob. Adm. 251, 254, where Lord Stowell observed: "If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favor; the criminal act intended has not been committed, and the man is innocent of the legal offence."

CHAPTER XXXI.

HOW THE SUBJECT OF THE CRIMINAL ACT MAY BE DIVIDED.

§ 443. **Scope of this Chapter.** — The object of this chapter is simply to look at the act which, in connection with the intent, constitutes crime, and inquire into what divisions this criminal thing may be separated, for the purposes of the minuter investigations which are to teach us what is, and what is not, indictable at the common law.

§ 444. **Blackstone's Division of Crime.** — Various divisions have been proposed or adopted; Blackstone's is as popular as any, thus: 1. Offences against God and religion; 2. Offences against the law of nations; 3. Offences against the king and government; 4. Offences against the commonwealth; as, against public justice, public peace, public trade, public health, public economy; 5. Offences against individuals; namely, against their persons, their habitations, and their property.

§ 445. **Purposes of Division.** — Whatever division of crime we make, it is arbitrary, — a mere device of an author to bring the subject aptly to the comprehension of his readers. The law itself is a seamless garment on the body politic. Perhaps, in the hands of Blackstone, his division was, for his book, the best. In the hands of the present author, and for this work, another will be better. In theory, there is no choice in divisions; the question is a mere practical one, and that is the best by which the particular author can convey the clearest and most exact idea to his readers.

§ 446. **Division in Present Work.** — In this work, we shall consider, in successive chapters: 1. The protection of the criminal law to the government, in its existence, authority, and functions; 2. Its protection to the relations of the government with other governments; 3. Its protection to the public revenue; 4. Its protection to the public health; 5. Its protection to the public morals, religion, and education; 6. Its protection to the public

wealth and to population; 7. Its protection to the public convenience and safety; 8. Its protection to the public order and tranquillity; 9. Its protection to individuals; 10. Its protection to the lower animals.

§ 447. **Oservations on this Division.** — If the purpose of division were to make the chapters of equal length, this one would be unfortunate. But it will enable us to traverse the whole field, and keep constantly within the subjects indicated by the titles to the several chapters. Thus it will accomplish all that any divisions can do.

§ 448. **Uses of these Chapters on the Act.** — The question first presenting itself to a practitioner asked for advice in a criminal cause, on whichever side, is, whether or not the thing assumed to have been done is a crime. To enable him to answer this question is the purpose of this series of chapters. Their usefulness, in localities where there are common-law crimes, as there are in most of our States, is obvious. But they are almost as important in those States in which all crimes are statutory. This arises from the fact, that the statutes are to be construed by the rules of the common law, and so are never truly understood by one ignorant of it.[1]

§ 449. **What accomplished in these Chapters.** — No book can be so written as to enable persons unacquainted with the subject to decide, at a glance in it, on the indictability of a transaction in question. So many considerations enter into every inquiry of this sort, — it depends so much on technical reasoning, so much on specific precedent, so much on principles of law which no author can crowd into his index in a way to enable a reader to find them, so much on combinations of thought possible only to a trained mind, — that, unless one has studied, not merely law in general, but criminal law in particular, it is useless for him to consult a book in an emergency, however well it may be written. He must first study the book; and, if he will not do this, honesty demands that he withhold advice on a question of this nature. But, if he will first carefully read the whole of these elementary discussions, he can then investigate, in the usual methods, a particular topic with effect.

[1] Stat. Crimes, § 6, 7, 75 82, 88, 114, and many other places.

CHAPTER XXXII.

PROTECTION TO THE GOVERNMENT IN ITS EXISTENCE, AUTHORITY, AND FUNCTIONS.

§ 450. **People and Government inseparable.** — It was a cardinal doctrine with our English ancestors, that the king was for the people, and their interests and his were inseparable. Much more, in our country, where, in a higher sense, the government is of the people, a part of whom it is, are they and the government one in interest. Indeed, neither can exist without the other. Hence —

§ 451. **Protection to Government.** — There is nothing so directly and certainly injurious to the whole people as an act against the existence of the government, or its authority, or impeding any of its functions. Nothing, therefore, is more clearly indictable than such an act, even a minute one, if not too trivial[1] for the law's notice. Yet plain and undisputed as this proposition is, there are, apparently within it, acts which occupy disputable ground, others which were once indictable but are not now, and still others which are indictable now, yet formerly they were not. For the conditions of society, the views of mankind, and the positive enactments change in some degree from age to age, though in the main they are in all ages the same.

§ 452. **Popular Interests and Governmental blending.** — In an old book,[2] written for the people, and obnoxious to kings because conceding too little to them, the author, in praise of Edward III., says: "He had a rule upon his private expenses, a good gloss upon the public, and a platform for the augmenting of the treasure of the kingdom, as well for the benefit of the people as of the

[1] Ante, § 212 et seq.

[2] "An Historical and Political Discourse of the Laws and Government of England, from the first times to the end of the Reign of Queen Elizabeth; with a vindication of the ancient way of Parliaments in England. Collected from some manuscript notes of John Selden, Esq., by Nathaniel Bacon, of Gray's Inn, Esq., 5th ed. &c., London, 1760."

Crown." Although he "was a king of many taxes above all his predecessors, yet cannot this be interpreted as a blot to the honor of the law or liberty of the people; for the king was not so unwise as either to desire it without evident cause, or to spend it in secret, or upon his own private interests; nor so weak and irresolved as not to employ himself and his soldiers to the utmost to bring to pass his pretensions; nor so unhappy as to fail of the desirable issue of what he took in hand. So as, though the people parted with much money, yet the kingdom gained much honor and renown; and, becoming a terror to their neighbors, enjoyed what they had in fuller security, and so were no losers by the bargain in the conclusion."

§ 453. **Compelling to Work — Fixing Wages.** — And this good king, not only taxed the people, but compelled men to work, and fixed by law the wages. "A sick and very crazy time questionless it was, when the clergy were stately, and the poor idle. The priests' wages for this cause are now settled; and they that would get much must get many littles, and do much. But the greater sore was amongst the poorer sort; either they would not serve, or at such wages as could not consist with the price of the clothes, and the subsistence of the clothier. Laws, therefore, are made to compel them to work, and to settle their wages; so as now it is as beneficial to them to serve the meaner sort of clothiers as the richer sort: for the master must give no more, nor the servant take more; and thus became labor current in all places."[1]

§ 454. **Work and Wages, continued.** — In just principle, there is nothing which a government has more clearly the right to do than to compel the lazy to work, and nothing is more absolutely beyond its jurisdiction than to fix the price of labor. In the time of Edward III. it might have been in a sense pardonable to do the latter, while highly commendable to do the former. Even the former would not be tolerated by the sentiment of the present age, except as to paupers and criminals. Yet it ought to be, if necessary. And the reason is, that men are dependent on one another, and people and government are mutually dependent; while, at the basis of all prosperity, and even life itself, lies active industry. He who lazes his life away, or spends it in use-

[1] Discourse, ut sup. Part 2, p. 38–41.

less sports, lives, directly or indirectly, at the public expense, and pays no equivalent for what he eats, drinks, or wears. He does what is as intrinsically dishonest as to pilfer from door to door. If he has inherited money or lands, this inheritance has come to him through the laws of the country, and as such is the gift of the country; and, so far from its justifying him in pursuing a life of idleness or dissipation, it places him under a still greater obligation to work.

§ 455. **Idleness as a Crime.** — The English statutes thus referred to have probably all been repealed; but, if they had not, we should know, as a result of the altered opinions upon labor pervading the United States, that they are not to be deemed a part of the common law which our forefathers brought to this country from England. Yet we see also, that, in just principle, wilful idleness in any person, male or female, rich or poor, is criminal; and, if two things existed together which do not, — first, if just views on the subject of labor prevailed, and, secondly, if the punishment of idleness as crime were practically expedient, — then idleness should be indictable with us now. Hence, —

As to what is Common-law Crime. — If we would determine whether or not a particular thing is punishable by our unwritten law, we are not only to inquire whether it is competent for the government to punish it, but whether its punishment is expedient, and accords with the current understanding of the enlightened mind of the country, particularly as expressed in judicial decision.[1] If decision has pronounced neither one way nor the other in this country, we are to inquire what was the law of England when this country was settled, and whether any sufficient reason appears why such law should not be deemed to have traversed the ocean with our forefathers and become established here.

§ 456. **Treason.** — The heaviest offence known to the law is treason; because, with governments, as with individuals, self-preservation is the first duty, taking precedence of all others. In this country, treason is either against the United States or a particular State.[2] In England, the crime is of wide range;[3] but

[1] And see ante, § 42.
[2] Ante, § 177.
[3] See Vol. II. § 1205–1207.

in this country it has been greatly limited, treason against the United States consisting "only in levying war against them, or in adhering to their enemies, giving them aid and comfort."[1] And, in most of the States, the offence against the State has been restricted within nearly or quite as narrow limits.[2]

§ 457. **Obstructions of Government less than Treason.** — But it is not the whole duty of a subject to abstain from the overthrow of the government. He should avoid what tends to its overthrow; nor should he weaken it, or bring it into contempt, or obstruct its functions in any of its departments. And he should render to it his active aid whenever occasion demands. Therefore every act or neglect, in violation of what is thus pointed out as duty, is, when sufficient in magnitude,[3] criminal. Thus, —

Sedition. — In England, there are various misdemeanors, which, not amounting to treason, are of like nature with it, known under the general name of sedition; such as libels upon the government, oral slanders of it, riots to its disturbance, and the like.[4]

[1] Const. U. S. art. 3, § 3, cl. 1. And see Vol. II. § 1214–1222; Charge on Law of Treason, 1 Story, 614; United States v. Hoxie, 1 Paine, 265; Ex parte Bollman, 4 Cranch, 75; Respublica v. McCarty, 2 Dall. 86; Respublica v. Malin, 1 Dall. 33; Respublica v. Carlisle, 1 Dall. 35; United States v. Vigol, 2 Dall. 346; United States v. Burr, 4 Cranch, 469; United States v. Hanway, 2 Wal. Jr. 139; United States v. Mitchell, 2 Dall. 348.

[2] As to New York, see People v. Lynch, 11 Johns. 549. See also, as to several of the States, 3 Greenl. Ev. § 237.

[3] Ante, § 212 et seq.

[4] 1 Hale P. C. 77; 1 East P. C. 48, 49; Stroud's Case, 3 Howell St. Tr. 235; Rex v. Frost, 22 Howell St. Tr. 471; In re Crowe, 3 Cox C. C. 123. In Archbold it is said: "A man may lawfully discuss and criticise the measures adopted by the queen and her ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. See Rex v. Lambert, 2 Camp. 398. . . . If a man curse the queen, wish her ill, give out scandalous stories concerning her (see Reg. v. Harvey, 2 B. & C. 257, 3 D. & R. 464), or do any thing that may lessen her in the esteem of her subjects, may weaken her government, or may raise jealousies between her and her people, . . . all these are sedition. In Rex v. Tutchin, 5 Harg. St. Tr. 527, 532, Holt, 424, Lord Holt said, that, if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished.' And Lord Ellenborough, in Rex v. Cobbett, Holt on Libel, 114, Stark. on Libel, 522, said, that, if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, &c., are punishable. And whether the defendant really intended, by his publication, to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. Rex v. Burdett, 4 B. & Ald. 95; Rex v. Harvey, supra." Archb. Crim. Pl. & Ev. 13th Lond. ed. 631, 632. For sedition under the Scotch law, see Sinclair's Case, 23 Howell St. Tr. 778; McLaren's Case, 33 Howel. St. Tr. 1.

Offences of this sort against the United States could be punished only under a statute,[1] and there has been little occasion for pursuing like offences against the States. Moreover, with us, popular sentiment tolerates great latitude in the discussion of governmental affairs. We have, therefore, no cases informing us to what extent sedition is an offence at common law in our States.

§ 458. **Refusal to accept Office.** — The government can be carried on only by officers. Therefore, as already observed,[2] a refusal, without lawful excuse,[3] to accept a public office to which one has been elected, is indictable.[4] Happily there is in this country, widely diffused, a commendable willingness to do this duty; therefore indictments for the breach of it are rare. But though this doctrine is of little practical applicability with us, it plainly is a part of our common law. For a like reason, —

§ 459. **Breaches of Official Duty — (Ministerial distinguished from Judicial).** — Any act or omission, in disobedience of official duty, by one who has accepted public office, is, when of public concern,[5] in general, punishable as a crime.[6] This is particularly so where the thing required is of a ministerial or other like nature, and there is reposed in the officer no discretion.[7] But this doctrine has its exceptions and qualifications; thus, —

[1] Ante, § 199.

[2] Ante, § 246; Reg. v. Vincent, 9 Car. & P. 91; Rex v. Burder, 4 T. R. 778.

[3] Attorney-General v. Read, 2 Mod. 299; Rex v. Grosvenor, 1 Wils. 18, 2 Stra. 1193; Rex v. Denison, 2 Keny. 259; Rex v. Prigg, Aleyn, 78; The State v. McEntyre, 3 Ire. 171.

[4] As to the form of the procedure, see Crim. Proced. II. § 820–822.

[5] Ante, § 232, 235, 243–246. A private person injured may have his action against the officer for damages. Jenner v. Joliffe, 9 Johns. 381. See ante, § 237 and note, 264.

[6] The State v. McEntyre, 3 Ire. 171, 174; Reg. v. Neale, 9 Car. & P. 431; Respublica v. Montgomery, 1 Yeates, 419; Reg. v. James, 1 Eng. L. & Eq. 552, 2 Den. C. C. 1, Temp. & M. 300, 14 Jur. 940; Rex v. Howard, 7 Mod. 307; Rex v. Angell, Cas. temp. Hardw. 124; Anonymous, 6 Mod. 96; Crouther's Case, Cro. Eliz. 654; Smith v. Langham, Skin. 60, 61; W.'s Case, Lofft, 44; Adams v. Tertenants, Holt, 179; The State v. Leigh, 3 Dev. & Bat. 127; Rex v. Commings, 5 Mod. 179; Rex v. Hemmings, 3 Salk. 187; Smith's Case, Syme, 185; Wilkes v. Dinsman, 7 How. U. S. 89; Rex v. Harrison, 1 East P. C. 382; Reg. v. Buck, 6 Mod. 306; Mann v. Owen, 9 B. & C. 595, 4 Man. & R. 449; Rex v. Bootie, 2 Bur. 864; s. c. nom. Rex v. Booty, 2 Keny. 575; Rex v. Fell, 1 Salk. 272, 1 Ld. Raym. 424; Reg. v. Tracy, 6 Mod. 30; The State v. Buxton, 2 Swan, Tenn. 57.

[7] Rex v. Osborn, 1 Comyns, 240; Commonwealth v. Genther, 17 S. & R. 135; People v. Norton, 7 Barb. 477; Anonymous, Lofft, 185; Rex v. Seymour, 7 Mod. 382; The State v. Maberry, 3 Strob. 144; Taylor v. Doremus, 1 Harrison, 473; Stone v. Graves, 8 Misso. 148; The State

§ 460. **Judicial — Ministerial, with Discretion.** — One serving in a judicial or other capacity in which he is required to exercise a judgment of his own, is not punishable for a mere error therein, or for a mistake of the law.[1] His act, to be cognizable criminally, or even civilly, must be wilful and corrupt.[2] And if it is strictly judicial, and he is, for instance, a justice of the peace, and has jurisdiction, he will not be liable to the suit of the party, however the law may be as to a criminal prosecution,[3] though corruption is alleged.[4] To allow such an action would be impolitic; and, since other remedies are open, needless.

§ 461. **Legislator — (Contempt — Impeachment — "Civil Officer").** — The king, according to English law, can do no wrong; that is, he is not punishable, in any form, for what he does.[5] In this country, there is no king, and no official person is so completely exempt as he.[6] But nearest to him, in this respect, is the legislator, acting officially.[7] If a legislator misbehaves himself, the legislative body can deal with him for the contempt.[1] Yet it is the better doctrine, that he is not a "civil officer," subject to impeachment, within the meaning of the Constitution of the United States;[2] and opinions of great weight have been expressed against his being impeachable on general principles.[3]

§ 462. **Indictable or not — (Legislators — Judges — Jurors — High Governmental Officers — Justices of Peace).** — It is sufficiently settled, that legislators,[4] the judges of our highest courts and of all courts of record acting judicially,[5] jurors,[6] and probably such of the high officers of each of the governments as are intrusted with responsible discretionary duties,[7] are not liable to an ordinary criminal process, like an indictment, for official doings however corrupt. There is some apparent authority for including with them justices of the peace, in respect of things judicial, and within their jurisdiction;[8] but the plain weight of authority, probably of reason also, excludes them; holding them liable to the ordinary criminal processes, though not to the civil as we have seen,[9] in cases of corruption, not of mere mistake or error.[10]

v. Stalcup, 2 Ire. 50. And see Arnold v. Commonwealth, 8 B. Monr. 109; Stoddard v. Tarbell, 20 Vt. 321.

[1] Ante, § 299.

[2] The State v. Porter, 2 Tread. 694; People v. Coon, 15 Wend. 277; In re ——, 14 Eng. L. & Eq. 151, 16 Jur. 995; The State v. Odell, 8 Blackf. 396; Reg. v. Badger, 6 Jur. 994; Commonwealth v. Rodes, 6 B. Monr. 171; Lining v. Bentham, 2 Bay, 1; The State v. Johnson, 2 Bay, 385; The State v. Gardner, 2 Misso. 28; The State v. Glasgow, Conference, 38; Cooper v. Adams, 2 Blackf. 294; People v. Norton, 7 Barb. 477; Rex v. Phelps, 2 Keny. 570; Rex v. Okey, 8 Mod. 45; Rex v. Allington, 1 Stra. 678; Garnett v. Ferrand, 6 B. & C. 611, 9 D. & R. 657; Rex v. Webb, 1 W. Bl. 19; Rex v. Halford, 7 Mod. 193; Rex v. Seaford, Justices, 1 W. Bl. 432; Rex v. Lediard, Say. 242; Cope v. Ramsey, 2 Heisk. 197; Downing v. Herrick, 47 Maine, 462.

[3] See post, § 462.

[4] Pratt v. Gardner, 2 Cush. 63; Floyd v. Barker, 12 Co. 23, 25; Cunningham v. Bucklin, 8 Cow. 178; Garnett v. Ferrand, 6 B. & C. 611, 9 D. & R. 657; Tyler v. Alford, 38 Maine, 530; Broom Leg. Max. 2d ed. 61; Furr v. Moss, 7 Jones, N. C. 525; Kelley v. Dresser, 11 Allen, 31; Weaver v. Devendorf, 3 Denio, 117; Steele v. Dunham, 26 Wis. 393. See Cooper v. Adams, 2 Blackf. 294; Linford v. Fitzroy, 13 Q. B. 240, 3 New Sess. Cas. 438; Muse v. Vidal, 6 Munf. 27; Coleman v. Frazier, 4 Rich. 146; Sthreshley v. Fisher, Hardin, 257; Alexander v. Card, 3 R. I. 145; Bessell v. Wilson, 1 Ellis & B. 489, 22 Law J. N. S. M. C. 94, 17 Jur. 664, 18 Eng. L. & Eq. 294; Hill v. Sellick, 21 Barb. 207. But see Garfield v. Douglass, 22 Ill. 100. **No Jurisdiction.** — If the magistrate has no jurisdiction, he is not protected. Sullivan v. Jones, 2 Gray, 570; Piper v. Pearson, 2 Gray, 120; Clarke v. May, 2 Gray, 410; Tracy v. Williams, 4 Conn. 107; Grumon v. Raymond, 1 Conn. 40; Bradley v. Fisher, 13 Wal. 335, 350; Lange v. Benedict, 48 How. Pr. 465. And so also of the members of a court-martial. Wise v. Withers, 3 Cranch, 331. And see Macon v. Cook, 2 Nott & McC. 379; Shoemaker v. Nesbit, 2 Rawle, 201. **Naval Commander.** — As to a naval commander, see Wilkes v. Dinsman, 7 How. U. S. 89.

[5] Broom Leg. Max. 2d ed. 40.

[6] 1 Kent Com. 289.

[7] Story Const. § 795; 1 Kent Com. 235, note; Lord Brougham in Ferguson v. Kinnoull, 9 Cl. & F. 251, 289, 290; Mr. Justice Coleridge, in Howard v. Gosset, May Parl. Law, 2d ed. 151.

[1] May Parl. Law, 2d ed. 60, 70, 78, 102; 1 Kent Com. 235, 236; Anderson v. Dunn, 6 Wheat. 204. A Massachusetts case decides, that the House of Representatives of the Commonwealth has power to expel a member; and the courts can inquire neither why it expelled him, nor whether it gave him due opportunity for defence; but, when he claims a privilege as member before a judicial tribunal, the fact of his expulsion is conclusive against him. Hiss v. Bartlett, 3 Gray, 468. And see Vol. II. § 247.

[2] Story Const. § 793, 794.

[3] Story Const. § 795; 1 Kent Com. 235, note. Lord Coke says, that, "if any lord of Parliament, spiritual or temporal, have committed any oppression, bribery, extortion, or the like," he may be impeached. 4 Inst. 24.

[4] Ante, § 461, and authorities cited in the notes.

[5] 1 Hawk. P. C. Curw. ed. p. 447, § 6; Yates v. Lansing, 5 Johns. 282, 9 Johns. 395; Cunningham v. Bucklin, 8 Cow. 178; Hammond v. Howell, 2 Mod. 218; Floyd v. Barker, 12 Co. 23, 25. **Judge, as to Civil Suit.** — Neither is the judge liable to a civil suit. Ante, § 460; Hamilton v. Williams, 26 Ala. 527; Yates v. Lansing, 5 Johns. 282; Taylor v. Doremus, 1 Harrison, 473; Stone v. Graves, 8 Misso. 148; Lenox v. Grant, 8 Misso. 254; Upshaw v. Oliver, Dudley, Ga. 241; Morrison v. McDonald, 21 Maine, 550. Otherwise, if he knows he acts without jurisdiction. Lange v. Benedict, 48 How. Pr. 465; Bradley v. Fisher, 13 Wal. 335.

[6] 1 Hawk. P. C. Curw. ed. p. 447, § 6; Yates v. Lansing, 5 Johns. 282, 298; yet see Rex v. Bynon, 2 Show. 304. See Wyld v. Cookman, Cro. Eliz. 492.

[7] 4 Bl. Com. 121; 2 Woodd. Lect. 355.

[8] The State v. Campbell, 2 Tyler, 177; Yates v. Lansing, supra; Floyd v. Barker, 12 Co. 23, 25.

[9] Ante, § 460.

[10] Wallace v. Commonwealth, 2 Va. Cas. 130; Commonwealth v. Alexander, 4 Hen. & Munf. 522; Rex v. Borron, 3 B. & Ald. 432; People v. Norton, 7 Barb. 477, 480; Rex v. Harrison, 1 East P. C. 382; Rex v. Seaford Justices, 1 W. Bl. 432; Rex v. Smith, 7 T. R. 80; Rex v. Fielding, 2 Bur. 719; Rex v. Allington, 1 Stra. 678; Lord Brougham, in Ferguson v. Kinnoull, 9 Cl. & F. 251, 290; Rex

Impeachable or not. — Judges, not jurors, and the high officers mentioned other than legislative, are answerable in another form, impeachment.

§ 463. **Effect of Impeachment — (Indictment afterward).** — According to the English practice, the officer impeached may suffer, not only the forfeiture of his office, but also any other penalties known to the law, even the deprivation of life.[1] But the Constitution of the United States provides, as to the national officers, that "judgment in cases of impeachment shall not extend further than removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law."[2] As the United States courts have no common-law jurisdiction,[3] doubtless they cannot take up a case after judgment is rendered on the impeachment, and proceed to conviction, without the aid of a statute. But some of the State constitutions have similar provisions; and it would be an interesting question, whether, after a judgment by impeachment and removal from office, or before, a court of ordinary criminal jurisdiction could, without help from a statute, inflict for the crime the additional penalty which in England the House of Lords, on conviction under the impeachment, would impose.[4]

v. Okey, 8 Mod. 45; Rex *v.* Phelps, 2 Keny. 570; Rex *v.* Davis, Lofft, 62; In re Fentiman, 4 Nev. & M. 126, 2 A. & E. 127; Rex *v.* Brooke, 2 T. R. 190; Rex *v.* Jones, 1 Wils. 7; Rex *v.* Cozens, 2 Doug. 426; Jacobs *v.* Commonwealth, 2 Leigh, 709; Rex *v.* Angell, Cas. temp. Hardw. 124; The State *v.* Gardner, 2 Misso. 23; Lining *v.* Bentham, 2 Bay, 1; The State *v.* Johnson, 2 Bay, 385; In re ——, 14 Eng. L. & Eq. 151; People *v.* Coon, 15 Wend. 277; The State *v.* Porter, 2 Tread. 694; Rex *v.* Rye Justices, Say. 25; Rex *v.* Baylis, 3 Bur. 1318; Rex *v.* Jackson, Lofft, 147; Rex *v.* Wykes, Andr. 238; Rex *v.* Harries, 13 East, 270; Rex *v.* Bishop, 5 B. & Ald. 612; Reg. *v.* Jones, 9 Car. & P. 401; The State *v.* Porter, 8 Brev. 175; and other cases cited ante, § 459, 460. In some States it is so by statute. Wickersham *v.* People, 1 Scam. 128. As to Texas, see The State *v.* Baldwin, 39 Texas, 75; The State *v.* Baldwin, 39 Texas, 155.

[1] May Parl. Law, 2d ed. 474–476; 2 Woodd. Lect. 864, 365; Story Const. 784.

[2] Const. U. S. art. 1, § 3; Story Const. § 759, 760, 781.

[3] Ante, § 189 et seq.

[4] See, as helping at some of the steps in this inquiry, ante, § 14, note, 193; 1 Bishop Mar. & Div. § 680–682; 2 Ib. § 291, 292; Stat. Crimes, § 171. Relating to the subjects of this and accompanying sections, the following are some —

1. **Further Views — (Executive Officer).** — In our system of government, where the executive, legislative, and judicial functions are distinct, — see the discussion in the chapter concerning military and martial law, ante, § 43 et seq., — there seems to be no good reason why an executive officer should be required

§ 464. **Officer de Facto — De Jure.** — In the actual affairs of government, a man sometimes holds an office to which he has not been duly appointed. But if he does the duties of it, *under color of title*, he is called an officer *de facto;* and his official acts are binding on third persons,[1] though they are said not to be valid in

to answer, in the judicial tribunals, for a departure from duty, on any other principles than would prevail if he were a judicial officer, sued or indicted in respect of alleged error or corruption in that office.

2. It cannot be, that, under any circumstances, those who administer our government in one of its departments should be justly entitled to overrule what those of another department decide, or to inflict punishment on them when acting honestly and within the general scope of their official duties. If it were proper to extend this discussion, I should show, that the attempt to do this would be a palpable infraction of the Constitution; which, by dividing the governmental functions into separate departments, left each one free from the control of any other. And for a judge to punish, or amerce in damages, an executive officer, because differing from him in opinion as to his official duty, would be as palpable a usurpation of the office as it would be for the executive officer to undertake the same thing against the judge. But I cannot pause to trace the line of argument fully here. There are several popular errors on this subject, — popular as prevailing in the legal profession as well as out of it.

3. A digest of a few cases will be convenient, — to be consulted in connection with those cited to the last few sections. **Justice of Peace.** — If a justice of the peace, in the discharge of a ministerial or judicial duty, acts corruptly to the injury of a party, this is a breach of his official bond. The State *v.* Flinn, 3 Blackf. 72. And see The State *v.* Jennings, 4 Ohio State, 418. **Not Trespass in Party.** — If a judicial officer, of either general or special jurisdiction, acts erroneously or oppressively, he in whose suit this occurs is not therefore a trespasser Taylor *v.* Moffatt, 2 Blackf. 305. See Poulk *v.* Slocum, 3 Blackf. 421. **What is Judicial.** — All that a justice of the peace is required to perform, from the commencement to the close of a suit, appears to be deemed judicial rather than ministerial, on a question of responsibility for his acts. Where a justice issued an execution, but by mistake made it returnable in sixty days, instead of ninety, as required by law, whereby the plaintiff lost his debt, he was held not liable for the loss. Wertheimer *v.* Howard, 30 Misso. 420. And see The State *v.* Dunnington, 12 Md. 340. **Officer's Fraud.** — An action lies against a public officer for a fraudulent representation in relation to property, made at a sale of it, in his official capacity. Culver *v.* Avery, 7 Wend. 380. **Inadequate Allegation.** — Where a magistrate issued a warrant, upon which one was arrested and fined, for a violation of the Sunday law, he was held not liable in an action of trespass, though the facts alleged may not have been an offence within the statute. Nor is the constable, executing such warrant, liable in trespass. The magistrate had jurisdiction over the subject-matter, and he is not responsible for consequences flowing from an error of judgment. Stewart *v.* Hawley, 21 Wend. 552. **Contradicting Record.** — In an action against a magistrate, he cannot defend himself by contradicting his record. Kendall *v.* Powers, 4 Met. 553. **Jurisdiction.** — A justice of the peace is liable for exercising authority where he has none. Ely *v.* Thompson, 3 A. K. Mar. 70.

[1] Thompson *v.* The State, 21 Ala. 48; People *v.* Gilbert, Anthon, 191; McBee *v.* Hoke, 2 Speers, 138; The State *v.* Hill, 2 Speers, 150; Doty *v.* Gorham, 5 Pick. 487; Bucknam *v.* Ruggles, 15 Mass. 180; Nason *v.* Dillingham, 15 Mass. 170; Plymouth *v.* Painter, 17 Conn. 585; Hoagland *v.* Culvert, Spencer, 387; Farmers and Merchants Bank *v.* Chester, 6 Humph. 458; Fowler *v.* Bebee, 9 Mass

his own favor.[1] One duly appointed and commissioned, serving in the office, is called an officer *de jure*. Now, clearly, —

231; Commonwealth v. Fowler, 10 Mass. 290; People v. Cook, 4 Seld. 67; The State v. Perkins, 4 Zab. 409; The State v. Alling, 12 Ohio, 16; McInstry v. Tanner, 9 Johns. 135; Blackman v. The State, 12 Ind. 556; People v. Collins, 7 Johns. 549; Burke v. Elliott, 4 Ire. 355; Gilliam v. Reddick, 4 Ire. 368; Stokes v. Kirkpatrick, 1 Met. Ky. 138; Gilmore v. Holt, 4 Pick. 258; Pool v. Perdue, 44 Ga. 454; The State v. Carroll, 38 Conn. 449; Kelley v. Story, 6 Heisk. 202; Douglas v. Neil, 7 Heisk. 437; Diggs v. The State, 49 Ala. 311; Waller v. Perkins, 52 Ga. 233; McCahon v. Leavenworth, 8 Kan. 437; The State v. Lewis, 22 La. An. 38; Wayne v. Benoit, 20 Mich. 176; Schoharie v. Pindar, 3 Lans. 8; The State v. Tolan, 4 Vroom, 195; McCormick v. Fitch, 14 Minn. 252; Durrah v. The State, 44 Missis. 789; Laver v. McGlachlin, 28 Wis. 364; Moore v. Graves, 3 N. H. 408; Ex parte Strang, 21 Ohio State, 610, 618; Commonwealth v. McCombs, 6 Smith, Pa. 436; The State v. Beloit, 21 Wis. 280. As to who is an officer *de facto*, Howard, J., in the Supreme Court of Maine, said: "A mere claim to be a public officer, and exercising the office, will not constitute one an officer *de facto*; there must be, at least, a fair color of right; or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of appointment or election." Brown v. Lunt, 37 Maine, 423, 429; Wilcox v. Smith, 5 Wend. 231; Cummings v. Clark, 15 Vt. 653; Burke v. Elliott, supra; Cornish v. Young, 1 Ashm. 153. The Maine court held, that a deed of real estate sold for non-payment of taxes is void if issued by an acting collector of taxes who has not taken the oath of his office. Shepley, C. J., observed: "When constables or sheriffs perform acts by virtue of judicial precepts, it is usually sufficient to show that they were officers *de facto*, without producing proof that they were legally qualified to do so. A person injured by such acts has a remedy by action against the officer, and his rights are secured by a final resort to the official bond. But one injured by the misconduct of a collector of taxes cannot be protected by a resort to his official bond for redress, that having been made for the security of the town alone." Payson v. Hall, 30 Maine, 319, 325. See Cavis v. Robertson, 9 N. H. 524. In Indiana, a town charter provided that the marshal should give bond in ten days after his election. And it was held that his failure to do this did not necessarily vacate the office. The State v. Porter, 7 Ind. 204. If a Governor holds his office after his term has expired, believing himself re-elected, and having received a certificate of election, he is Governor *de facto*, and his approval of a legislative act is valid. The State v. Williams, 5 Wis. 308. As to officers *de facto* in a State in rebellion, see Hawver v. Seldenridge, 2 W. Va. 274; Brown v. Wylie, 2 W. Va. 502; Cooke v. Cooke, Phillips, 583. One disqualified to hold office as having participated in the rebellion, may still be an officer *de facto*. Lockhart v. Troy, 48 Ala. 579.

[1] Rhodes v. McDonald, 24 Missis. 418; Neale v. The Overseers, 5 Watts, 538; Pearce v. Hawkins, 2 Swan, Tenn. 87. See Eldred v. Sexton, 5 Ohio, 215. **Distinctions.** — The acts of officers *de facto* are valid when they concern the public, or the rights of third persons who have an interest in what is done. **Act for Officer's Benefit.** — But a different rule prevails where the act is for the benefit of the officer, because he is not permitted to take advantage of his own wrong. Venable v. Curd, 2 Head, 582; Patterson v. Miller, 2 Met. Ky. 493; Gourley v. Hankins, 2 Iowa, 75. And see People v. Treman, 30 Barb. 198; People v. Albany, &c., Railroad, 55 Barb. 344. **Evidence.** — That one acts as an officer is *prima facie* evidence of authority to act. Rex v. Verelst, 3 Camp. 432; Eldred v. Sexton, 5 Ohio, 215; Commonwealth v. Tobin, 108 Mass. 426; Crim. Proced. II. § 885, 886. See United States v. Phelps, 4 Day, 469; Commonwealth v. McCue, 16 Gray, 226.

Malfeasance of Officer de Facto. — An officer *de facto*, indicted for malfeasance in office, cannot object that he is not such *de jure;* because his acting in the office estops him to deny his right to it.[1] And —

Embezzlement. — He is an officer, liable to punishment, within the statutes against embezzlement.[2] But, —

Non-feasance. — Having the right to cease to do wrong, — that is, to stop acting in the office to which he has no just title, — the mere officer *de facto* cannot be indicted for refusing to act in his office. Such is the general doctrine;[3] yet perhaps, in special circumstances, as where the refusal is to take a particular step constituting a part of a whole which he has taken upon himself to do, his not doing of the part, when he might have declined the whole, will subject him to punishment.[4]

Resisting or Assaulting Officer de Facto. — The difficult question is, whether third persons are indictable for resisting, or for the aggravated offence of assaulting, a mere officer *de facto*. And, though the decisions on it are not harmonious,[5] the better opinion is, that they are; the law not permitting them to test in this way the claim to an office of one who exercises it under an apparent right. Other methods of testing the right are open.[6] So, also, —

[1] Rex v. Borrett, 6 Car. & P. 124; Neale v. The Overseers, 5 Watts, 538; The State v. Maberry, 3 Strob. 144; The State v. Cansler, 75 N. C. 442; The State v. Long, 76 N. C. 254; Kitton v. Fag, 10 Mod. 288, 290. But see Commonwealth v. Rupp, 9 Watts, 114. See Rex v. Clay, 2 East P. C. 580; Williams v. Lunenburg, 21 Pick. 75; Miller v. Callaway, 32 Ark. 666; People v. Beach, 77 Ill. 52.

[2] Fortenberry v. The State, 56 Missis. 286; The State v. Goss, 69 Maine, 22. And see Rainey v. The State, 8 Texas Ap. 62; Burke v. The State, 34 Ohio State, 79; Hamilton v. The State, 34 Ohio State, 82.

[3] Olmsted v. Dennis, 77 N. Y. 378, 387; People v. Weber, 89 Ill. 347; Commonwealth v. Rupp, 9 Watts, 114.

[4] This doctrine was expressed by Ruffin, C. J., in a North Carolina case, in terms which, it is submitted, are quite too broad. After admitting that such an officer cannot be indicted for not *accepting* the office, he adds: "A person who undertakes an office and is in office, though he might not have been duly appointed, and therefore may have a defeasable title, or not have been compellable to serve therein, is yet, from the possession of its authorities, and the enjoyment of its emoluments, bound to perform all the duties, and liable for their omission, in the same manner as if the appointment were strictly legal and his right perfect." The State v. McEntyre, 3 Ire. 171, 174. Compare People v. Staton, 73 N. C. 546; Kitton v. Fag, 10 Mod. 288, 290.

[5] See People v. Hopson, 1 Denio, 574; Commonwealth v. Dugan, 12 Met. 233; Rex v. Gordon, 1 Leach, 4th ed. 515, 1 East P. C. 312; United States v. Wood, 2 Gallis. 361; Bell v. Tooley, 11 Ire. 605; Muir v. The State, 8 Blackf. 154; Reg. v. Newton, 1 Car. & K. 469; The State v. Boies, 34 Maine, 235; People v. Cook, 4 Seld. 67; 1 Hawk. P. C. Curw. ed. p. 432. See, as to the Scotch Law, Gunn v. Procurator-Fiscal, 2 Broun, 564; Crim. Proced. II. § 885, 886, 895.

[6] See McKim v. Somers, 1 Pa. 297; Aulanier v. The Governor, 1 Texas, 653;

Assisting Officer de Facto. — The command of an officer *de facto* will justify one who assists him to make an arrest or seizure.[1]

§ 464 *a*. **Office distinguished from Officer.** — One exercising an office which does not exist in matter of law is not an officer *de facto*. There must first be an office, of which there might be an incumbent *de jure*.[2]

§ 465. **Obstructing Officers.** — The public good requiring officers duly to perform their official functions, it results that persons who obstruct them therein, in any matter of public concern and of sufficient magnitude,[3] are punishable.[4] Thus, —

Resisting Process, or Arrest. — The resisting of judicial process "is at all times an offence of a very high and presumptuous nature; but more particularly so when it is an obstruction of an arrest upon a criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis;* that is, an accessory in felony and a principal in high treason."[5] Still, as to the technical form in which the guilt of such person shall be viewed, the doctrine — at least, the better doctrine — appears to be, that, as in the case of a prison breach, a rescue, or an escape,[6] so in this, the offence is substantive, while in proper cases it is also accessorial. And where, by the rules which govern the law of principal and accessory, it may be treated as accessorial, it may equally also, at the election of the prosecuting power, be proceeded against as substantive.[7] If the indictment is on a statute, of course it must conform to the statutory terms, whatever they may be.[8] Again, —

In re Boyle, 9 Wis. 264; Morse *v.* Calley, 5 N. H. 222.

[1] Soudant *v.* Wadhams, 46 Conn. 218. And see Gunby *v.* Welcher, 20 Ga. 336. And see Crim. Proced. I. § 185, 186. So an execution issued by a *de facto* clerk of the court may be valid. Blount *v.* Wells, 55 Ga. 282; Threadgill *v.* Carolina Central Railway, 73 N. C. 178. Compare with Biggerstaff *v.* Commonwealth, 11 Bush, 169.

[2] Ex parte Snyder, 64 Misso. 58. See Smith *v.* Lynch, 29 Ohio State, 261.

[3] Ante, § 212 et seq.

[4] Vol. II. § 1009 et seq.

[5] 4 Bl. Com. 129; 1 Gab. Crim. Law, 281; 2 Hawk. P. C. Curw. ed. p. 445, § 26; The State *v.* Buchanan, 17 Vt. 573; The State *v.* Caldwell, 2 Tyler, 212; The State *v.* Hailey, 2 Strob. 73; The State *v.* Downer, 8 Vt. 424, 429; Commonwealth *v.* Sheriff, 3 Brews. 343; Reg. *v.* Marsden, Law Rep. 1 C. C. 131, 11 Cox C. C. 90; United States *v.* Tinklepaugh, 3 Blatch. 425.

[6] Vol. II. § 1066–1069.

[7] Commonwealth *v.* Miller, 2 Ashm. 61. And see Rex *v.* Shaw, Russ. & Ry. 526; Reg. *v.* Allan, Car. & M. 295; Rex *v.* Fell, 1 Ld. Raym. 424; The State *v.* Murray, 15 Maine, 100; Rex *v.* Stokes, 5 Car. & P. 148; The State *v.* Buchanan, 17 Vt. 573. Contra, The State *v.* Cuthbert, T. U. P. Charl. 13.

[8] Horan *v.* The State, 7 Texas Ap. 183; Reg. *v.* Bailey, Law Rep. 1 C. C

§ 466. **Rescue.**[1] — One is indictable at the common law who rescues another from an officer,[2] or from prison.[3] And —

Prison Breach — Escape — Forging Discharge.[4] — A prisoner who himself breaks away from an officer having him in custody,[5] or from prison,[6] whether before or after conviction, or gets released by forging his discharge,[7] is in like manner punishable. Even —

§ 467. **Obstructing Private Suit.** — Private justice administered in the courts is deemed to be of public concern; therefore it is a crime, at least under various circumstances, to obstruct civil proceedings.[8] Yet —

Rescuing Goods — Resisting Civil Process. — The South Carolina court held it not indictable to rescue goods in execution from a constable on whom no assault is made.[9] And in Alabama, there being a statute which probably did not alter the case, a warrant reciting that A opposed B, a constable, in the execution of civil process, by concealing property of C, was adjudged not to charge a crime.[10] In these cases, however, the real objection seems to be, not alone that the proceedings are civil, but that the act of obstruction is not sufficiently near and direct. Abundant analogies teach us that the criminal law regards private justice as within its protecting care.[11]

§ 468. **Other Obstructions of Justice.** — Doubtless, and in the nature of things, not all the possible forms of obstructing justice have been passed upon in specific adjudications reported in the

347, 12 Cox C. C. 129; Reg. *v.* Crumpton, 5 Q. B. D. 341; United States *v.* Fears, 3 Woods, 510; The State *v.* Putnam, 35 Iowa, 561; The State *v.* Welch, 37 Wis. 196; Woodworth *v.* The State, 26 Ohio State, 196; United States *v.* Lukins, 3 Wash. C. C. 335; Jones *v.* The State, 60 Ala. 99; The State *v.* Smith, 24 Texas, 285. And see The State *v.* Maloney, 12 R. I. 251.

[1] See Vol. II. § 1064 et seq.

[2] 2 Hawk. P. C. Curw. ed. p. 445, § 27; 4 Bl. Com. 131; Anonymous, Jenk. Cent. 171; Rex *v.* Stokes, 5 Car. & P. 148; The State *v.* Cuthbert, T. U. P. Charl. 13.

[3] The State *v.* Murray, 15 Maine, 100; Rex *v.* Martin, Russ. & Ry. 196; Reg. *v.* Allan, Car. & M. 295; Anonymous, 1 Dy. 99, pl. 60; People *v.* Tompkins, 9 Johns. 70.

[4] See Vol. II. § 1064 et seq.

[5] Commonwealth *v.* Farrell, 5 Allen, 130; Reg. *v.* Nugent, 11 Cox C. C. 64.

[6] Rex *v.* Haswell, Russ. & Ry. 458; People *v.* Duell, 3 Johns. 449; Commonwealth *v.* Miller, 2 Ashm. 61; The State *v.* Doud, 7 Conn. 384.

[7] Rex *v.* Fawcett, 2 East P. C. 862; Vol. II. § 149.

[8] Reg. *v.* Allan, Car. & M. 295; The State *v.* Buchanan, 17 Vt. 573; United States *v.* Lowry, 2 Wash. C. C. 169; The State *v.* Caldwell, 2 Tyler, 212; The State *v.* Hailey, 2 Strob. 73; The State *v.* Lovett, 3 Vt. 110; Rex *v.* Fawcett, 2 East P. C. 862. See Comfort *v.* Commonwealth, 5 Whart. 437.

[9] The State *v.* Sotherlen, Harper, 414. See ante, § 465; Vol. II. § 1012, 1013.

[10] Crumpton *v.* Newman, 12 Ala. 199.

[11] As to **Rescuing Cattle,** — while being driven to pound, see The State *v.* Barrett, 42 N. H. 466.

books. And when new forms appear, the principles which controlled the former decisions should be applied to them. Among those already found to be indictable are —

Preventing Attendance on Court — Bribery — Perjury — Less than Perjury — Tampering with Witness — Tampering with Judge or Juror — Preventing Coroner's Inquest — Burying Body — Personating Officer — Acting as Officer — Forging Records, &c. — Preventing, or attempting to prevent, a witness, juror, or officer of the court from attending upon it;[1] bribery, actual or attempted, of a judicial or other like officer;[2] persuading a witness to take, in a judicial proceeding, a false oath, which he does, called in law subornation of perjury;[3] attempting to induce him to take such oath;[4] even tampering with him, short of this direct act,[5] as by undertaking to intimidate him;[6] endeavoring, by indirect means, to influence the judge or jury concerning the merits of a cause on trial or on the eve of trial,[7] as by circulating papers respecting its merits;[8] committing perjury;[9] making or publishing false affidavits, prejudicial to justice, or to the workings of the government, in cases not amounting technically to perjury;[10] preventing a coroner from holding an inquest, as by burying the body or otherwise, in a case where an inquest is required by law;[11] personating or falsely pretending to be an officer, or a juryman,[12] or

[1] The State *v.* Carpenter, 20 Vt. 9; The State *v.* Keyes, 8 Vt. 57; The State *v.* Early, 3 Harring. Del. 562; Rex *v.* Chaundler, 2 Ld. Raym. 1368; s. c. nom. Rex *v.* Chandler, 1 Stra. 612, 8 Mod. 336, which last see; Roberts's Case, 3 Inst. 139; Commonwealth *v.* Feeley, 2 Va. Cas. 1; Commonwealth *v.* Reynolds, 14 Gray, 87, 89; Martin *v.* The State, 28 Ala. 71; Crim. Proced. I. § 556; II. § 897; The State *v.* Ames, 64 Maine, 386; Reg. *v.* Hamp, 6 Cox C. C. 167. As to the Pennsylvania statute against absconding witnesses, see Commonwealth *v.* Phillips, 3 Pittsb. 426; post, § 695.

[2] Barefield *v.* The State, 14 Ala. 603; The State *v.* Carpenter, 20 Vt. 9; 4 Bl. Com. 139; Vol II. § 85 et seq.

[3] Vol. II. § 1197.

[4] 2 Russ. Crimes, 3d Eng. ed. 596; Vol. II. § 1197. And see Ashley's Case, 12 Co. 90.

[5] Rex *v.* Johnson, 2 Show. 1; Reg. *v.* Darby, 7 Mod. 100.

[6] Reg. *v.* Loughran, 1 Crawf. & Dix C. C. 79.

[7] 4 Bl. Com. 140.

[8] Rex *v.* Burdett, 1 Ld. Raym. 148; Rex *v.* Jolliffe, 4 T. R. 285; Anonymous, Lofft, 462; Rex *v.* Lee, 5 Esp. 123; Rex *v.* Fisher, 2 Camp. 563.

[9] 2 Russ. Crimes, 3d Eng. ed. 596; Rex *v.* Aylett, 1 T. R. 63; Vol. II. § 1015.

[10] Omealy *v.* Newell, 8 East, 364; Rex *v.* De Beauvoir, 7 Car. & P. 17; Rex *v.* O'Brian, 2 Stra. 1144, 7 Mod. 378; Vol. II. § 1014, 1029.

[11] Rex *v.* Soleguard, Andr. 231; Anonymous, 7 Mod. 10; Rex *v.* Proby, 1 Keny. 250.

[12] Scarlet's Case, 12 Co. 98; Anonymous, March, 81, pl. 132. **Usurping Office.** — By the Constitution of Kentucky, "no person shall be eligible to the office of commonwealth's or county attorney, unless he shall have been a licensed practising attorney for two years." And a statute makes it punishable, "if any person shall usurp any office established by the constitution or laws of this commonwealth." Consequently, if one who has not been a licensed practising attorney for two years accepts the office on being elected, and receives its emoluments, he commits the statutory offence. Commonwealth *v.* Adams, 3 Met. Ky. 6. And see Wayman *v.* Commonwealth, 14 Bush, 466. In Ohio, an officer who, after serving his time, in good faith holds over till his successor is qualified, believing this to be his duty, is not punishable under the statute for usurping office. Kreidler *v.* The State, 24 Ohio State, 22. And see Daniel *v.* The State, 3 Heisk. 257; Lansing *v.* People, 57 Ill. 241; Commonwealth *v.* Connolly, 97 Mass. 591; Brown *v.* The State, 43 Texas, 478; The State *v.* Withers, 7 Baxter, 16.

one having authority to discharge soldiers,[1] and acting as such; counterfeiting the processes, or altering the records, of a court;[2] — these and other like obstructions of public justice are indictable at the common law. Again, —

§ 468 *a*. **Corruptly neglecting or doing Official Duties.** — One who has assumed office is, within limits already appearing,[3] indictable at the common law, as well as under statutes which prevail in most of our States, if he wilfully or corruptly neglects or declines any official duty, equally whether prescribed by the written law or by the unwritten.[4] Even, —

Not giving Bond — (Officer de Facto). — It has been held, that an indictment lies against a constable for acting in his office without giving bond;[5] while still, the reader perceives, the exercise of the office under color of title made him a constable *de facto*.[6]

§ 469. **Refusing to assist Officer.** — From principles already laid down[7] it results, that, when the law permits, as in various circumstances it does, an officer to call upon private persons for assistance in the execution of his office,[8] one's refusal without lawful excuse to undertake the service, or to proceed therein in

[1] Serlested's Case, Latch, 202. In this case, money was taken from the soldier for discharging him; so it would perhaps be more accurate to regard the offence as cheat.

[2] 2 East P. C. 865, 866. And see Saunders *v.* People, 38 Mich. 218; The State *v.* Williams, 30 Maine, 484.

[3] Ante, § 462, 464; Lange *v.* Benedict, 73 N. Y. 12.

[4] Vol. II. § 971 et seq.; Reg. *v.* Wyat, 1 Salk. 380; s. c. nom. Reg. *v.* Wyatt, 2 Ld. Raym. 1189; The State *v.* Furguson, 76 N. C. 197; The State *v.* Halsted, 10 Vroom, 402; Ex parte Harrold, 47 Cal. 129; Anonymous, Lofft, 285; The State *v.* Laresche, 28 La. An. 26; The State *v.* Hawkins, 77 N. C. 494; Allison *v.* The State, 60 Ala. 54; Commonwealth *v.* Morrissey, 5 Norris, Pa. 416; Housh *v.* People, 75 Ill. 487; The State *v.* Wedge, 24 Minn. 150; The State *v.* Morse, 52 Iowa, 509; Watson *v.* Hall, 46 Conn. 204; Gordon *v.* The State, 2 Texas Ap. 154; Snowden *v.* The State, 17 Fla. 386; The State *v.* Ferriss, 3 Lea, 700; Jones *v.* Commonwealth, 1 Bush, 34.

[5] United States *v.* Evans, 1 Cranch C. C. 149.

[6] Ante, § 464 and note; Soudant *v.* Wadhams, 46 Conn. 218.

[7] Ante, § 457.

[8] Crim. Proced. I. § 185, 186; ante, § 464.

good faith after undertaking it, will subject him to indictment. Thus, —

In Arrest, &c. — Of this nature is a declining to aid a constable or sheriff in arresting a person, or in otherwise serving process, civil or criminal, or in preventing an escape.[1] In like manner, says Mr. East, "the mere act of refusing personal assistance to the king, either against rebels or an invading army, . . . is a high misdemeanor."[2] So, —

Disobeying Statute or Judicial Order. — Within this doctrine are the already-specified offences of disobeying statutes,[3] magistrates' orders,[4] and the like.[5] At the common law and by statutes they are made crimes. Again, —

§ 470. **Oral Slander of Officer.** — Slanderous words, spoken of official persons, especially spoken to them, may be indictable when they would not be if uttered of or to a private individual.[6] Also —

Assault on Officer. — Assaults and other like offences are aggravated by being committed against persons in official station, particularly when in the actual discharge of official duties.[7]

§ 471. **Offences against Elections — (Preventing Election — Bribery — Double Voting — Buying Office).** — It is indispensable to the functions of the government that persons be designated to conduct its several departments, and in the highest degree important that the choice be free and wise. Therefore any act tending to

[1] Coyles *v.* Hurtin, 10 Johns. 85; The State *v.* Deniston, 6 Blackf. 277, decided, however, upon a statute; Reg. *v.* Brown, Car. & M. 314; The State *v.* Hailey, 2 Strob. 73; Comfort *v.* Commonwealth, 5 Whart. 437.

[2] 1 East P. C. 80. And see 4 Bl. Com. 122.

[3] Ante, § 237; Reg. *v.* Walker, Law Rep. 10 Q. B. 355.

[4] Ante, § 240; Rex *v.* Kingston, 8 East, 41; Rex *v.* Gilkes, 8 B. & C. 439, 2 Man. & R. 454.

[5] The State *v.* Soragan, 40 Vt. 450; Drake *v.* The State, 60 Ala. 62; Avery *v.* The State, 52 Ala. 340; Commonwealth *v.* Chase, 127 Mass. 7; Thomas *v.* People, 19 Wend. 480.

[6] Vol. II. § 946; Rex *v.* Pocock, 2 Stra. 1157; Rex *v.* Revel, 1 Stra. 420; Rex *v.* Darby, 3 Mod. 139, Comb. 65; Ex parte Chapman, 4 A. & E. 773; Reg. *v.* Nun, 10 Mod. 186, 187; Reg. *v.* Langley, 3 Salk. 190, 6 Mod. 124; Rex *v.* Spiller, 2 Show. 207, 209; Anonymous, Comb. 46, 65, 66; Rex *v.* Staples, Andr. 228; Reg. *v.* Wrightson, 11 Mod. 166; Rex *v.* Leafe, Andr. 226. Query, whether verbal slander of a justice of the peace is indictable, unless the words are spoken to him in his presence. Rex *v.* Weltje, 2 Camp. 142; 2 Stark. Slander, 194–197. But several of the above cited cases are opposed to this distinction. As to granting a criminal information, see Ex parte Marlborough, 5 Q. B. 955; Reg. *v.* Rea, 7 Ir. Com. Law, 584. As denying that verbal slander is indictable in this country, see The State *v.* Wakefield, 8 Misso. Ap. 11.

[7] Vol. II. § 42, 45, 49–51; Oldfield's Case, 12 Co. 71.

defeat these objects — as, forcibly or unlawfully preventing an election from being held,[1] bribing or corruptly influencing an elector,[2] receiving as an elector a bribe,[3] casting more than one vote,[4] "the taking or giving of a reward for offices of a public nature,"[5] and the like — is punishable under the criminal common law. But offences of this class are now so fully defined and made punishable by statutes State and National, that seldom is an indictment for any of them brought at the common law. They are explained, both as to the law and the procedure, in "Statutory Crimes."[6]

§ 472–476. **Spreading False News.** — One of the old common-law offences, confirmed by statutes early enough in date to be common law in this country, is termed the spreading of false news. It relates primarily, if not exclusively, to public affairs, — "to make discord," as Blackstone expresses it, "between the king and nobility, or concerning any great man of the realm."[7]

§ 477. **Continued.** — What were the precise limits of the doctrine in England, when our ancestors brought the common law

[1] Reg. *v.* Soley, 11 Mod. 115.

[2] Rex *v.* Cripland, 11 Mod. 387; Rex *v.* Plympton, 2 Ld. Raym. 1377; Rex *v.* Pitt, 3 Bur. 1335, 1338; Rex *v.* Jolliffe, 1 East, 154, note; Commonwealth *v.* Callaghan, 2 Va. Cas. 460. And see 1 Gab. Crim. Law, 164, note, 165; 1 Russ. Crimes, 3d Eng. ed. 154; Vol. II. BRIBERY.

[3] Commonwealth *v.* Callaghan, 2 Va. Cas. 460.

[4] Commonwealth *v.* Silsbee, 9 Mass. 417; The State *v.* Bailey, 21 Maine, 62; The State *v.* Williams, 25 Maine, 561. See also Walker *v.* Winn, 8 Mass. 248; Clark *v.* Binney, 2 Pick. 113. **Personating Voter at Municipal Election.** — It has been held in England (Rex *v.* Bent, 1 Den. C. C. 157), and in Canada (Reg. *v.* Hogg, 25 U. C. Q. B. 66), that falsely to personate a voter at a municipal election is not indictable at the common law. The Canada case does not explain why, but it purports to proceed simply on the authority of the English. In the English case, the election was for counsellors; and, before the Municipal Corporations Act was passed, no such election could be had. But that Act made provision for the exact offence; therefore, as it could not exist at common law before, it could not now, the statute having occupied the place of the common law. **Voting at Municipal Election.** — In The State *v.* Liston, 9 Humph. 603, the Tennessee court, not referring to any authorities, held, that for a person to vote at a municipal election, without being qualified, is not indictable at the common law. We may doubt whether, as general doctrine, this decision should be elsewhere followed. See ante, § 246.

[5] 1 Hawk. P. C. 6th ed. c. 67, § 3; Rex *v.* Taggart, 1 Car. & P. 201.

[6] Stat. Crimes, § 802–843.

[7] 4 Bl. Com. 149. In the fifth edition of the present work, § 472–476, as above, this subject is explained at length. In § 473, Stat. Westm. 1 (3 Edw. 1) c. 34 is given; in § 474, 475, are Lord Coke's comments upon it, from 2 Inst. 226, 227; and, in § 467, is given the statute of 2 Rich. 2, stat. 1, c. 5. I do not think it necessary to encumber the later editions with this matter in full. There are also Stats. 1 & 2 Phil. & M. c. 3, and 1 Eliz. c. 6; but they concern merely the Crown, and do not therefore appear important in this connection.

to this country, we may not be able to state; and this branch of the inquiry is left here, with a simple reference to some sources of authority.[1]

How with us. — This old doctrine of the English law belongs to a class[2] which, if received by us, are by the courts shaped to our institutions and times. But whether, under any modifications, it shall be deemed law in our States is a question upon which judges may differ. Plainly enough, properly limited, it is adapted to our institutions, circumstances, and needs. But it has long been practically unused. Lying in print and with the naked tongue, to the detriment alike of individuals and the public, lying in every possible pernicious form, has been so long and with so great *éclat* practised among us, and so immense would seem the scandal of requiring writers and speakers to confine themselves to the truth, that judges might well hesitate to enforce the doctrine. And since there can be no common-law offences against our national government,[3] it can have effect only in the States. An application of prime importance would be to —

[1] During the trial of a cause, in 1680, Scroggs, C. J., said: "It is not long since that all the judges met by the king's command, as they did some time before too, and they both times declared unanimously, that all persons that do write or print or sell any pamphlet that is either scandalous to public or private persons, such books may be seized, and the person punished by law; that all books which are scandalous to the government may be seized, and all persons so exposing them may be punished. And, further, that all writers of news, though not scandalous, seditious, nor reflective upon the government or the state, yet, if they are writers (as there are few others) of false news, they are indictable and punishable upon that account." Rex *v.* Harris, 7 Howell, St. Tr. 925, 929, 930. And see the marginal notes and references in Ruffhead and the other printed editions of the above-mentioned statutes; 2 Inst. 225 et seq.; 3 Inst. 198; 4 Bl. Com. 149. **Mistake of Fact. — Form of Indictment.** — In 1778, Alexander Scott was indicted at the Old Bailey "for that he, on the 23d of April last, unlawfully, wickedly, and maliciously did publish false news, whereby discord, or occasion of discord, might grow between our lord the king and his people, or the great men of the realm, by publishing a certain printed paper, containing such false news; which said printed paper is of the tenor following: 'In pursuance of His Majesty's order in counsel to me directed, these are to give public notice, that war with France will be proclaimed on Friday next, the 24th instant, at the palace royal, St. James's, at one of the clock, of which all heralds and pursuivants at arms are to take notice, and give their attendance accordingly. Given under my hand this 22d day of April, 1778. Effingham, D. M.'" The defendant was a bill-sticker; and, it appearing on the trial that he had been imposed upon, and induced to stick up the bill containing the false matter believing it to be true, whereas it was a forgery, he was acquitted. There does not seem to have been any doubt that the act with which he was charged was indictable. Scott's Case, 5 New Newgate Calendar, 284.

[2] Ante, § 92, 97.

[3] Ante, § 189 et seq.

§ 478. **Political Slanders, &c.** — On principle, and as matter addressing itself to the legislative discretion, if not to the judicial, the political falsehoods, as they are called, whereby official persons and candidates for office, and those who seek to influence voters, are made to speak, do, and intend what they never dreamed of, and their real views and purposes are perverted, and all other falsehoods with respect to the views and purposes and declarations of men regarding public affairs, are among the highest crimes, next to treason itself, of which any person can be guilty.

§ 479. **Counterfeiting Coin.** — Counterfeiting the coin[1] appears to be regarded, in England, as an offence against the king, or government. It used there to be treason,[2] though now it is only felony.[3] Perhaps this was hardly the just view of it in England; for East aptly observes, that it "is in truth a species of the *crimen falsi*, or forgery."[4] It touches at several points the forbidden ground; but is analogous to forgery, which is a peculiar species of attempt, successful or otherwise, to defraud individuals.[5] It is indictable at the common law.[6]

§ 480. **In Conclusion.** — The foregoing illustrations of the general doctrine of this chapter are not meant to be exhaustive. Not even, at all points, are its exact bounds known. And many of the wrongs set down under the other heads in the following chapters are likewise, in a measure, governmental obstructions properly enough belonging also to the present division.

[1] Discussed Vol. II. § 274 et seq.

[2] 4 Bl. Com. 99; 1 Hawk. P. C. 6th ed. c. 17, § 54; 1 East P. C. 158.

[3] 1 Russ. Crimes, 3d Eng. ed. 54 et seq.

[4] 1 East P. C. 158.

[5] Post, § 572.

[6] Yet see, as to this country, Vol. II. § 281, 283–287.

CHAPTER XXXIII.

PROTECTION TO THE RELATIONS OF THE GOVERNMENT WITH OTHER GOVERNMENTS.

§ 481. **Scope of this Chapter.** — The principal doctrines on the subject of this chapter will be stated in it; but they will be less expanded, because less important, than if it were not understood that our national tribunals have no jurisdiction of offences under the common law of nations.[1]

Leading Doctrine. — The leading doctrine is, that nations should conduct uprightly in their intercourse with one another; and each should abstain from acts justly offensive to other nations, or injurious to them, or to their subjects, according to the common understanding of mankind as expressed in the law of nations. And the subject who violates this duty, due from his government to another nation, is by his government punishable.

§ 482. **Neutrality.** — One of the most important duties of a nation, recognized in modern times, is to forbear taking sides against a friendly power, in its quarrel with another power. Hence our neutrality laws.[2] But as these are of infrequent application, it will be sufficient simply to refer to some cases under them and the like English statute.[3] Enactments of this sort are not in affirmance of an unwritten law; but are aids to the government in preserving the peace with friendly governments, and dealing with them in harmony with the modern law of nations.

§ 483. **Law of Nations.** — Governments are no more capable than individuals[4] of existing together without law to regulate

[1] Ante, § 199–202.

[2] R. S. of U. S. § 5281–5291.

[3] The Estrella, 4 Wheat. 298; The Gran Para, 7 Wheat. 471; United States v. Reyburn, 6 Pet. 352; United States v. Quincy, 6 Pet. 445; Ex parte Needham, Pet. C. C. 487; United States v. Kazinski, 2 Sprague, 7; United States v. Lumsden, 1 Bond, 5; Attorney-General v. Sillim, 8 Fost. & F. 646; s. c. nom. Attorney-General v. Sillem, 2 H. & C. 431 Reg. v. Jones, 4 Fost. & F. 25; Reg. v. Rumble, 4 Fost & F. 175; Reg. v. Corbett, 4 Fost. & F. 555.

[4] Ante, § 5, 14; Bishop First Book, § 43–45.

their mutual relations. This law is called the law of nations. It is in truth common law;[1] or, rather, the common law has appropriated the law of nations, making it a part of itself.

§ 484. **What punishable under Law of Nations.** — Any conduct, therefore, in one of our citizens, or in a foreigner within our borders, tending to involve our government in difficulty with a foreign power, is an offence for which, on general principles and according to English doctrine, an indictment can be maintained. Thus, —

Excite to Revolt — Libel on Foreign Prince. — Endeavors to create a revolt against a government in amity with ours,[2] libelling a foreign prince[3] or other person in official station abroad,[4] and the like, are offences against the law of nations.

Passports — Food for Prisoners of War. — The same, in a time of war between our government and another, are the violation of safe conducts or passports given under authority of ours to an enemy;[5] and the deceitfully, maliciously, and wilfully supplying of prisoners of war with unwholesome food, not fit to be eaten by man.[6]

§ 485. **Conclusion.** — Such is the general scope of the law of nations as to crime. This law has provided rules to determine the jurisdiction, on the high seas and elsewhere, of the several governments; and the classes of persons who are subject to, and exempt from, the municipal regulations of each; but these questions were treated of in the early chapters of this volume.

[1] 4 Bl. Com. 67.

[2] Phillim. International Law, 416, 417; 124 Hansard Parl. Deb. 1046.

[3] Phillim. International Law, 417; Vint's Case, 27 Howell St. Tr. 627; Peltier's Case, 28 Howell St. Tr. 529.

[4] Rex v. Gordon, 1 Russ. Crimes, 3d Eng. ed. 246; Rex v. Vint, 1 Russ. Crimes, 3d Eng. ed. 246.

[5] 4 Bl. Com. 68.

[6] Treeve's Case, 2 East P. C. 821

CHAPTER XXXIV.

PROTECTION TO THE PUBLIC REVENUE.

§ 486. **In General of the Revenue.** — As governments cannot be conducted without revenue, protection to it becomes of prime importance. And separate revenues are required by the United States and the States. But the State governments are not permitted to levy duties on imports; therefore their revenues come exclusively from internal taxation and other sources of this kind. The United States government has both sources of revenue; though, till of late, it has come mainly from the sale of public lands, and from duties laid on imports.

§ 487. **Continued.** — But the emergencies of a civil war and the debt following have compelled the United States to add to her other sources of revenue what comes from internal taxation.

§ 488. **Common Law of Revenue.** — There do not appear to be any offences, at the common law, founded distinctly and separately on the duty to protect the governmental revenues. But —

Statutes. — The statutes on this subject are numerous. In general, they are not classed as criminal laws.[1] Their primary object is the collection of duties[2] and other taxes. Still, by these laws, some crimes have been constituted.[3]

[1] United States *v.* Hodson, 10 Wal. 395; United States *v.* Three Tons of Coal, 6 Bis. 379.

[2] Stat. Crimes, § 195.

[3] As to **Smuggling**, see United States *v.* Nolton, 5 Blatch. 427; United States *v.* Bettilini, 1 Woods, 654; United States *v.* Cases of Books, 2 Bond, 271; United States *v.* Thomas, 4 Ben. 370, 2 Abb. U. S. 114; The Missouri, 4 Ben. 410. **Illicit Distilling.** — United States *v.* Chaffee, 2 Bond, 110; United States *v.* Spirits, 4 Ben. 471; United States *v.* Fox, 1 Lowell, 199; United States *v.* Boyden, 1 Lowell, 266; United States *v.* Three Hundred, &c. Pipes, 5 Saw. 421; Dobbins's Distillery *v.* United States, 96 U. S. 395. **Other Cases on United States Internal Revenue.** — United States *v.* Jacoby, 12 Blatch. 491; United States *v.* Page, 2 Saw. 353; United States *v.* One Case, 6 Ben. 493; United States *v.* Foster, 2 Bis. 453; Fein *v.* United States, 1 Wy. Ter. 246; United States *v.* Harries, 2 Bond, 311; United States *v.* Smith, 2 Bond, 323; United States *v.* Feigelstock, 14 Blatch. 321; Boyd *v.* United States, 14 Blatch. 317; United States *v.* Two Hundred Barrels of Whiskey, 95 U. S. 571; United States *v.* Buzzo, 18 Wal. 125. **Kentucky Tax Laws.** — Olds *v.* Commonwealth, 3 A. K. Mar. 465; Taylor *v.* Commonwealth, 15 B. Monr. 11. **South Carolina.** — The State *v.* Chapeau, 4 S. C. 378. **Illinois.** — Faulds *v.* People, 66 Ill. 210.

CHAPTER XXXV.

PROTECTION TO THE PUBLIC HEALTH.

§ 489. **Indictable to endanger Public Health.** — The public health is an interest of supreme regard. Therefore every thing of sufficient magnitude,[1] calculated to impair it, is indictable at the common law. Thus, —

§ 490. **Exposing to Contagious Disease.** — It is no crime for a man to be sick of a contagious disease in his own house, even in a populous locality, or for his friends to decline removing him;[2] yet, if he goes into a public way carrying the infection to the danger of the public, or if one so takes out an infected child,[3] or a horse having a disease communicable by infection to man,[4] an offence indictable at the common law is committed. And, —

Filthy Houses — Unhealthful Manufactories — (Private Abatement of Nuisance). — As observed in a New York case: "It is a common nuisance, indictable, to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in time of sickness and infection of the plague.[5] So manufactures, lawful in themselves, may become nuisances, if erected in parts of towns where they cannot but greatly incommode the inhabitants, and destroy their health." Therefore, when cholera was supposed to be contagious, — a consideration, however, which does not directly appear to have influenced the decision, — a dwelling-house, divided into small apartments, thickly inhabited, and kept in a filthy condition, during the cholera time, was adjudged to be a nuisance, even abatable by persons residing near.[6] Again, —

[1] Ante, § 212 et seq.

[2] Boom *v.* Utica, 2 Barb. 104.

[3] Rex *v.* Vantandillo, 4 M. & S. 73; Rex *v.* Burnett, 4 M. & S. 272; 1 East P. C. 226.

[4] Reg. *v.* Henson, Dears. 24, 18 Eng. L. & Eq. 107.

[5] Referring to 2 Rol. Abr. 139.

[6] Meeker *v.* Van Rensselaer, 15 Wend. 397. See The State *v.* Purse, 4 McCord, 472; People *v.* Townsend, 3 Hill, N. Y. 479; and as to the abatement of the nuisance, Welch *v.* Stowell, 2 Doug. Mich. 332, and Moffett *v.* Brewer, 1 Greene, Iowa, 348; Barclay *v.* Commonwealth, 1 Casey, 503.

§ 491. **Unwholesome Food and Drink.** — It is indictable at the common law to corrupt a fountain of water which is to be drank,[1] or to render unwholesome any food which is to be consumed in the community,[2] or to sell or cause to be used for food [3] what is injurious to the health. Indeed the mere exposure for sale, as food, of unwholesome provisions, in an open market, or the sending of them there for the purpose, constitutes the complete offence at common law.[4] And even the common carrier who brings them to market, with knowledge, is indictable.[5] But the act is not indictable if the unwholesome provisions are not intended to be used for food.[6] And the mere private administering, to a single individual, of what is unwholesome is not an indictable public nuisance, however it may be viewed as an assault or battery.[7]

Old Statutes — Modern. — If this were not so under the ancient common law, still there are English statutes to this effect, so old as to be common law with us.[8] And there are modern

[1] The State *v.* Buckman, 8 N. H. 203. And see Commonwealth *v.* Lyons, 1 Pa. Law Jour. Rep. 497; Stein *v.* The State, 37 Ala. 123.

[2] Rex *v.* Dixon, 3 M. & S. 11, 4 Camp. 12; Rex *v.* Haynes, 4 M. & S. 214.

[3] The State *v.* Smith, 3 Hawks, 378; The State *v.* Norton, 2 Ire. 40; Rex *v.* Treeve, 2 East P. C. 821; The State *v.* Buckman, 8 N. H. 203; Hunter *v.* The State, 1 Head, 160; People *v.* Parker, 38 N. Y. 85; Goodrich *v.* People, 3 Parker C. C. 622, 19 N. Y. 574.

[4] Reg. *v.* Stevenson, 3 Fost. & F. 106.

[5] Reg. *v.* Jarvis, 3 Fost. & F. 108.

[6] Reg. *v.* Crawley, 3 Fost. & F. 109.

[7] **Administering as Assault.** — In the jury case of Reg. *v.* Hanson, 2 Car. & K. 912, 4 Cox C. C. 138; it was held, by two judges, not to be even an assault. But the correctness of this decision is, in principle, more than doubtful. And in Massachusetts such an act is held to be assault and battery. Commonwealth *v.* Stratton, 114 Mass. 303. The noxious thing was a force put in motion by the party administering it, and it inflicted an intended physical injury, — why, then, was not the act an assault? And see Vol. II. § 32 and note. Afterward the defect, if such there was, in the law, was in England cured by legislation. Stat. 28 Vict. c. 8, § 2, re-enacted in 24 & 25 Vict. c. 100, § 24, provides (I copy from the latter) that "whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and," &c. And it has been held, that the administering of cantharides to a woman, in order to excite her sexual passions, and thus obtain a criminal connection with her, is an offence within the statute. Reg. *v.* Wilkins, Leigh & C. 89, 9 Cox C. C. 20. The same was held in Michigan, at an earlier date, on a similar statute. People *v.* Carmichael, 5 Mich. 10. Where the ulterior object is to obtain, by stealth, the property of the person injured, it is the same. People *v.* Adwards, 5 Mich. 22. The principle is, that, since the defendant meant to inflict the injury which the statute pointed out, this intent, with the act, filled the statutory terms; and, though he had also another intent, and it was the principal one, still a surplusage of intent could not take away what, without it, was fully within the statute. And see ante, § 339.

[8] Burnby *v.* Rollitt, 11 Jur. 827; 4 Bl. Com. 162, where this learned commentator says: "A second offence against public health is the selling of unwholesome provisions. To prevent which the statute 51 Hen. 3, stat. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. 2, c. 25, § 11, any brewing or adulteration of wine is punished with the forfeiture of £100 if done by the wholesale merchant; and £40 if done by the vintner or retail trader."

statutes, English and American, in affirmance of the ancient law.[1]

Noxious Trade. — Injury to the public health is one ground on which the carrying on of noxious trades in thickly settled neighborhoods is held to be a crime.[2]

§ 492. **Quarantine, &c.** — Considerations of public health enter into the regulations of quarantine [3] and others of a like nature.[4]

§ 493. **Selling Liquors — Lotteries — Gaming, &c.** — Considerations of public health lie, in part, at the foundation of statutory regulations and prohibitions, existing in most of the States, concerning the sale of intoxicating liquor, concerning lotteries, gaming, and various other like things. They are discussed in "Statutory Crimes." The wisdom of this sort of legislation is for the legislature; the constitutional right to adopt it is generally conceded by the courts.[5]

§ 494. **Conclusion.** — There are offences besides these, into which a regard for the public health enters as one of the considerations; but they are reserved for other connections.

[1] Pope *v.* Tearle, Law Rep. 9 C. P. 499; Roberts *v.* Egerton, Law Rep. 9 Q. B. 494; Fitzpatrick *v.* Kelly, Law Rep. 8 Q. B. 337; Commonwealth *v.* Raymond, 97 Mass. 567; The State *v.* Taylor, 29 Ind. 517; Vason *v.* Augusta, 88 Ga. 542.

[2] Rex *v.* Davey, 5 Esp. 217; Rex *v.* Neil, 2 Car. & P. 485.

[3] See Rex *v.* Harris, 4 T. R. 202, 2 Leach, 4th ed. 549; The State *v.* Patterson, 14 La. An. 46.

[4] See Commonwealth *v.* Fahey, 5 Cush. 408; Harrison *v.* Baltimore, 1 Gill, 264. **As to Importing Infected Cattle.** — Yeazel *v.* Alexander, 58 Ill. 254; Somerville *v.* Marks, 58 Ill. 371. **Noxious Trades in Cities.** — Taunton *v.* Taylor, 116 Mass. 254; Watertown *v.* Mayo, 109 Mass. 315. **Other Nuisances in Cities.** — Underwood *v.* Green, 3 Rob. N. Y. 86; Reed *v.* People, 1 Parker C. C. 481. **Selling Adulterated Milk.** — Stat. Crimes, § 358, 385, 561.

[5] And see, in illustration, The State *v.* Fisher, 52 Misso. 174. **Cattle Guards.** — So the Vermont court has held, that the railroads may be compelled by legislative act to maintain cattle guards at the crossings. Thorpe *v.* Rutland and Burlington Railroad, 27 Vt. 140.

CHAPTER XXXVI.

PROTECTION TO RELIGION, PUBLIC MORALS, AND EDUCATION.

§ 495. **General Doctrine.** — Upon religion, morals, and education society and the state itself rest. Therefore, within practical limits, yet not to the full extent which mere theory might indicate, the law protects them, and holds to be indictable acts wrongfully committed to their detriment.

How the Chapter divided. — But the protection given to one of these interests is not necessarily the measure of that awarded to another. Therefore we shall consider them separately, as respects, I. Religion; II. Public Morals; III. Public Education.

I. *Religion.*

§ 496. **Religion as distinguished from its Forms.** — The mind of man consists of many faculties and propensities, on the harmonious action of which his happiness depends. And among these, is the faculty which takes cognizance of a Higher Power, and the propensity to look to that Power, in conscious feebleness, for help. Such is what we witness of man, in all ages, in all countries, and in all grades of civilization and of barbarism. If there are individual instances in which this seems not to be so, it is because the religious part is apparently hidden by an unnatural and deformed growth of some other; and it may be equally observed of parts not religious. But in most men, of whatever class, age of the world, or country, a religious part distinctly appears. And this is a thing quite separate from the multitudinous forms of religion in which it manifests itself.

Form established by Law. — When this country was settled, there was in England, as now, a form of religion established by law. But it was not brought hither, in a way to become a part of our common law; for the early emigrants deemed, that religion, in its essence and spirit, flourishes best when left to its own forms.

Simony — Non-conformity, &c. — In England, therefore, growing out of its church establishment, there are statutory and common-law offences unknown in the United States. Such are simony, being a corrupt presentation to an ecclesiastical benefice;[1] non-conformity to the worship of the church;[2] beating a clerk in orders, as an offence higher than an ordinary battery;[3] and some others.

§ 497. **Christianity a part of our Common Law.** — Yet, in a more general sense, while religion, as above explained, is a part of universal law, Christianity is a part of our common law.[4] But —

Apostasy, &c. — Imposture — Pretended Prophecies. — Whether it follows from this, that apostasy, which is a total renunciation of Christianity by those who have embraced it;[5] those darker heresies which tend to overturn Christianity itself, and not merely some form of it;[6] religious imposture,[7] false and pretended prophecies,[8] and the like, — were ever subjects of indictment here, as they were in England when our forefathers came to this country, we have probably no adjudications. Practically they have dropped silently out of the catalogue of crimes even on the other side of the Atlantic. And the good sense of the present age has taught, that opinions should not be restrained by law, unless developed in some injurious act. This, indeed, we have seen to be fundamental in the common law itself.[9]

§ 498. **Profaneness and Blasphemy.** — Public profane swearing and blasphemy are in this country indictable at the common law; yet less, according to some views, as tending to sap the founda-

[1] 4 Bl. Com. 62; 1 East P. C. 35.
[2] 4 Bl. Com. 51.
[3] 4 Bl. Com. 217.
[4] Updegraph *v.* Commonwealth, 11 S. & R. 394; People *v.* Ruggles, 8 Johns. 290; Shover *v.* The State, 5 Eng. 259: 1 Bancroft Hist. U. S. 243; Vol. II. § 74. See Cincinnati Board of Education *v.* Minor, 23 Ohio State, 211.
[5] 4 Bl. Com. 43.
[6] 4 Bl. Com. 44. And see Reg. *v.* Gathercole, 2 Lewin, 237.
[7] 4 Bl. Com. 62.
[8] 4 Bl. Com. 149.
[9] Ante, § 204, 206, 480, 481.

tions of Christianity, than as disturbing the peace and corrupting the morals of the community.[1]

§ 499. **Lord's Day.** — The observance of the Lord's day is, both here and in England, so fully enforced by statutes that it is of little consequence to inquire what the law would be without them.[2] One of our State courts[3] has deemed that its violation is not a common-law offence in this country. Yet if we reflect, that its observance contributes to the public repose, health, morals, and convenience, as well as religion; that our ancestors were a Sabbath-keeping people; and that the law in both countries rests on exactly the same reasons, — we shall see room for at least the doubt, whether this part of the English system did not come to us with the great body of English law. If it should be found to have originated in ancient acts of Parliament, rather than in immemorial usage, the result would not therefore be different.[4]

II. *Public Morals.*

§ 500. **How protected by Law.** — But however uncertain may be the extent to which the common law protects Christianity, plainly it cherishes fully the public morals. And every act which it deems sufficiently evil and direct,[5] tending to impair them, it punishes as crime. Thus, —

Bawdy-house — Open Obscenity, &c. — The keeping of bawdy-houses;[6] the public exhibiting or publishing of obscene pictures

[1] People *v.* Ruggles, 8 Johns. 290; The State *v.* Jones, 9 Ire. 38; The State *v.* Chandler, 2 Harring. Del. 553; Updegraph *v.* Commonwealth, 11 S. & R. 394. And see The State *v.* Kirby, 1 Murph. 254; Commonwealth *v.* Kneeland, 20 Pick. 206; The State *v.* Ellar, 1 Dev. 267; Vol. II. § 74.

[2] 1 East P. C. 5; The State *v.* Brooksbank, 6 Ire. 73; Nabors *v.* The State, 6 Ala. 200; The State *v.* Schnierle, 5 Rich. 299. And see The State *v.* Williams, 4 Ire. 400.

[3] The State *v.* Brooksbank, 6 Ire. 73.

[4] It is a mistake to suppose, that Sabbath-keeping is a thing only of religious observance, or a mere tenet of a sect. There are, indeed, views as to the manner of the observance, or the particular day, peculiar to sect; yet the setting apart, by the whole community, of one day in seven, wherein the thoughts of men and their physical activities shall be turned into another than their accustomed channel, is a thing as much pertaining to the law of nature as is the alternation of night with day, and the rest and restoring influence of sleep. Those who, out of dislike to sect or party in religion, seek to abolish the Sabbath, are as unwise as he who, to destroy a bird of prey, should aim his gun where the ball would take effect on his nearest friend.

[5] Ante, § 212 et seq.

[6] 4 Bl. Com. 168; Reg. *v.* Williams, 10 Mod. 63, 1 Salk. 384; Smith *v.* The State, 6 Gill, 425; The State *v.* Evans, 5 Ire. 603; Smith *v.* Commonwealth, 6 B. Monr. 21; Ross *v.* Commonwealth, 2 B. Monr. 417; People *v.* Erwin, 4 Denio, 129; Commonwealth *v.* Harrington, 3 Pick. 26; Reg. *v.* Pierson, 1 Salk. 382; Jennings *v.* Commonwealth, 17 Pick. 80; Warren *v.* People, 3 Parker C. C. 544. And see The State *v.* Bailey, 1 Fost. N. H. 343.

and writings;[1] the public utterance of obscene words;[2] the indecent and public exposure of one's person, or the person of another;[3] and, generally, all acts of gross and open lewdness;[4] are indictable at the common law. But, —

§ 501. **Adultery — Fornication — Private Exposure of Person — Solicitations.** — For reasons already considered,[5] the same things, — as adultery and fornication,[6] though committed with many persons,[7] solicitations to permit these offences,[8] exposure of a man's person to one female only,[9] — done in a more private manner, are not punishable criminally, except indeed under statutes, which exist in many of the States.

Open Adultery. — In South Carolina, an open living in adultery has been held not to be indictable at the common law, though charged as an offence against public decency.[10] The courts of some of our other States recognize the better doctrine in principle, that adultery and fornication may be so notorious and gross as to be common-law crimes. The line may not easily be drawn, yet, in a just view, some things of this general class should be deemed punishable, others not.[11]

[1] Commonwealth *v.* Holmes, 17 Mass. 336; Commonwealth *v.* Sharpless, 2 S. & R. 91; Willis *v.* Warren, 1 Hilton, 590; Reg. *v.* Grey, 4 Fost. & F. 73; Commonwealth *v.* Landis, 8 Philad. 453.

[2] Bell *v.* The State, 1 Swan, Tenn. 42.

[3] Britain *v.* The State, 3 Humph. 203; The State *v.* Roper, 1 Dev. & Bat. 208; Reg. *v.* Webb, 1 Den. C. C. 338, 2 Car. & K. 933, Temp. & M. 23, 13 Jur. 42; Miller *v.* People, 5 Barb. 203; The State *v.* Rose, 32 Misso. 560; People *v.* Bixby, 4 Hun, 636; Reg. *v.* Reed, 12 Cox C. C. 1, 2 Eng. Rep. 157; Reg. *v.* Saunders, 1 Q. B. D. 15, 19, 13 Cox C. C. 116.

[4] 4 Bl. Com. 64; Brooks *v.* The State, 2 Yerg. 482.

[5] Ante, § 235, 236, 243–246.

[6] Reg. *v.* Pierson, 1 Salk. 382; Galizard *v.* Rigault, 2 Salk. 552; s. c. nom. Gallisand *v.* Rigaud, 2 Ld. Raym. 809; The State *v.* Brunson, 2 Bailey, 149; Anderson *v.* Commonwealth, 5 Rand. 627; Commonwealth *v.* Isaacs, 5 Rand. 634; Commonwealth *v.* Jones, 2 Grat. 555; The State *v.* Cooper, 16 Vt. 551; The State *v.* Foster, 31 Texas, 578; The State *v.* Rahl, 33 Texas, 76; The State *v.* Smith, 32 Texas, 167; ante, § 38.

[7] The State *v.* Evans, 5 Ire. 603; Reg. *v.* Pierson, 1 Salk. 382; The State *v.* Moore, 1 Swan, Tenn. 136.

[8] Reg. *v.* Pierson, 1 Salk. 382. **Solicitation an Attempt.** — Where a statute makes adultery an indictable felony, the solicitation is punishable as an attempt. The State *v.* Avery, 7 Conn. 266. See Shannon *v.* Commonwealth, 2 Harris, Pa. 226; post, § 767.

[9] Rex *v.* Webb, 1 Den. C. C. 338, 2 Car. & K. 933; Reg. *v.* Watson, 2 Cox C. C. 376, 20 Eng. L. & Eq. 599; Reg. *v.* Holmes, 20 Eng. L. & Eq. 597; ante, § 244.

[10] The State *v.* Brunson, 2 Bailey, 149.

[11] The State *v.* Moore, 1 Swan, Tenn. 136; Anderson *v.* Commonwealth, 5

Night-walking. — Common night-walking may be classed among the offences against morality. There are, in many of our States, statutes against it, and it is also indictable at the common law. Night-walkers are persons who make themselves a common nuisance by going about nights, committing bawdry, or other petty offences, or annoyances.[1]

§ 502. **Public selling and buying Wife.** — The public selling and buying of a wife has been held, in England, to be a common-law crime.[2]

Incest. — Incest is punished by statutes in a large number of the States;[3] but it seems not to be otherwise an indictable offence.[4]

Polygamy. — Polygamy — that is, simple polygamy, as distinguished from open and notorious cohabitation — was not an offence in the temporal courts until 1 Jac. 1, c. 11, made it such when committed "within his majesty's dominions of England and Wales";[5] consequently in this country its criminality rests only on our own statutes.[6]

Rand. 627; Commonwealth *v.* Isaacs, 5 Rand, 634; Commonwealth *v.* Jones, 2 Grat. 555. And see Rex *v.* Johnson, Comb. 377; Rex *v.* Talbot, 11 Mod. 415; Claxton's Case, 12 Mod. 566; The State *v.* Cagle, 2 Humph. 414; Stat. Crimes, § 654.

[1] In The State *v.* Dowers, 45 N. H. 543, it was said to be indictable as well at the common law as under the statute to be a common night-walker. And Bellows, J., gave the following exposition of the offence: "In Watson *v.* Carr, 1 Lewin, 6, Bayley, J., laid it down, that by night-walkers were meant such persons as are in the habit of being out at night for some wicked purpose. See Roscoe Crim. Ev. 745, where this case is cited. In 1 Burn's Justice, 765, night-walkers are said to be those who eave-drop men's houses, cast men's gates, carts, and the like, into ponds, or commit other outrages or misdemeanors in the night, or shall be suspected to be pilfering or otherwise like to disturb the peace, or that be persons of ill-behavior or of evil fame or report generally, or that shall keep company with any such, or with other suspicious persons in the night. In other places night-walkers are said to be those who are abroad during the night and sleep by day, and of suspicious appearance and demeanor. [Referring to Bouv. Law Dict. tit. Night-walkers, and Haunters of Bawdy-houses; 2 Hawk. P. C. c. 8, § 38; c. 10, § 34 and 35; § 12, § 20.] From these authorities, it is obvious, we think, that, to constitute this offence, the habit should exist of being abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrongful or wicked act. If some crime is actually committed, that is the subject of a separate indictment; but the power to arrest and punish for the offence of night-walking is conferred for the preservation of the peace, and to prevent the commission of crime." p. 544, 545.

[2] Rex *v.* Delaval, 3 Bur. 1434, 1438; 4 Bl. Com. 64, note; Commonwealth *v.* Sharpless, 2 S. & R. 91, 102.

[3] See Commonwealth *v.* Goodhue, 2 Met. 193; United States *v.* Hiler, Morris, 330; Stat. Crimes, § 727–736.

[4] 4 Bl. Com. 64.

[5] 1 Bishop Mar. & Div. § 297.

[6] Stat. Crimes, § 577–613.

§ 503. **Sodomy.** — For other reasons, as well as to protect the public morals, sodomy — called sometimes buggery, sometimes the offence against nature, and sometimes the horrible crime not fit to be named among Christians, being a carnal copulation by human beings with each other against nature, or with a beast — is, though committed in secret, highly criminal. Hawkins says, it "was felony by the ancient common law";[1] yet Blackstone remarks, that, in the times of popery, it was subject only to ecclesiastical censures.[2] Stat. 25, Hen. 8, c. 6, sufficiently early in date to be common law in this country, made it felony;[3] and either by the adoption of early English enactments, or the earlier English common law, we have received it into the catalogue of our common-law crimes.[4]

Attempt at Sodomy — (Divorce). — An attempt to commit sodomy, much more the offence itself, is, in that body of the English unwritten law which was formerly administered in the ecclesiastical courts, a ground of divorce.[5]

§ 504. **Immoral Public Shows.** — But chastity is not the only form of morality protected by the common law. It has been laid down that the erection of a mountebank's stage is indictable;[6] and more broadly, that so is "every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals."[7]

Gaming and other Disorderly Houses. — And the keeping of a common gaming-house,[8] or of a disorderly ale-house or inn,[9] or of any other disorderly house,[10] is a common-law offence, on account,

[1] 1 Hawk. P. C. 6th ed. c. 4, p. 9, Curw. ed. p. 357.

[2] 4 Bl. Com. 216. And see Rex *v.* Mulreaty, 1 Russ. Crimes, 3d Eng. ed. 698.

[3] Hawk. P. C. ut sup.; 1 Russ. Crimes, 3d Eng. ed. 698; 1 Hale P. C. 669; 1 East P. C. 480.

[4] Commonwealth *v.* Thomas, 1 Va. Cas. 307; Davis *v.* The State, 3 Har. & J. 154.

[5] 1 Bishop Mar. & Div. § 739; 2 Ib. 640.

[6] Rex *v.* Bradford, Comb. 304. And see Hall's Case, 1 Mod. 76.

[7] Knowles *v.* The State, 3 Day, 103. See Jacko *v.* The State, 22 Ala. 73; Reg. *v.* Grey, 4 Fost. & F. 73; Reg. *v.* Saunders, 1 Q. B. D. 15, 19, 13 Cox C. C. 116. "The common law, which sanctions prudent theatrical performances, denounces as unlawful such as are demoralizing, licentious, or obscene." Robertson, J., in Pike *v.* Commonwealth, 2 Duvall, 89.

[8] 1 Russ. Crimes, 3d Eng. ed. 323; Rex *v.* Dixon, 10 Mod. 335; People *v.* Jackson, 3 Denio, 101; United States *v.* Dixon, 4 Cranch C. C. 107; The State *v.* Haines, 30 Maine, 65; Vanderworker *v.* The State, 8 Eng. 700; Rex *v.* Medlor, 2 Show. 36; The State *v.* Savannah, T. U. P. Charl. 235; The State *v.* Doon, R. M. Charl. 1; Commonwealth *v.* Tilton, 8 Met. 232, 235.

[9] Stephens *v.* Watson, 1 Salk. 45; Hall *v.* The State, 4 Harring. Del. 132, 145.

[10] The State *v.* Bailey, 1 Fost. N. H

among other reasons, of its evil influence on the public morals. But, —

Gaming — Cock-fighting. — In the absence of statutes, gaming alone is not cognizable criminally;[1] though perhaps some kinds of games are, from their peculiar nature, such as the cruel game of cock-fighting.[2] And, —

§ 505. **Ale-house.** — At the common law, an ale-house, if not disorderly, was lawful; no license being required to keep it.[3] But early English legislation regulated considerably this subject,[4] and the example of our ancestors has been widely followed by us during all periods of our history.[5]

§ 506. **Offences against Sepulture.** — As corrupting to the public morals, and disturbing to the sensibilities, are such acts as casting a human dead body into a river without the rites of sepulture;[6] the stealing of a corpse;[7] the digging of it up, when buried, or conveying of it from the burial-ground for sale[8] or dissection;[9] and the selling, for dissection, of the dead body of one executed when the death sentence did not so direct.[10] These acts are severally indictable at the common law.[11]

III. *Public Education.*

§ 507. **Ecclesiastical Cognizance in England.** — When our country was settled from England, the public education was there a thing

343; Commonwealth *v.* Stewart, 1 S. & R. 342; Hunter *v.* Commonwealth, 2 S. & R. 289; The State *v.* Mathews, 2 Dev. & Bat. 424; The State *v.* Bertheol, 6 Blackf. 474; Wilson *v.* Commonwealth, 12 B. Monr. 2; Smith *v.* Commonwealth, 6 B. Monr. 21; Bloomhuff *v.* The State, 8 Blackf. 205; The State *v.* Mullikin, 8 Blackf. 260. See Rex *v.* McDonald, 3 Bur. 1645; post, § 1083–1097, 1106–1121, 1135–1137.

[1] West *v.* Commonwealth, 3 J. J. Mar. 641; The State *v.* Cotton, 6 Texas, 425; People *v.* Sergeant, 8 Cow. 139; Reg. *v.* Ashton, 16 Eng. L. & Eq. 346, 1 Ellis & B. 286. And see The State *v.* Pemberton, 2 Dev. 281; People *v.* Jackson, 8 Denio, 101; Dunman *v.* Strother, 1 Texas, 89, 92. For a discussion of the statutory offence, see Stat. Crimes, § 844–930.

[2] Commonwealth *v.* Tilton, 8 Met. 232, 234; Squires *v.* Whisken, 3 Camp. 140. As to wages, see Ball *v.* Gilbert, 12 Met. 397; McElroy *v.* Carmichael, 6 Texas, 454.

[3] Rex *v.* Ivyes, 2 Show. 468.

[4] Stephens *v.* Watson, 1 Salk. 45. And see Rex *v.* Holland, 1 T. R. 692.

[5] The unlicensed selling of intoxicating drinks is discussed, Stat. Crimes, § 982–1070.

[6] Kanavan's Case, 1 Greenl. 226.

[7] 2 East P. C. 652.

[8] Rex *v.* Gilles, Russ. & Ry. 367, note.

[9] Rex *v.* Lynn, 2 T. R. 733, 1 Leach, 4th ed. 497; Commonwealth *v.* Cooley, 10 Pick. 37; Kanavan's Case, 1 Greenl. 226.

[10] Rex *v.* Cundick, D. & R. N. P. 13.

[11] See Vol. II. Sepulture.

of ecclesiastical cognizance. There were some acts of Parliament upon the subject, as on others within the ecclesiastical jurisdiction.[1] And, —

License to Schoolmaster. — To teach a school, one must have had a license from the authorities of the church.[2] But disobedience of this requirement was punished only ecclesiastically, it was not indictable.[3] This ecclesiastical offence, therefore, was never recognized by our unwritten law.[4] And, —

In General. — Though the common law seems, in various ways, to recognize the benefits of education, considered as a public good, separate from morality and religion, no common-law crimes, resting solely on this basis, have, it is believed, come to us from the mother-country.

Statutes. — Nor have we many statutes resting solely on this foundation. But they are not quite unknown.[5]

§ 508. **In Part as to Public Education.** — There were, in England, some common-law offences founded in part on the interest of the government in the public education. As to the principal ones of these, an American judge has said: —

Regulations of Trade — Wages — Apprenticeships. — "All those laws of the parent country, whether rules of the common law or early English statutes, which were made for the purpose of regulating the wages of laborers,[6] the settlement of paupers, and making it penal for any one to use a trade or handicraft to which he had not served a full apprenticeship[7] — not being adapted to the circumstances of our colonial condition — were not [by us] adopted, used, or approved."[8]

[1] Burn Ec. Law, Schools.

[2] Ib.; Rex *v.* York, 6 T. R. 490; Rex *v.* Litchfield, 2 Stra. 1028.

[3] Matthews *v.* Burdett, 3 Salk. 318; Rex *v.* Douse, 1 Ld. Raym. 672.

[4] And see ante, § 38.

[5] Commonwealth *v.* Sheffield, 11 Cush. 178.

[6] Ante, § 453–455.

[7] Anonymous, 2 Show. 155; Rex *v.* Fox, 12 Mod. 251; Stat. Crimes, § 196.

[8] Shaw, C. J., in Commonwealth *v.* Hunt, 4 Met. 111, 122.

CHAPTER XXXVII.

PROTECTION TO THE PUBLIC WEALTH AND TO POPULATION.

§ 509. **In General.** — By the public wealth, is meant the personal wealth of the individuals constituting the public at large. The revenue of the government depends on it, and the government on population. To promote this wealth, our civil laws secure to every man the enjoyment of his own acquisitions, and to promote population, they provide such rules as that the husband may hold the lands of his deceased wife during his life, if, while the connection continued, a living child was born, but not otherwise, thus in effect offering a reward for issue.[1] The criminal laws protect both wealth and population by various means, only the more direct of which will be specified in this chapter. Thus, —

Abortion. — Though matrimony is not compelled, because this would infringe private rights, the criminal law punishes abortion.[2]

§ 510. **Homicide.** — The destruction of a human being born into the world is a still graver offence against population. While it is a crime also against the individual whose life is taken,[3] it is such against all who compose the state; since it deprives each of a support on which he is entitled to rest. For it is neither possible nor desirable that men should be independent of one another.[4] Therefore, —

Taking Life of one requesting — Persuading to Suicide. — If a man voluntarily deprives of life another, who even requests it; or stands by persuading him to take his own life, which is done, — he thereby commits murder.[5]

[1] 1 Bishop Mar. Women, § 473 et seq.

[2] See 1 Russ. Crimes, 3d Eng. ed. 671; Stat. Crimes, § 740–762, where this offence is discussed.

[3] Post, § 547.

[4] "The crime of homicide partly concerned the king, whose peace was infringed, and partly, as Bracton expresses it, the person who was killed." 2 Reeves Hist. Eng. Law, 3d ed. 9.

[5] 1 East P. C. 228, 229; Rex v. Hughes, 5 Car. & P. 126; Reg. v. Alison, 8 Car. & P. 418; Rex v. Dyson, Russ. & Ry. 523; ante, § 259; Vol. II. § 1187. There is some diversity of judicial opinion as to the legal liability of a party at whose persuasion another, in his absence, kills himself. See Vaux's Case, 4 Co. 44; Rex v. Russell, 1 Moody, 356; Reg. v. Leddington, 9 Car. & P. 79; Commonwealth v. Bowen, 13 Mass. 356.

§ 511. **Suicide.** — So, by the English common law, suicide is felony;[1] but our law does not, like the English, allow, in felony, those forfeitures[2] which alone can be inflicted on one whose life is ended; therefore self-murder is not practically an offence with us. Yet we recognize it as criminal when the opportunity arises indirectly.[3] There are writers who have maintained, that men are naturally entitled to end their own lives at pleasure;[4] but this view accords neither with our instincts nor with our better reason, as certainly it does not with our law.

§ 512. **Leaving Country.** — Leaving the country, to take up a residence abroad, is not regarded by the law as equivalent to suicide. In most civilized countries, it is deemed to be the right of the government, if it will, to prevent emigration to foreign countries. In practice, this right is not generally exercised, except in emergencies; and then it is. And in England it is laid down, even in a very old case, that a man may lawfully depart from the realm "solely with the intent that he might live there free from the laws of this realm here, and not for any cause of traffic," when no "express prohibition or restraint by proclamation or writ" stands in his way.[5] In our country, there are no restraints on expatriation, which is free to all. Yet it is believed that a special emergency may justify a temporary restraint here, the same as in England; and, on this idea, our government in some instances acted during the late civil war.

Changing Allegiance — Calling Home Citizens. — On the question whether a man may cast off allegiance to one government and take another, there has been some judicial discussion and a great deal of diplomatic, and of late the subject has become in a measure regulated by treaties. It would seem, that, according to the American doctrine, anterior to the treaties, though a citizen cannot lawfully leave his country when it needs his services and makes demand for them, yet, if, not forbidden, he goes to another country and there contracts a new allegiance, the new discharges

[1] 1 East P. C. 219; Rex v. Russell, 1 Moody, 356; Reg. v. Clerk, 7 Mod. 16; Hales v. Petit, 1 Plow. 253, 260, 261; Rex v. Ward, 1 Lev. 8; Vol. II. § 1187.

[2] Post, § 615, 616, 970.

[3] Vol. II. § 1187.

[4] Dawes on Crimes, 72.

[5] Anonymous, 3 Dy. 296, pl. 19.

him from the old. Doubtless, according to both American and English doctrine, if, while no intent to cast off the old allegiance has been manifested, a citizen is abroad, and his country demands his services, he may be called home, — though this is a question not much discussed among us. But, according to what has hitherto been generally understood to be the English and perhaps the prevailing European law in the absence of a treaty, contrary to what the American publicists maintain, no native-born subject can ever so change his allegiance, by going abroad and taking upon himself the obligations of a new one, as to free him from the claims of the government under which he was born, provided it chooses to exercise its right.[1]

§ 513. **Injuring or Neglecting Self.** — For the same reason that a man may not deprive the community of what he might do for it by taking his own life, he may not deprive it of the equivalent of his life in another form. And the reason would seem to carry us still further; namely, that he may not be idle, or waste his goods, or neglect opportunities for self-improvement. Practically, however, to conduct the doctrine to this extent would be unwise, and it would trench on personal rights. Let us see, in a few examples, how far it is carried. Thus, —

Mayhem. — We have already seen, that a man is answerable to the criminal law who inflicts on himself a mayhem.[2] But —

§ 514. **Injuries to One's own Property.** — The law gives men full control over their own property,[3] to do what they will with it, only not to the injury of their neighbors. They may, for instance, burn it. This rule promotes public wealth, by stimulating private industry. Also —

§ 515. **Vagrancy, Idleness, &c.** — Men may ordinarily dispose of their time as they will. And it is not clear that the ancient common law of England took notice of mere idleness and vagrancy as criminal; indeed, one case lays it down that a vagrant, as such, is not indictable.[4] But we find, from early times, statutes authoriz-

[1] I have stated the doctrine in a general way, but I trust with reasonable accuracy, for the benefit merely of the student. It would be out of place here to collect the multitudes of authorities relating to the question.

[2] Ante, § 259. See Vol. II. § 1001 et seq.

[3] See ante, § 260; United States v. Johns, 1 Wash. C. C. 363.

[4] Reg. v. Branworth, 6 Mod. 240; it being added: "But, if he be an *idle and loose person*, you may take him up as a vagrant, and bind him to his good behavior, by the common law." See Rex v. King's Langley, 1 Stra. 631; Reg. v. Egan, 1 Crawf. & Dix C. C. 338; Anonymous, 11 Mod. 3; Rex v. Miller, 2 Stra. 1103; Rex v. Talbot, 11 Mod. 415; Claxton's Case, 12 Mod. 566; Rex v. Brown, 8 T. R. 26; Rex v. Patchett, 5 East, 339; Soldier's Case, 1 Wils. 331; Rex v. Rhodes, 4 T. R. 220; Rex v. Hall, 3 Bur. 1636; 4 Bl. Com. 169; Dawes on Crimes, 81.

ing summary proceedings against idlers, vagabonds, and rogues; to be regarded perhaps by us as regulations concerning paupers, not therefore belonging to our common law.[1] Generally, in our States, vagrancy has been legislated upon to such an extent as to leave it unimportant what is the anterior, or common law, on the subject.[2]

§ 516. **Wandering Mariners, &c. — Gypsies.** — There are old English enactments against wandering mariners and soldiers,[3] and against gypsies,[4] probably never accepted as common law in any of the States.

Game Laws. — The same may be said of the game laws of England,[5] though some of the older States have statutory regulations of their own for the preservation of game.[6] And we have statutes for the protection of domestic animals and fish.

§ 517. **Owling.** — Owling is an old offence, both at the common law and under statutes; consisting, says Blackstone, of "transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture." It ceased by 5 Geo. 4, c. 47, § 2, to be indictable in England;[7] and probably no one considers that it was ever a crime in this country.[8]

§ 518. *Forestalling, Regrating, and Engrossing:*[9] —

In General. — These are kindred offences, indictable both under

[1] For a comparison of the English and Irish statutes, see 1 Gab. Crim. Law, 908. And see ante, § 508.

[2] In The State v. Maxcy, 1 McMullan, 501, the court held the South Carolina statute of 1836, concerning vagrants, to be constitutional. Likewise the New York statutes are constitutional. People v. Forbes, 4 Parker C. C. 611. For several points under the statutes, see this case; also, People v. Gray, 4 Parker C. C. 616; Commonwealth v. Holloway, 5 Binn. 516; Commonwealth v. Murray, 14 Gray, 397; Commonwealth v. Carter, 108 Mass. 17; The State v. Custer, 65 N. C. 339; Boulo v. The State, 49 Ala. 22; Allen v. The State, 51 Ga. 264; Walters v. The State, 52 Ga. 574.

[3] 4 Bl. Com. 165.

[4] 4 Bl. Com. 165.

[5] 2 Bl. Com. 419, note; 4 Ib. 143, 173. See Reg. v. Nickless, 8 Car. & P. 757; Rex v. Passey, 7 Car. & P. 282; Rex v. Lockett, 7 Car. & P. 300; Rex v. Caradice, Russ. & Ry. 205; Reg. v. Uezzell, 2 Den. C. C. 274, 4 Eng. L. & Eq. 568; Rex v. Southern, Russ. & Ry. 444; Rex v. Smith, Russ. & Ry. 368; Reg. v. Hale, 2 Car. & K. 326.

[6] **Deer-killing.** — A statute of Vermont, forbidding, for ten years, the killing of deer found running at large, has been adjudged constitutional. The State v. Norton, 45 Vt. 258.

[7] 4 Bl. Com. 154 and note.

[8] See ante, § 452 et seq.

[9] For the procedure connected with these offences, see Crim. Proced. II. § 348–350, 396, 397.

the ancient common law and by early English statutes, yet seldom made the subject of a criminal prosecution in modern times. And in England they were abolished, in 1844, by 7 & 8 Vict. c. 24, both as common-law offences and statutory.

§ 519. **How defined.** — To define these offences, as recognized by the old common law, would be difficult; because, in England, the early statutes practically took the place of the unwritten rule. Blackstone gives us the definitions furnished by 5 & 6 Edw. 6, c. 14, as follows: —

Forestalling — is "the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there."

Regrating — is "the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place."

Engrossing — is "the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again." He adds: "And so the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and finable at the common law."[1] But in a late English case it is said that the common-law offences of engrossing and regrating extend only to the necessaries of life.[2]

§ 520. **Under our Common Law.** — It is reasonably plain that the common law of our States has not adopted these offences in terms as thus defined. Yet, under modifications, they are, in legal principle, criminal misdemeanors with us. Thus, —

§ 521. **Hoarding to defraud.** — If men, to enrich themselves by losses or sufferings which they contemplate bringing upon others, knowing that an article of commerce, especially one pertaining to the necessaries of life, is in sufficient supply, buy in large quantities and hoard the article for a higher price, — stimulating, therefore, production unduly, and compelling consumers to pay, while the stimulant is on, too much for it, — they do a wrong alike to producer, to consumer, and to the honest retail trader who is obliged to keep it in stock for his customers. The hoarder,

[1] 4 Bl. Com. 158. And see Rex v. Davies, 1 Rol. 11; Rex v. Waddington, 1 East, 143; Rex v. Webb, 14 East, 406; Pratt v. Hutchinson, 15 East, 511; Rex v. Rusby, Peake Add. Cas. 189, and post, § 528, note.

[2] Pettamberdass v. Thackoorseydass, 7 Moore P. C. 239, 262.

in this instance, would, in the end, be heavily punished, though not so heavily as he deserves, by the pecuniary loss suffered when the crash came, if he did not, foreseeing its coming, succeed in working off his goods in season to save himself by casting the ruin on others. Now, he who uses the power which money or credit gives him to play a prank like this upon the community is an enemy to the race, and as deserving of punishment as the thief or the robber.

§ 522. **Under our Common Law, continued.** — What is thus said is suggestive of the form which these offences must be deemed to assume in this country, if accepted as pertaining to our common law. And, modified to our circumstances, they would seem, in reason, to have been as well adapted to our country, when it was settled, as to England. Our own Mr. Dane observes: "The common law against these offences of forestalling, engrossing, regrating, and monopolies, has borne the test of ages, and has been wise and useful. The fault has not been in this law in the United States, but in the non-execution of it. Its notorious violations have often been complained of, but scarcely in any instance prosecuted; partly owing to the difficulty there has ever been in defining and proving these offences, and therefore the possible failure of prosecutions when commenced; but not wholly to this cause, for this difficulty is nearly the same in every country; yet in many countries in Europe, and in which there is a tolerable share of freedom, this kind of law has usually been tolerably well executed. But the principal cause to which the inexecution of this portion of the common law is owing, in the United States, is the easy and indulgent temper and character of the people generally, who have ever been disposed to suffer themselves to be cheated and imposed upon in these ways, by these kinds of offenders, in hundreds of instances, complaining generally, but never prosecuting."[1] Let us now see more exactly what, under the English common and statutory law, these several offences were, in England, when our country was settled.

§ 523. **Forestalling,**[2] **&c.** — In Russell on Crimes,[3] we have the following: "Every practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandise,

[1] 7 Dane Abr. 39, and see to the end of the chapter. See also Louisville v. Coupe, 6 B. Monr. 591.

[2] See Crim. Proced. II. § 396.

[3] 1 Russ. Crimes, 3d Eng. ed. 165.

has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general.[1] Practices of this kind come under the notion of forestalling; which anciently comprehended, in its signification, regrating and engrossing, and all other offences of the like nature.[2] Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind.[3] Also if a person within the realm buy any merchandise in gross, and sell the same again in gross, it has been considered to be an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavor to make his profit of it.[4] So the bare engrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at the common law; for, if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit.[5] And so jealous is the common law of all practices of this kind, that it has been held contrary to law to sell corn in the sheaf; upon the supposition, that, by such means, the market might be in effect forestalled."[6]

§ 524. **Continued.** — The author then proceeds to say, that, "the offences of forestalling, regrating, and engrossing were for a considerable period prohibited by statutes; and chiefly by the 3 & 4 Edw. 6, c. 21, and 5 & 6 Edw. 6, c. 14; altered by 5 Eliz. c. 5, § 13, 5 Eliz. c. 12, and 13 Eliz. c. 25, § 13. But the beneficial tendency of such statutes was doubted; and, at length, by the 12 Geo. 3, c. 71, they were repealed,[7] as being detrimental to the supply of the laboring and manufacturing poor of the kingdom."[8] This repealing statute of 12 Geo. 3, c. 71, A. D. 1772, is too recent to have any force in our States. But those of Edw. 6 and Eliz. are of dates to render them common law with us. So is

[1] 3 Inst. 196; Bac. Abr. tit. Forestalling, A.

[2] Ib.

[3] 1 Hawk. P. C. c. 80, § 1.

[4] 3 Inst. 196; Bac. Abr. tit. Forestalling, A; 1 Hawk. P. C. c. 80, § 3. But it was held, that any merchant, whether subject or foreigner, bringing victuals or other merchandise into the realm, may sell it in gross. 3 Inst. 196.

[5] 1 Hawk. P. C. c. 80, § 3; 3 Inst. 196.

[6] 3 Inst. 197; Bac. Abr. tit. Forestalling, A.

[7] The acts repealed are 3 & 4 Edw. 6, c. 21; 5 & 6 Edw. 6, c. 14; 3 Phil. & M. c. 3; 5 Eliz. c. 5; 15 Car. 2, c. 8; and so much of 5 Anne, c. 34, as relates to butchers selling cattle alive or dead in London or Westminster, or within ten miles thereof; and all the acts made for the better enforcement of the same.

[8] 1 Russ. Crimes, 3d Eng. ed. 168.

3 & 4 Edw. 6, c. 21, but it relates merely to the sale of butter and cheese. The statutes of Eliz. are unimportant, except perhaps a single section. The only old statute, therefore, which much concerns us, is 5 & 6 Edw. 6, c. 14, which must be deemed common law with us, as far as it was found applicable.[1]

§ 525. **Continued.** — Russell proceeds: "It has been sometimes contended, that forestalling, regrating, and engrossing were punishable only by the provisions of these statutes;[2] but that doctrine has not been admitted, and they still continue offences at common law;[3] though their precise extent and definition at the present day may perhaps admit of some doubt."[4] Where, in this country, 5 & 6 Edw. 6, c. 14, has not been repealed, we have not the same doubt whether these are common-law offences; but we have the doubt as to their precise extent and nature.

§ 526. **Forestalling, what, in Principle.** — In reason, forestalling, considered distinct from engrossing and regrating, seems to be committed whenever a man, by false news, or by any kind of deception, gets into his hands a controlling amount of any one article of merchandise, and holds it for an undue profit, thereby creating a perturbation in what pertains to the public interests. If he circulates the false news, or uses the other deception, to enable others to operate in this way, or to operate himself, but fails, still he has committed, if not the full offence, at least the criminal attempt.[5]

[1] In the fifth edition, the first nine sections of this act were copied here; but I do not deem it essential to repeat them.

[2] Rex v. Maynard, Cro. Car. 231; Rex v. Waddington, 1 East, 143.

[3] 1 Hawk. P. C. c. 80, § 15.

[4] 1 Russ. Crimes, 3d Eng. ed. 168, 169; see ante, § 518.

[5] See both the foregoing and the subsequent sections, and the authorities there cited. Also 2 Chit. Crim. Law, 527 et seq.; Gordon on Patents, 16 et seq. Lord Coke says, that, on one occasion, the judge had in consideration a case, which he seems to approve, "where it was presented that a Lombard did proceed to promote and enhance the price of merchandise, and showed how. The Lombard demanded judgment of the presentment for two causes. 1. That it did not sound in forestalling; 2. That of his endeavor or attempt by words no evil was put in ure, that is, no price was enhanced, *et non allocatur*, and thereupon he pleaded not guilty. Whereby it appeareth, that the attempt by words to enhance the price of merchandise was punishable by law, and did sound in forestallment; and it appeareth by the book, that the punishment was by fine and ransom. And in that case Knivet reported, that certain people (and named their names) came to Cateswold in Herefordshire, and said, in deceit of the people, that there were such wars beyond the seas as no wool could pass or be carried beyond sea, whereby the price of wools was abated; and, upon presentment hereof made, they appeared, and upon their confession they were put to fine and ransom." 3 Inst. 196.

§ 527. **Engrossing.**[1] — Engrossing, with us, must doubtless be deemed of kin to forestalling, as it was in the English common law. And whenever a man, to put things, as it were, out of joint, and obtain an undue profit, purchases large quantities of an article of merchandise, holding it, not for a fair rise, but to compel buyers to pay what he knows to be much more than can be regularly sustained in the market, he may, on principle, be deemed, with us, to be guilty of the common-law offence of engrossing.[2]

§ 528. **Regrating.** — It is not easy to see how regrating, simply, as defined by Blackstone,[3] and distinguished from forestalling and engrossing, can be a common-law offence in this country. We may expand the definition, and thus make it such; but the terms forestalling and engrossing would seem to cover all practical forms of the offence, as properly understood in this country.[4]

[1] See Crim. Proced. II. § 348–350.

[2] 1. In 1801, two cases against the same defendant — Rex *v.* Waddington, 1 East, 143; Rex *v.* Waddington, 1 East, 167 — came before the Court of King's Bench, wherein the substance of the charge seems to have been engrossing, though there was no effort to give name to the crime. They grew out of a villanous speculation in hops, and the defendant was held to be rightly convicted. These cases will repay an attentive examination. And see 1 Russ. Crimes, 3d Eng. ed. 168–174; Rex *v.* Gilbert, 1 East, 583.

2. The doctrine of the text, the reader perceives, tones down the ancient common law greatly in favor of trade and speculation. For Lord Coke says: "It was upon conference and mature deliberation resolved by all the justices, that any merchant, subject, or stranger, bringing victuals or merchandise into this realm, may sell them in gross; but that vendor cannot sell them again in gross, for then he is an engrosser according to the nature of the word, for that he buy in gross and sell in gross, and may be indicted thereof at the common law, as for an offence that is *malum in se*. 2. That no merchant or any other may buy within the realm any victual or other merchandise in gross, and sell the same in gross again, for then he is an engrosser, and punishable *ut supra*: for by this means the prices of victuals and other merchandise shall be enhanced to the grievance of the subject; for, the more hands they pass through, the dearer they grow, for every one thirsteth after gain." 3 Inst. 196.

[3] Ante, § 519.

[4] 1. The last English case of regrating at the common law, of which I have knowledge, is Rex *v.* Rushby, Peake Add. Cas. 189, A.D. 1800. I have also before me a pamphlet report of the trial, somewhat more full. Lord Kenyon presided, Mr. Erskine was the leading counsel for the prosecution, Mr. Law for the defence. The learned judge observed to the jury (I quote from the pamphlet), that, "although all the acts of Parliament which had been on the statute-book a hundred and fifty years had in an evil hour been done away, notwithstanding the ravages made by the Conqueror and some other princes of the Norman line it had been discovered, in some Saxon laws which had been found since, that this was an offence at common law, and there could be no doubt but by the law of the land these offences are provided against." After some discussion concerning the evidence, the case was submitted to the jury, and they returned a verdict of guilty. Whereupon his lordship said: "Gentlemen, you have conferred as great benefit on your country as, I believe, almost any jury did confer." I am not able to draw from this case the precise limit which Lord Kenyon would have given to the offence. "The defendant," says the pamphlet report, "stood indicted for having, on the 8th of November last, at the Corn Exchange, purchased thirty quarters of oats, which he had exposed to sale and sold again on the same day." Nothing is thus said about any enhancement of the price; but the title-page of the pamphlet describes the trial as having been "for regrating in buying corn at Mark Lane, and afterwards selling it on the same day at an advanced price." Mr. Erskine said: "The crime of regrating was that of buying any commodity in a market, and selling it again in the same market on the same day." Lord Kenyon gave, in his address to the jury, his views of the reason of the law as follows: "When provisions arrive at a high price, they become a mighty injury and oppression to the poor. All must have the necessaries of life; and, when they become enhanced, the consequences are dreadful in the extreme. In speculations it has been said that nobody can be hurt. I deny it: that great writer and learned man, Dr. Smith, had said that monopoly is no more to be dreaded than witchcraft. If that great writer was here now, he would tell me that it does exist. In a county which I know, all the butter, cheese, fresh provisions, &c., were bought up by the large consumer, and resold to the poor and indigent at a profit of near fifty per cent. I would ask Dr. Smith if this is not more to be dreaded than witchcraft."

2. According to a note in Peake, this is the same case which Chitty mentions under the name of Rex *v.* Rushby, 2 Chit. Crim. Law, 536; where the form of the indictment appears. The first count, from which the others vary but slightly, charges that the defendant, on a day mentioned, "at London aforesaid, that is to say, at the parish of Allhallows Barking, in the ward of Tower in London aforesaid, in a certain market, there called the Corn Exchange, unlawfully did buy, obtain, and get into his hands and possession, of and from J. S., J. G., and J. H., a large quantity of oats, of the growth and produce of this kingdom of Great Britain, to wit, ninety quarters of oats, of the growth and produce of the kingdom of Great Britain, at and for the price or sum of forty-one shillings for each and every of the said ninety quarters of oats, part of the said oats, by way of sample of the said ninety quarters of oats, then being brought to the said market by the said J. S., J. G., and J. H., for the sale of the said ninety quarters of oats in the same market; and afterwards, to wit, on the same, &c., he the said Rushby, at, &c., in the same market there called the Corn Exchange, unlawfully did regrate a large quantity, to wit, thirty quarters of the said oats, and sell the said thirty quarters of the said oats again to one W. H. at and for the price or sum of forty-three shillings for each and every of the said thirty quarters of the said oats, in contempt, &c., to the evil example, &c., and against the peace, &c." And Mr. Chitty adds, that, after conviction, "and after an ineffectual application for a new trial, Mr. Law (the late Lord Ellenborough), Mr. Sergeant Best (the now chief justice of the Common Pleas), and Mr. Marryatt, moved in arrest of judgment," &c., on the ground, that, since the repeal of the statutes, the acts alleged against the defendants were not punishable. "Upon this suggestion, the court granted a rule to show cause why judgment should not be arrested; and, after argument, the court were divided in opinion, and no judgment was passed upon the defendant." 2 Chit. Crim. Law, 537 and note. And see 4 Bl. Com. Chit. ed. 158, note; Godson on Patents, 33. Lord Campbell, who was not an admirer of Kenyon, comments, in his Lives of the Chief Justices (iv. 84 et seq. of Am. ed.), very disparagingly

§ 529. **Conspiracies to Forestall, &c.** — A conspiracy to commit any of the acts formerly punishable in England under the name

of forestalling, engrossing, or regrating, is, of course, indictable with us if the acts themselves are. But it may be so, even though we should hold that these are not common-law offences in our States.[1]

upon this case and Rex v. Waddington, cited to the last section. But he admits that the doctrines "were at the time highly popular," and contributed to enhance Kenyon's "reputation as a great judge." His pages are very racy where he states what the judges held; and, if they really laid down exactly what he says they did, we may doubt whether their expositions were true to any law ever prevailing in any country. And still we should be at liberty to agree or not with the biographer as to the cause which he assigns; namely, Kenyon's lack of an early classical and general education in the schools. Campbell cites no authorities against these cases.

[1] See Vol. II. CONSPIRACY.

CHAPTER XXXVIII.

PROTECTION TO THE PUBLIC CONVENIENCE AND SAFETY.

§ 530. **In General.** — All unjustifiable disturbances of the public convenience and safety, sufficient in degree,[1] are indictable at the common law. Therefore —

§ 531. **Nuisances — (Ways — Other Public Places — Trades — Noises — Gunpowder, &c.).** — Obstructions of highways,[2] public squares,[3] harbors,[4] navigable rivers,[5] and the like;[6] injuries done to such ways and places;[7] neglect or refusal, by those whose duty it is, to keep them in repair;[8] the carrying on, in populous localities or near a highway, of trades which render the air either unwholesome or disagreeable to the senses;[9] making great noises,

[1] Ante, § 212 et seq.

[2] Commonwealth v. Milliman, 13 S. & R. 408; Reg. v. Scott, 2 Gale & D. 729; Rex v. Cross, 3 Camp. 224; Rex v. Jones, 3 Camp. 230; Rex v. Morris, 1 B. & Ad. 441; People v. Cunningham, 1 Denio, 524; Reg. v. Scott, 3 Q. B. 543; Rex v. Russell, 6 East, 427; The State v. Duncan, 1 McCord, 404; The State v. Spainhour, 2 Dev. & Bat. 547; Rex v. Moore, 3 B. & Ad. 184; Reg. v. Watts, 1 Salk. 357; Justice v. Commonwealth, 2 Va. Cas. 171; Commonwealth v. Wilkinson, 16 Pick. 175; The State v. Pollok, 4 Ire. 303; The State v. Hunter, 5 Ire. 369; Commonwealth v. Gowen, 7 Mass. 378; Rex v. Carlile, 6 Car. & P. 636; Rex v. West Riding of Yorkshire, 2 East, 342; Commonwealth v. King, 13 Met. 115; Reading v. Commonwealth, 1 Jones, Pa. 196; Rex v. Sarmon, 1 Bur. 516; Rex v. Webb, 1 Ld. Raym. 737; Rex v. Dobbins, 11 Mod. 317; Reg. v. Derbyshire, 2 Q. B. 745; The State v. Knapp, 6 Conn. 415; Reg. v. Sheffield Gas Co., 22 Eng. L. & Eq. 200; Vol. II. § 1272 et seq.

[3] The State v. Commissioners, Riley, 146; Rung v. Shoneberger, 2 Watts, 23; The State v. Commissioners, 3 Hill, S. C. 149; Commonwealth v. Rush, 2 Harris, Pa. 186.

[4] Rex v. Tindall, 1 Nev. & P. 719, 6 A. & E. 143. And see Commonwealth v. Alger, 7 Cush. 53.

[5] Commonwealth v. Church, 1 Barr, 105; The State v. Thompson, 2 Strob. 12; Rex v. Trafford, 1 B. & Ad. 874, 887; Rex v. Watts, 2 Esp. 675; Renwick v. Morris, 7 Hill, N. Y. 575; Rex v. Russell, 6 B. & C. 566; Cummins v. Spruance, 4 Harring. Del. 315.

[6] See Vol. II. § 1266–1271.

[7] Rex v. Edgerly, March, 131; Reg. v. Leach, 6 Mod. 145; Rex v. Stanton, 2 Show. 30; Commonwealth v. Eckert, 2 Browne, Pa. 249.

[8] Rex v. Hendon, 4 B. & Ad. 628; Rex v. Stoughton, 2 Saund. 157; Reg. v. Wilts, Holt, 339; Rex v. Dixon, 12 Mod. 198; Waterford and Whitehall Turnpike v. People, 9 Barb. 161; Payne v. Partridge, 1 Show. 256; The State v. Murfreesboro', 11 Humph. 217; Vol. II. § 1280–1283.

[9] Rex v. White, 1 Bur. 333; Commonwealth v. Brown, 13 Met. 365; Rex v.

to the disquiet of the neighborhood;[1] keeping large quantities of gunpowder in populous places, to the danger of the public safety;[2] and other acts of a similar tendency;[3] — being, with some which were mentioned under previous heads,[4] termed in legal language nuisances, are severally common-law offences. Statutes have more or less confirmed or enlarged them, or added to their number. Thus, —

Railways. — Though the obstruction of a railway track is indictable at the common law,[5] there are statutes making it specially so, and more particularly if endangering life.[6] And, —

Railway causing Death. — Where through negligent management a railway causes the death of a passenger, there are statutes under which the corporation is indictable therefor, and the fine imposed in punishment is payable to the representatives of the deceased person.[7] In these cases, the rules applicable to civil actions, which in essence they are, prevail in a good measure.[8]

§ 532. **Inns — Refusing Travellers.** — Since inns[9] are for the public convenience, and the keepers have certain privileges given in return for the public good they do, — "an indictment," says

Watts, Moody & M. 281, 2 Car. & P. 486; Rex *v.* Neville, Peake, 91; Ray *v.* Lynes, 10 Ala. 63; The State *v.* Hart, 34 Maine, 36; post, § 1138–1144.

[1] Rex *v.* Smith, 1 Stra. 704; The State *v.* Haines, 30 Maine, 65. And see Commonwealth *v.* Smith, 6 Cush. 80.

[2] Anonymous, 12 Mod. 342; Cheatham *v.* Shearon, 1 Swan, Tenn. 213; Rex *v.* Taylor, 2 Stra. 1167; Bradley *v.* People, 56 Barb. 72; People *v.* Sands, 1 Johns. 78; post, § 1097–1100. And see Williams *v.* Augusta, 4 Ga. 509. **Duty of Licensed Seller.** — One licensed to sell gunpowder, if he sells it to one whom he knows to be incapable of taking proper care of it, is civilly liable for the consequences. Carter *v.* Towne, 98 Mass. 567.

[3] Rex *v.* Wharton, 12 Mod. 510; Reg. *v.* Wigg, 2 Salk. 460, 2 Ld. Raym. 1163; Commonwealth *v.* Webb, 6 Rand. 726; Commonwealth *v.* Chapin, 5 Pick. 199.

[4] Ante, § 490, 500, 502, 504; post, § 1071 et seq.

[5] Vol. II. § 1266, 1270.

[6] Reg. *v.* Upton, 5 Cox C. C. 298; Reg. *v.* Monaghan, 11 Cox C. C. 608; Reg. *v.* Hadfield, Law Rep. 1 C. C. 253, 11 Cox C. C. 574; Reg. *v.* Hardy, Law Rep. 1 C. C. 278, 11 Cox C. C. 656; Reg. *v.* Bradford, Bell C. C. 268, 8 Cox C. C. 309; Reg. *v.* Sanderson, 1 Fost. & F. 37; Roberts *v.* Preston, 9 C. B. N. S. 208; Reg. *v.* Court, 6 Cox C. C. 202; Reg. *v.* Bowray, 10 Jur. 211; McCarty *v.* The State, 37 Missis. 411; Allison *v.* The State, 42 Ind. 354; Commonwealth *v.* Killian, 109 Mass. 345.

[7] The State *v.* Grand Trunk Railway, 59 Maine, 189; The State *v.* Grand Trunk Railway, 60 Maine, 145; The State *v.* Grand Trunk Railway, 61 Maine, 114; The State *v.* Maine Central Railroad, 60 Maine, 490; Commonwealth *v.* Sanford, 12 Gray, 174; The State *v.* Manchester and Lawrence Railroad, 52 N. H. 528; Commonwealth *v.* Metropolitan Railroad, 107 Mass. 236; Commonwealth *v.* Vermont and Massachusetts Railroad, 108 Mass. 7.

[8] The State *v.* Grand Trunk Railway, 58 Maine, 176; post, § 1074–1076.

[9] See Hall *v.* The State, 4 Harring. Del. 132, 141. As to what is an "Inn," "Tavern," "Hotel," &c., see Stat. Crimes, § 297.

Coleridge, J., "lies against an innkeeper who refuses to receive a guest, he having at the time room in his house, and either the price of the guest's entertainment being tendered to him, or such circumstances occurring as will dispense with that tender;"[1] though, from a later case, it would appear that the tender is always necessary.[2] So if, having received the guest, he refuses to find for the guest food and lodging, he is indictable.[3] But, to produce these consequences, the person applying as guest must be a traveller.[4] Such is the clear English doctrine; and it is affirmed in a dictum of the North Carolina court.[5] Coleridge, J., seemed to put the liability on the ground that "innkeepers are a sort of public servants;"[6] and in this view perhaps we should have discussed the topic under a previous title.[7] Another view is, that the innkeeper who allures a traveller to his house by holding himself out as ready to entertain him, and then refuses, assumes toward the traveller an unfair ground; in which aspect the question pertains to our chapter after the next.[8] But, unless we call in the aid of principles like these, we do not readily find a foundation for the indictment, where the refusal is not general; because the traveller is merely an individual, and the public sustains no separate injury.[9] Perhaps, however, the wrong may be likened to an obstruction in a public way. At all events, the law on this subject is probably as above stated; because no sufficient reason appears for discarding the old doctrine. Yet it has little practical effect at this time, being rather a relic of the past than a living thing of the present.

[1] Rex *v.* Ivens, 7 Car. & P. 213, 218. See Newton *v.* Trigg, 1 Show. 268, 269.

[2] Fell *v.* Knight, 8 M. & W. 269, 5 Jur. 554.

[3] 1 Hawk. P. C. Curw. ed. p. 714, § 2.

[4] Rex *v.* Luellin, 12 Mod. 445.

[5] The State *v.* Mathews, 2 Dev. & Bat. 424.

[6] In Rex *v.* Ivens, 7 Car. & P. 213, 219

[7] Ante, § 458 et seq.

[8] And see ante, § 232.

[9] **Offences by Innkeepers enumerated.** — Hawkins says: "It seems to be agreed, that the keeper of an inn may, by the common law, be indicted and fined, as being guilty of a public nuisance, if he usually harbor thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. And it seems also to be clear, that, if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals, or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king." 1 Hawk. P. C. Curw. ed. p. 714, § 1, 2. And see Reg. *v.* Rymer, 2 Q. B. D. 136, 13 Cox C. C. 378.

CHAPTER XXXIX.

PROTECTION TO THE PUBLIC ORDER AND TRANQUILLITY.

§ 533. **In General.** — Whatever, of sufficient magnitude for the law's notice,[1] one wilfully does to the disturbance of the public order or tranquillity, is indictable at the common law. Thus, —

§ 534. **Riot — Rout — Unlawful Assembly.** — Riots, routs, and unlawful assemblies, three allied disturbances of the public tranquillity, are thus punishable. They severally require, says Blackstone,[2] "three persons, at least, to constitute them. An unlawful assembly is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren, or the game therein; and part without doing it, or making any motion towards it.[3] A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way; and make some advances towards it.[4] A riot is where three or more actually do an unlawful act of violence, either with or without common cause or quarrel: as, if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent or tumultuous manner."[5]

[1] Ante, § 212 et seq.

[2] 4 Bl. Com. 146.

[3] And see The State *v.* Stalcup, 1 Ire. 30; Reg. *v.* Vincent, 9 Car. & P. 91; Reg. *v.* Neale, 9 Car. & P. 431; Rex *v.* Hunt, 1 Russ. Crimes, 3d Eng. ed. 278; Rex *v.* Blisset, 1 Mod. 13; Rex *v.* Birt, 5 Car. & P. 154. For other definitions, see Vol. II. § 1256 and note.

[4] And see The State *v.* Sumner, 2 Speers, 599. For other definitions, see Vol. II. § 1183 and note.

[5] And see The State *v.* Connolly, 8 Rich. 337; The State *v.* Snow, 18 Maine, 346; The State *v.* Straw, 33 Maine, 554; Williams *v.* The State, 9 Misso. 270; Scott *v.* United States, Morris, 142; The State *v.* Brooks, 1 Hill, S. C. 361; Turpin *v.* The State, 4 Blackf. 72; The State *v.* Calder, 2 McCord, 462; The State *v.* Jackson, 1 Speers, 13; The State *v.* Cole, 2 McCord, 117; Pennsylvania *v.* Cribs, Addison, 277; Pennsylvania *v.* Morrison, Addison, 274; Rex *v.* Scott, 3 Bur. 1262, 1 W. Bl. 350; Reg. *v.* Vincent, 9 Car. & P. 91; Rex *v.* Sudbury, 12 Mod. 262; Rex *v.* Hunt, 1 Keny. 108; Commonwealth *v.* Runnels, 10 Mass. 518; Pennsylvania *v.* Craig, Addison, 190; Anonymous, 6 Mod. 43; Reg. *v.* Soley, 2 Salk. 594, 595; Reg. *v.* Ellis, Holt, 636; The State *v.* Russell, 45 N. H. 83. For other definitions, see Vol. II. § 1143 and note.

There are some English statutes, ancient as well as comparatively modern, making the riotous assembling of twelve or more persons, under certain circumstances and for certain specific purposes, a heavier offence;[1] but we have no reported instances of attempts to give them a common-law force in this country.

§ 535. **Affray.** — Of a similar nature to riot and the like is affray; being the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people. It is indictable at the common law.[2]

[1] 4 Bl. Com. 142. The following is what Blackstone says in the place thus referred to: "The *riotous assembling* of *twelve* persons, or more, and not dispersing upon proclamation. This was first made high treason by Statute 3 & 4 Edw. 6, c. 5, when the king was a minor, and a change in religion to be effected: but that statute was repealed by Statute 1 Mary, c. 1, among the other treasons created since the 25 Edw. 3; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by Statute 1 Mar. stat. 2, c. 12, which made the same offence a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress, as, for example, such as were set on foot with intention to offer violence to the Privy Council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse; and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the fact indemnified the peace officers and their assistants, if they killed any of the mob in endeavoring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by Statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the First to the death of Queen Anne, it was never once thought expedient to revive it: but, in the first year of George the First, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the Statute 1 Geo. 1, c. 5, enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hindrance, and not dispersing, are felons without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavor to disperse them; being copied from the act of Queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy."

[2] Vol. II. § 1; 4 Bl. Com. 145; The State *v.* Sumner, 5 Strob. 53; Simpson *v.*

Private Fighting together. — Fighting in a private place is either no offence [1] or an assault and battery, according to the circumstances.

Public — (Prize-fight). — Of course, a public prize-fight is indictable.[2]

§ 536. **Breaches of Peace.** — These offences are also known as breaches of the peace, — a term of indefinite yet larger meaning, sometimes greatly expanded, but commonly it signifies in the law a criminal act of the sort which disturbs the public repose. There are still other forms of indictable breaches of the peace.[3] Thus, —

Forcible Detainer — (Defence of Self and Property). — While all reasonable and necessary force may lawfully be used by one to defend his real or personal estate, of which he is in the actual possession, against another who comes to dispossess him without right; [4] yet, if a man undertakes to retain what he knows [5] to be a wrongful possession, by a force or by numbers reasonably exciting terror, he is indictable. This offence is called in law a forcible detainer.[6] So —

Forcible Entry — Forcible Trespass. — A man is indictable for a forcible entry or trespass, who, by strong hand, awakening fear, wrests from another's peaceable possession either personal [7] or

The State, 5 Yerg. 356; Curlin *v.* The State, 4 Yerg. 143; O'Neill *v.* The State, 16 Ala. 65; Cash *v.* The State, 2 Tenn. 198; Kium *v.* The State, 1 Blackf. 377; The State *v.* Heffin, 8 Humph. 84; The State *v.* Allen, 4 Hawks, 356; Commonwealth *v.* Perdue, 2 Va. Cas. 227; Duncan *v.* Commonwealth, 6 Dana, 295; Hawkins *v.* The State, 13 Ga. 322.

[1] Ante, § 260 and note; Vol. II. § 35.

[2] Reg. *v.* Brown, Car. & M. 314; ante, § 260, note; Vol. II. § 35.

[3] And see The State *v.* Hanley, 47 Vt. 290; The State *v.* Matthews, 42 Vt. 542; The State *v.* Warner, 34 Conn. 276; The State *v.* Lunn, 49 Misso. 90; post, § 548.

[4] Weaver *v.* Bush, 8 T. R. 78; Harrington *v.* People, 6 Barb. 607; Commonwealth *v.* Kennard, 8 Pick. 133; The State *v.* Godsey, 13 Ire. 348; The State *v.* Johnson, 12 Ala. 840; The State *v.* Morgan, 3 Ire. 186; Monroe *v.* The State, 5 Ga. 85; Rex *v.* Ford, J. Kel. 51; McDaniel *v.* The State, 8 Sm. & M. 401; The State *v.* Zellers, 2 Halst. 220; The State *v.* Smith, 3 Dev. & Bat. 117; Moore *v.* Hussey, Hob. 93, 96; Semayne's Case, 5 Co. 91 *a*; Holloway's Case, Palmer, 545; s. c. nom. Halloway's Case, Cro. Car. 131; Commonwealth *v.* Drew, 4 Mass. 391; Rex *v.* Longden, Russ. & Ry. 228; United States *v.* Wiltberger, 3 Wash. C. C. 515; The State *v.* Briggs, 3 Ire. 357; The State *v.* Clements, 32 Maine, 279; The State *v.* Lazarus, 1 Mill, 33; 1 East P. C. 402. And see, for a full discussion of the right to defend one's self or property, post, § 836–877.

[5] Ante, § 303.

[6] Vol. II. § 489 et seq.; The State *v.* Godsey, 13 Ire. 348; Commonwealth *v.* Rogers, 1 S. & R. 124; Commonwealth *v.* Lakeman, 4 Cush. 597; Milner *v.* Maclean, 2 Car. & P. 17.

[7] Vol. II. § 517; The State *v.* Armfield, 5 Ire. 207; The State *v.* McDowell, 1 Hawks, 449; The State *v.* Watkins, 4

real [1] property, even though he is proceeding under a just claim.[2] But this doctrine does not apply where one, having lawful right, immediately recaptures what has been wrongfully taken from him.[3] When the property is personal, the demonstration must be in the presence of the possessor, from whom it is taken away.[4]

§ 537. **Riotous Injuries and Enforcements of Rights.** — In like manner, the riotous entry into a house by the landlord, on the termination of a lease, or for the enforcement of a forfeiture; [5] the riotous pulling down of enclosures, even under a claim of right; [6] the breaking, with wood and stones, of the windows of a dwelling-house in the night, to the terror of the occupants; [7] the unlawful throwing down of the roof and chimney of a dwelling-house in the peaceable possession and actual occupancy of another, who is put in fear; [8] the riotous breaking into another's dwelling-house, and making a great noise, whereby a woman in it miscarries,[9] — are severally indictable at the common law, as either forcible entries, or other breaches of the peace.

§ 538. **Limits of Doctrine.** — In these cases, the trespass is not alone indictable, for the thing done must go further; [10] while the

Humph. 256; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Mills, 2 Dev. 420; The State *v.* Ray, 10 Ire. 39; The State *v.* Phipps, 10 Ire. 17; The State *v.* Flowers, 1 Car. Law Repos. 97.

[1] Vol. II. § 489; Commonwealth *v.* Shattuck, 4 Cush. 141; Burt *v.* The State, 3 Brev. 413; The State *v.* Speirin, 1 Brev. 119; The State *v.* Pollok, 4 Ire. 305; The State *v.* Pridgen, 8 Ire. 84; Reg. *v.* Newlands, 4 Jur. 322; Rex *v.* Nicholls, 2 Keny. 512; The State *v.* Tolever, 5 Ire. 452; Rex *v.* Smyth, 5 Car. & P. 201; Harding's Case, 1 Greenl. 22; The State *v.* Morris, 3 Misso. 127.

[2] The State *v.* Bennett, 4 Dev. & Bat. 43; Rex *v.* Marrow, Cas. temp. Hardw. 174; The State *v.* Pearson, 2 N. H. 550; People *v.* Leonard, 11 Johns. 504; Beauchamp *v.* Morris, 4 Bibb, 312; Rex *v.* Storr, 3 Bur. 1698, 1699.

[3] The State *v.* Elliot, 11 N. H. 540.

[4] Vol. II. § 517; The State *v.* McDowell, 1 Hawks, 499; The State *v.* Watkins, 4 Humph. 256; The State *v.* Mills, 2 Dev. 420; The State *v.* Farnsworth, 10 Yerg. 261; Reg. *v.* Harris, 11 Mod. 113. And see Rex *v.* Gardiner, 1 Russ. Crimes, 3d Eng. ed. 53; The State *v.* Flowers, 1 Car. Law Repos. 97. See, as to real estate, The State *v.* Fort, 4 Dev. & Bat. 192.

[5] Rex *v.* Stroude, 2 Show. 149.

[6] Rex *v.* Wyvill, 7 Mod. 286. And see The State *v.* Tolever, 5 Ire. 452; Reg. *v.* Harris, 11 Mod. 113.

[7] The State *v.* Batchelder, 5 N. H. 549.

[8] The State *v.* Wilson, 3 Misso. 125, The State *v.* Morris, 3 Misso. 127.

[9] Commonwealth *v.* Taylor, 5 Binn 277.

[10] The State *v.* Phipps, 10 Ire. 17; Henderson *v.* Commonwealth, 8 Grat. 708; Commonwealth *v.* Keeper of Prison, 1 Ashm. 140; Rex *v.* Bake, 3 Bur. 1731; Rex *v.* Smyth, 5 Car. & P. 201, 1 Moody & R. 155; The State *v.* Pollok, 4 Ire. 305; The State *v.* Ray, 10 Ire. 39; The State *v.* Mills, 2 Dev. 420; The State *v.* Watkins, 4 Humph. 256; The State *v.* Armfield, 5 Ire. 207; Rex *v.* Gardiner, 1 Russ. Crimes, 3d Eng. ed. 53; 6 Mod. 175, note; 2 Mod. 306, note; Kilpatrick *v.* People, 5 Denio, 277; Rex *v.* Storr, 3 Bur. 1698; Rex *v.* Atkyns, 3 Bur. 1706; Rex *v.* Gil-

terror may be excited as well by numbers [1] as by other means. Therefore, for example, —

Excessive Distress — Abusing Family. — A landlord does not commit crime by taking an excessive distress; [2] nor does any one by merely going often to the house of another, and in words so abusing his family as to make their lives uncomfortable; the injury being only of a civil nature.[3]

§ 539. **Peace actually broken — Tending to Breach.** — To lay the foundation for a criminal prosecution the peace need not be actually broken. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Thus, —

§ 540. **Challenge to Duel — Going dangerously armed. — Libel — Words to stir Quarrels — Eavesdropping — Common Scold.** — Sending a challenge, verbal or written, to fight a duel; [4] going about armed, with unusual and dangerous weapons, to the terror of the people; [5] riotously driving in a carriage through the streets of a populous city, to the hazard of the safety of the inhabitants; [6] publishing libels,[7] even in some extreme cases uttering words [8] calculated to stir up resentments and quarrels; eavesdropping; [9] being a common scold; [10] and the like; are cognizable criminally by the common law. For —

The Reason. — The criminal law is as well preventive as vindic-

let, 3 Bur. 1707; The State v. Flowers, 1 Car. Law Repos. 97.

[1] The State v. Simpson, 1 Dev. 504; Milner v. Maclean, 2 Car. & P. 17; Commonwealth v. Shattuck, 4 Cush. 141; Rex v. Jopson, cited 8 Bur. 1702. And see The State v. Wilson, 3 Misso. 125.

[2] Rex v. Lesingham, T. Raym. 205; s. c. nom. Rex v. Leginham, 1 Mod. 71.

[3] Commonwealth v. Edwards, 1 Ashm. 46. See The State v. Caldwell, 2 Jones, N. C. 468; The State v. Bordeaux, 2 Jones, N. C. 241.

[4] 4 Bl. Com. 150; Rex v. Newdigate, Comb. 10; Reg. v. Langley, 2 Ld. Raym. 1029, 1031, 6 Mod. 124; Smith v. The State, 1 Stew. 506.

[5] The State v. Huntly, 3 Ire. 418; Sir John Knight's Case, 3 Mod. 117, Comb. 38.

[6] United States v. Hart, Pet. C. C. 390. **Fast Driving.** — As to fast driving contrary to a city ordinance, see Commonwealth v. Worcester, 3 Pick. 462; Stat. Crimes, § 20.

[7] Commonwealth v. Clap, 4 Mass. 163, 168, 169; Commonwealth v. Chapman, 13 Met. 68; Rex v. Topham, 4 T. R. 126; Reg. v. Collins, 9 Car. & P. 456; Rex v. Kinnersley, 1 W. Bl. 294; Reg. v. Lovett, 9 Car. & P. 462; Rex v. Pain, Comb. 358; The State v. Burnham, 9 N. H. 34.

[8] Reg. v. Taylor, 2 Ld. Raym. 879; Ex parte Marlborough, 1 New Sess. Cas. 195, 13 Law J. N. S. M. C. 105, 8 Jur. 664; ante, § 470.

[9] The State v. Williams, 2 Tenn. 108; 4 Bl. Com. 168; Commonwealth v. Lovett, 4 Pa. Law Jour. Rep. 5; post, § 1122 et seq.

[10] 4 Bl. Com. 168; Reg. v. Foxby, 6 Mod. 11; James v. Commonwealth, 12 S. & R. 220; United States v. Royall, 3 Cranch C. C. 620; Commonwealth v. Mohn, 2 Smith, Pa. 248; post, § 943 1101 et seq.

tive.[1] And a threatened danger demands correction the same as an actual one. Moreover, the community is disturbed when it is alarmed. Attempts are indictable,[2] and the before-mentioned acts are in the nature of attempt.

§ 541. **Barratry — Maintenance — Champerty.** — We have a triangle of analogous offences known as barratry,[3] maintenance, and champerty; [4] which are rather actual than attempted disturbances of the repose of the community. The gist of them severally is, that they embroil men in lawsuits and other like quarrels. Blackstone defines barratry to be the "frequently exciting and stirring up of suits and quarrels between his majesty's subjects, either at law or otherwise;" [5] maintenance, "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it;" [6] champerty, "a bargain with a plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." [7]

Selling Land in Adverse Possession. — The sale of real estate, of which another holds an adverse seisin, is usually a species of champerty.[8]

§ 542. **Disturbing Meetings.** — When people assemble for worship,[9] or in their town meetings,[10] or in others of the like sort,[11] or probably always when they come together in an orderly way for

[1] Ante, § 210.

[2] Ante, § 434, 435; post, § 723 et seq.

[3] Discussed Vol. II. § 62 et seq.

[4] Discussed Vol. II. § 121 et seq.

[5] 4 Bl. Com. 134; Case of Barretry, 8 Co. 36 *b*, 37 *b*; Rex v. ——, 3 Mod. 97; The State v. Chitty, 1 Bailey, 379; Commonwealth v. McCulloch, 15 Mass. 227.

[6] 4 Bl. Com. 134; Brown v. Beauchamp, 5 T. B. Monr. 413.

[7] 4 Bl. Com. 135; Thurston v. Percival, 1 Pick. 415; Rust v. Larue, 4 Litt. 411, 417; Douglass v. Wood, 1 Swan, Tenn. 393; Knight v. Sawin, 6 Greenl. 361; Byrd v. Odem, 9 Ala. 755; Key v. Vattier, 1 Ohio, 132; McMullen v. Guest, 6 Texas, 275; Lathrop v. Amherst Bank, 9 Met. 489; Holloway v. Lowe, 7 Port. 488.

[8] Vol. II. § 136–140; Cockell v. Taylor, 15 Eng. L. & Eq. 101; Hoyt v. Thompson, 1 Seld. 320; Van Dyck v. Van Beuren, 1 Johns. 345, 363; Whitesides v. Martin, 7 Yerg. 384; Williams v. Hogan, Meigs, 187; Wellman v. Hickson, 1 Ind. 581; Michael v. Nutting, 1 Ind. 481; Truax v. Thorn, 2 Barb. 156; Tuttle v. Hills, 6 Wend. 213, 224; Anderson v. Anderson, 4 Wend. 474. Whether Stat. 32 Hen. 8, c. 9, is common law in this country, see Brinley v. Whiting, 5 Pick. 348, 358; Hall v. Ashby, 9 Ohio, 96; People v. Sergeant, 8 Cow. 139; Sessions v. Reynolds, 7 Sm. & M. 130; Vol. II. § 137, 138.

[9] Bell v. Graham, 1 Nott & McC. 278, 280; The State v. Jasper, 4 Dev. 323.

[10] Commonwealth v. Hoxey, 16 Mass. 385.

[11] Campbell v. Commonwealth, 9 Smith, Pa. 266.

a purpose not unlawful, the common law holds any disturbance of the meeting to be a crime. In England, statutes were passed to protect dissenters in their worship,[1] said to be necessary, because their assembling was unlawful. In this country, where all forms of worship are favored,[2] it is admitted that such statutes are not required.[3] And opposed to this view, even of the English law, is a strong dictum by Lord Mansfield, who said: "I would have it understood in general, that Methodists have a right to the protection of this court, if interrupted in their decent and quiet devotions; and so have dissenters from the established church likewise, if so disturbed."[4] What amounts to disturbance varies with the nature and objects of the meeting.[5]

§ 543. **Conclusion.** — There are statutory offences within the scope of this chapter, but they are sufficiently explained in "Statutory Crimes." And those which are mentioned here are discussed more fully in other connections in the present work; the nuisances, in the closing chapters of this volume, and the others in the second volume.

[1] Rex *v.* Hube, Peake, 132, 5 T. R. 542. And see Rex *v.* Richardson, 6 Car. & P. 335; Rex *v.* Warren, Cowp. 371.
[2] Ante, § 496.
[3] The State *v.* Jasper, 4 Dev. 323.
[4] Rex *v.* Wroughton, 3 Bur. 1683.
[5] As to religious meetings, see 1 Russ. Crimes, 3d Eng. ed. 299. As to the rights of an audience at a theatre, Rex *v.* Forbes, 1 Crawf. & Dix C. C. 157; Vol. II. § 308, note. And see the subject of this section further discussed, Vol. II. § 301–310.

CHAPTER XL.

PROTECTION TO INDIVIDUALS.

§ 544. **Scope of this Chapter.** — We have already seen something of the principles on which the criminal law casts its protection over the individual, and of the extent of such protection.[1] The purpose of this chapter is to lead that topic into minuter detail, in connection with a general survey of the part of the criminal field to which it relates.

§ 545. **Fair Ground.** — The main proposition, already explained, is, that, while one occupies what the law deems fair ground, assumes no unequal position, toward another in any controversy or fraud, he is not indictable, however deep the wrong he may inflict. And, on the other hand, he is indictable if he assumes unfair ground, and thus does an injury to the individual. Now, when we descend to the minuter discussion, we must call to our aid a distinction of another sort; namely, —

§ 546. **Two Kinds of Force — (Mental — Physical).** — There are two kinds of force known among men, — mental and physical. The physical force has its just uses, but it should never be wielded aggressively by one private person against another. If one, therefore, does wield it thus to another's injury, he disturbs the order of the community; and, violating its repose, assumes toward his victim an unfair ground. But it is otherwise with mental force. Though, through it, a wrong is often done to an individual, its employment is, within certain limits, deemed on the whole a public benefit. Still there is an unfair ground, which

[1] Ante, § 231–233, 250–253.

one may occupy, in the employment even of this force; and when, from such ground, he injures an individual by it, he is indictable. In other words, the use of physical force, to the injury of a private person, is of itself an assumption of unfair ground toward him; but the use of mental force is not such of itself, yet it may become such from the manner of its use, or from special circumstances attending the particular instance. Carrying these distinctions in our minds, —

How the Chapter divided. — We shall consider, I. Offences against the Right of Personal Preservation and Comfort; II. Offences against the Right of Acquiring and Retaining Property; III. Offences against Personal Reputation; IV. Combinations to commit Private Injuries.

I. *Offences against the Right of Personal Preservation and Comfort.*

§ 547. **Homicide.** — The heaviest offence against the individual is the unjustifiable taking away of his life, called felonious homicide. The common law divides it into murder and manslaughter; that is, what in this country is termed the common law does, though the division proceeded from an early English statute.[1] And there are in many of the States other divisions also, introduced by statutes.[2] We have seen,[3] that it is likewise a crime against the public.

Mayhem. — Another like offence, but less grave, is mayhem.[4] It is an injury to a man by which he is rendered less able, in fighting, to defend himself or annoy his adversary.[5]

§ 548. **Assault and Battery.** — Two offences against the person and personal security, usually existing in the facts of cases together, and practically regarded by the law as one, are assault[6] and battery.[7] A battery is any unlawful beating, or other wrongful physical violence or constraint,[8] inflicted on a human being without his consent;[9] an assault is less than a battery, where the

[1] Vol. II. § 623–628; Crim. Proced. II. § 498 et seq.
[2] Ante, § 409; Vol. II. § 722–731.
[3] Ante, § 510.
[4] Ante, § 257, 259, 513.
[5] Vol. II. § 1001.
[6] Vol. II. § 22 et seq.
[7] Vol. II. § 70 et seq.
[8] Long *v.* Rogers, 17 Ala. 540; Reg. *v.* Cotesworth, 6 Mod. 172; Edsall *v.* Russell, 6 Jur. 996; Pike *v.* Hanson, 9 N. H. 491.
[9] Ante, § 258–260.

violence is cut short before actually falling; being committed whenever a reasonable apprehension of immediate physical injury, from a force already partly or fully put in motion, is created.[1] An assault is included in every battery.[2]

§ 549. **Noise to injure Sick Person.** — In like manner, if one knows that another is sick, and that the discharge of a gun near him will make him worse, yet discharges the gun producing the effect, this is indictable at the common law.[3]

§ 550. **Reason why — (Assault and Battery).** — These offences are generally spoken of in the books as breaches of the peace,[4] which in a qualified sense they are. But they are more. For the common law deems, that one assumes toward another unfair ground, and gives occasion for public interposition, when wrongfully undertaking to injure him by any kind of physical force.[5] There are, indeed, passages in the books in effect denying this, by maintaining that, in these cases, the liability to indictment rests solely on the disturbance to the public repose. But that such is not the doctrine of the law is plain; because, in considering these offences, it never inquires whether the act was committed under circumstances to create a public tumult. If the accused person inflicted unjustifiable blows, however privately, even on an infant[6] a day old, having no power to create a tumult or to revenge them, and no knowledge of the wrong, it holds him to be guilty of the offence.[7]

§ 551. **Further of Reasons — Erroneous Old Dicta, &c.** — Nothing so embarrasses the progress of true legal learning as the tenacity with which judges and text-writers adhere to such ancient forms of expression as, falling inadvertently from the lips of some old

[1] Vol. II. § 23; Stephens *v.* Myers, 4 Car. & P. 349; The State *v.* Davis, 1 Ire. 125; The State *v.* Crow, 1 Ire. 375; The State *v.* Morgan, 3 Ire. 186; The State *v.* Cherry, 11 Ire. 475; Commonwealth *v.* Eyre, 1 S. & R. 347; The State *v.* Sims, 3 Strob. 137; United States *v.* Hand, 2 Wash. C. C. 435; The State *v.* Blackwell, 9 Ala. 79; Reg. *v.* St. George, 9 Car. & P. 483; Blake *v.* Barnard, 9 Car. & P. 626; The State *v.* Smith, 2 Humph. 457.
[2] 1 Hawk. P. C. 6th ed. c. 62, § 1. And see, on this, and as additional to the above notes, Reg. *v.* Case, 1 Den. C. C. 580, 1 Eng. L. & Eq. 544, Temp. & M. 318, 4 Cox C. C. 220; Anonymous, 1 East P. C. 305; Reg. *v.* Button, 8 Car. & P. 660; Forde *v.* Skinner, 4 Car. & P. 239; Rex *v.* Nichol, Russ. & Ry. 130; Evans *v.* The State, 1 Humph. 394; The State *v.* Freels, 3 Humph. 228; Rex *v.* Ridley, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653; Reg. *v.* Miles, 6 Jur. 243; Rex *v.* Rosinski, 1 Moody, 19; Keay's Case, 1 Swinton, 543.
[3] Commonwealth *v.* Wing, 9 Pick. 1.
[4] Ante, § 536.
[5] Ante, § 252, 545, 546.
[6] Commonwealth *v.* Stoddard, 9 Allen, 280.
[7] See ante, § 232, 253, 274.

judge, or erroneously reported to have done so, have come to us conveying no correct legal meaning. The language in which a judicial opinion is clothed constitutes no part of the law of the case; and, though mere words transmitted to us from the bench are, if words of wisdom, properly regarded with respect, yet when they are inconsiderate and inaccurate, they should not be permitted to disfigure the pages of books in after times.

§ 552. **Continued.** — These observations are applicable, not only to the foregoing offences, but also to most of the others mentioned in this chapter. And it is not easy to see how lawyers, from generation to generation, could be so deluded by a form of inaccurate and careless words as to hold these various offences to be indictable solely as wrongs to the community.

§ 553. **Other Physical Wrongs.** — There are other physical wrongs, indictable on the same ground with those already mentioned. To some of these, as well as to those, the law has given specific names; as —

Kidnapping — False Imprisonment. — Kidnapping [1] and false imprisonment,[2] two offences against the individual, of which the latter is included in the former,[3] are punishable by the common law.

Robbery. — Robbery, another common-law offence, is a violent larceny from the person (or from the immediate presence, which is termed in law the person [4]) of one usually,[5] not always,[6] assaulted. Or, in more apt legal phrase, it is larceny committed by violence from the person of one put in fear.[7]

[1] 4 Bl. Com. 219; 1 East P. C. 429; The State *v.* Rollins, 8 N. H. 550; Rex *v.* Baily, Comb. 10.

[2] 4 Bl. Com. 218; Floyd *v.* The State, 7 Eng. 43. And see Breck *v.* Blanchard, 2 Fost. N. H. 303; Pike *v.* Hanson, 9 N. H. 491; Vol. II. § 746 et seq.

[3] Click *v.* The State, 3 Texas, 282; Vol. II. § 750.

[4] Rex *v.* Peat, 1 Leach, 4th ed. 228; Rex *v.* Lapier, 1 Leach, 4th ed. 320, 321; Vol. II. § 1177, 1178.

[5] Kit *v.* The State, 11 Humph. 167; Commonwealth *v.* Snelling, 4 Binn. 379; Rex *v.* Mason, Russ. & Ry. 419; Rex *v.* Edwards, 5 Car. & P. 518; s. c. nom. Rex *v.* Edward, 1 Moody & R. 257; United States *v.* Jones, 3 Wash. C. C. 209, 216; Rex *v.* Fallows, 5 Car. & P. 508; Rex *v.* Simons, 2 East P. C. 731; 2 East P. C. 707; Rex *v.* Moore, 1 Leach, 4th ed. 335; Rex *v.* Knewland, 2 Leach, 4th ed. 721.

[6] Rex *v.* Donnally, 1 Leach, 4th ed. 193; 2 East P. C. 713, 783; Rex *v.* Elmstead, 1 Russ. Crimes, 3d Eng. ed. 894; Rex *v.* Jones, 2 East P. C. 714, 715, 1 Leach, 4th ed. 139; Rex *v.* Harrold, 2 East P. C. 715; Rex *v.* Hickman, 1 Leach, 4th ed. 278, 2 East P. C. 728; Rex *v.* Astley, 2 East P. C. 729; Rex *v.* Brown, 2 East P. C. 731; Rex *v.* Reane, 2 East P. C. 734, 2 Leach, 4th ed. 616; Rex *v.* Gardner, 1 Car. & P. 479; Britt *v.* The State, 7 Humph. 45; Rex *v.* Egerton, Russ. & Ry. 375; Rex *v.* Fuller, Russ. & Ry. 408; Reg. *v.* Stringer, 2 Moody, 261; People *v.* McDaniels, 1 Parker C. C. 198.

[7] Vol. II. § 1156.

§ 554. **Rape.** — There is no form of violence more odious either in law or in morals than rape. It is the having of unlawful carnal knowledge, by a man of a woman, forcibly and against her will,[1] or when she does not consent;[2] and it is committed only by a male person (that is, as principal in the first degree), arrived at his age of legal puberty, which is conclusively fourteen years.[3] Puberty in the female is not essential.[4]

§ 555. **Forcible Marriage (or Abduction).** — Every form of unlawful physical constraint being indictable, it is particularly so to carry off forcibly a woman to marry her against her will.[5] For the force is greatly aggravated by this intent. An old English statute, 3 Hen. 7, c. 2, made such forcible abduction, if for lucre, the woman being an heiress, felony;[6] but whether this statute is common law with us is a question not settled by adjudication.[7]

§ 556. **Further of Physical Force.** — Let us proceed to further illustrations, — the doctrine being, it is remembered,[8] that one is indictable for every wrongful act of physical force, whereby he injures another.

Acting through Agent — Physical Elements. — It is not necessary the force should be immediate and direct; we have already seen, that a crime may be committed through the instrumentality of a third person, innocent or guilty;[9] so may it be equally through the agency of the physical elements. Thus, —

§ 557. **Abandoning Child or Servant — Neglect to provide — (Assault — Homicide).** — If one exposes or abandons a child, incapable of taking care of itself, to cold or wet, whereby it receives an injury, he is indictable for misdemeanor;[10] or, if the child dies,

[1] Vol. II. § 1113; 4 Bl. Com. 210; 1 Hale P. C. 628; 1 East P. C. 434; 1 Russ. Crimes, 3d Eng. ed. 675; The State *v.* Jim, 1 Dev. 142; Reg. *v.* Camplin, 1 Car. & K. 746, 1 Den. C. C. 89, 1 Cox C. C. 220; Reg. *v.* Hallet, 9 Car. & P. 748; Rex *v.* Jackson, Russ. & Ry. 487; The State *v.* Shepard, 7 Conn. 54.

[2] Vol. II. § 1114, 1115.

[3] Ante, § 878, it appearing, however, that some courts allow evidence of actual puberty in boys under fourteen. See Vol. II. § 1117.

[4] Vol. II. § 1118.

[5] **Attempt.** — So the attempt is indictable at common law. Rex *v.* Pigot, Holt, 758; Stat. Crimes, § 619.

[6] 4 Bl. Com. 208; 1 Hawk. P. C. 6th ed. c. 42; 1 East P. C. 452; Reg. *v.* Swanson, 7 Mod. 101, 102; Reg. *v.* Whistler, 7 Mod. 129, 132.

[7] Stat. Crimes, § 618. We have statutes of our own against this and analogous offences, as see Stat. Crimes, § 614-652.

[8] Ante, § 546, 548.

[9] Ante § 310; post, § 564, 631, 673, 677.

[10] Reg. *v.* Renshaw, 11 Jur. 615, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Reg. *v.* Mulroy, 3 Crawf. & Dix C. C. 318; Reg. *v.* Cooper, 1 Den. C. C. 459, Temp. & M. 125, 13 Jur. 502; Reg. *v.* Hogan, 5 Eng. L. & Eq. 558, 2 Den. C. C. 277, 15 Jur

for a felonious homicide.[1] And the same consequence follows if he neglects,[2] being under legal obligation, to furnish it with suitable food and clothing;[3] or thus neglects a servant, apprentice, or other person, where there is a legal duty.[4]

§ 558. **Malpractice by Physician.** — We have seen, that, if a medical man takes the life of a patient by gross malpractice, he is answerable for a felonious homicide;[5] so, if the injury falls short of the deprivation of life, he may be punished for a misdemeanor.[6] And —

Unwholesome Food. — Partly on this ground rests the offence, already mentioned,[7] of providing unwholesome food to be consumed in the community.[8]

§ 559. **Burglary — Arson.** — Dwelling-places are built to protect people from the physical elements and from the violence of beasts and men. Offences, therefore, against the habitation are indirectly such against the person. Of these, the common law has two, burglary and arson. The former[9] is the breaking[10] and entering,[11] in the night,[12] of another's dwelling-house,[13] with intent to commit a felony therein.[14] The latter[15] is the malicious[16] burning[17] of another's house.[18]

805; Gibson's case, 2 Broun, 366; Reg. v. Phillpot, 20 Eng. L. & Eq. 591.

[1] Reg. v. Waters, 1 Den. C. C. 356, Temp. & M. 57, 13 Jur. 130.

[2] Ante, § 241, 316, 317, 433; Vol. II. § 643, 659–662, 696.

[3] Rex v. Friend, Russ. & Ry. 20; Rex v. Smith, 2 Car. & P. 449.

[4] Rex v. Ridley, 2 Camp. 650; Rex v. Squire, 1 Russ. Crimes, 3d Eng. ed. 19; Reg. v. Pelham, 8 Q. B. 959, 10 Jur. 659, 15 Law J. N. S. M. C. 105; Rex v. Warren, Russ. & Ry. 47, note; Rex v. Meredith, Russ. & Ry. 46; Rex v. Booth, Russ. & Ry. 47, note; Reg. v. Gould, 1 Salk. 381; Rex v. Clerke, 2 Show. 193; Rex v. Barney, Comb. 405; Rex v. Friend, Russ. & Ry. 20.

[5] Ante, § 217, 314.

[6] Greenvelt's Case, 1 Ld. Raym. 213; Parke, J. in Rex v. Long, 4 Car. & P. 398, 405.

[7] Ante, § 484, 491.

[8] Treeve's Case, 2 East P. C. 821.

[9] Vol. II. § 90.

[10] Stat. Crimes, § 290, 312.

[11] Rex v. Rust, 1 Moody, 183; Rex v. Roberts, Car. Crim. Law, 3d ed. 293; Rex v. Bailey, Russ. & Ry. 341; Rex v. Bailey, 1 Moody, 23; The State v. McCall, 4 Ala. 643; Rex v. Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex v. Davis, Russ. & Ry. 499.

[12] Stat. Crimes, § 276.

[13] Stat. Crimes, § 277–287.

[14] 1 Russ. Crimes, 3d Eng. ed. 785; ante, § 427; Commonwealth v. Newell, 7 Mass. 245; The State v. Wilson, Coxe, 439; The State v. Bancroft, 10 N. H. 105; Lewis v. The State, 16 Conn. 32; Rex v. Knight, 2 East P. C. 510; Reg. v. Segar, Comb. 401; Rex v. Dobbs, 2 East P. C. 513; Rex v. Dingley, cited 1 Show. 53; The State v. Cooper, 16 Vt. 551.

[15] Vol. II. § 8.

[16] Ante, § 427–429.

[17] Stat. Crimes, § 310.

[18] Stat. Crimes, § 277, 289; ante, § 329, 334; 2 Russ. Crimes, 3d Eng. ed. 548; 4 Bl. Com. 220; 2 East P. C. 1015; Bloss v. Tobey, 2 Pick. 320, 325; Curran's Case, 7 Grat. 619; Sullivan v. The State, 5 Stew. & P. 175; Ritchey v. The State, 7 Blackf. 168; McNeal v. Woods, 3 Blackf

§ 560. **Mental Force — ("Cruelty" in Divorce Law).** — The foregoing are illustrations of the law's protection to the person against wrongful physical force. Mental force,[1] when directed against the personal safety and comfort, is not, like physical, universally indictable. But we shall see under the next sub-title, that, in some circumstances, it is so when employed to injure a man in his pecuniary interests;[2] and, in reason, it should be equally so when directed against his physical well-being. Practically, this question cannot often arise; because it is seldom that what proceeds only from the mind, with no aid from any thing physical, can injure a person in his physical existence. And there is no authority for holding that the production of mental unhappiness, by whatever means, is indictable. Even in matrimonial law, as administered in England and in most of our States, it is not, however extreme, the cruelty which authorizes a divorce.[3] And in the criminal law, we have seen, that one is not punishable for going frequently to a neighbor's house and so abusing his family as to render their lives uncomfortable.[4] Yet in matrimonial law, according to the better opinion, it is cruelty for a husband to injure his wife physically, as in her health, by conduct addressed primarily to her mind.[5] Assuming, then, that a physical injury produced by mental causes is in like manner indictable, still it results from the differing nature of the criminal law, that the mental force must be of a sort, or attended by circumstances, to place him who employs it on unequal ground toward the other.[6] Thus, —

Yielding to Persuasion — Kidnapping. — In a North Carolina case, Pearson, J., observing upon the construction of a statute against carrying free negroes out of the State to make slaves of them, said: "As a subject of the State, he [the free negro] has a right to expect protection against force; but, if he yields to seduction or persuasion, or allows himself to be beguiled by fraud, and of his own accord goes out of the State, it is his own folly.

485; Rex v. Pedley, Cald. 218, 1 Leach, 4th ed. 242, 2 East P. C. 1026; Rex v. Scofield, Cald. 397; Rex v. Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025; Rex v. Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1026; Rex v. Gowen, 2 East P. C. 1027, 1 Leach, 4th ed. 246, note; Rex v. Harris, 2 East P. C. 1023.

[1] Ante, § 546.

[2] Post, § 581–589.

[3] 1 Bishop Mar. & Div. § 722–725.

[4] Commonwealth v. Edwards, 1 Ashm. 46; ante, § 538.

[5] 1 Bishop Mar. & Div. § 728–732.

[6] Ante, § 252, 545; post, § 581, 582 585–588.

And although he has the protection of the State, and can bring an action for damages, he has no right to call for protection by the use of the strong arm of the criminal law, when he consents to the act, and does it of his own folly." [1]

§ 561. **How in Principle.** — Nothing can be clearer in legal principle than that, in the proper circumstances, mental force employed to create a physical injury to an individual may be punishable. For while it is established, that, as to various other things, particularly as to property, there can be guile or fraud cognizable by the criminal law, — being, indeed, a plain and admitted ground of common-law liability to indictment, — surely such guile or fraud employed to the detriment of a man's physical nature deserves reprehension, and merits punishment, quite as much as if it merely took away a little of his property.

§ 562. **Mental Force in Homicide.** — If life may be taken by mental force, and the act of so taking it be deemed murder or manslaughter, that will settle the entire question. Lord Hale says: "If a man either by working upon the fears of another, or possibly by harsh or unkind usage, put another into such passion of grief or fear that the party either die suddenly or contract some disease whereof he dies;" this, though murder or manslaughter in the sight of God, is not such at the common law, because of the difficulty of making proof.[2] And later elementary writers follow Hale.[3] But this proposition rests merely on private opinion, having never been affirmed in adjudication. And

[1] The State *v.* Weaver, Busbee, 9, 12.

[2] 1 Hale P. C. 429.

[3] 1 East P. C. 225. And see Commissioners Phillips & Walcott's Report on the Penal Code of Massachusetts, A. D. 1844, tit. Homicide, p. 12, note. These commissioners recommend that it be not an indictable homicide "to occasion death by the operation of words or signs upon the imagination of persons." They say this rule accords with the French code. They also deem it to be the rule of both the common and the Scotch law; but they add, that the British commissioners recommended the opposite for the code in India. As to the common law, they cite simply Lord Hale, and writers who cite him. As to the Scotch law, they refer to 1 Hume Crim. Law, 267, 2d ed. 177, — an authority which hardly sustains them. For instance, it is there said: "Among other charges against Patrick Kinninmouth is that of breaking into a person's house, and grievously alarming his wife, recently delivered, to the great injury (the libel says) of her health, and so that her child died, soon after, at her breast. *The interlocutor sustains the personal injury done to the mother* as a ground of arbitrary pain; but it takes no notice of the death of the child." The learned Scotch author cites this case, with another, to the point that the death must sufficiently appear to have been caused by the injury alleged in the libel. So much it shows; and also shows, it seems to me, that the principle of the Scotch law is not in accordance with the recommendation of the Massachusetts commissioners.

the reason assigned by this eminent authority is unsatisfactory; since — why cast out from court a case, the proof of which is plain, simply because it may be difficult to prove cases not in court? On the other hand, a learned judge more recently said to the jury: "A man may throw himself into a river under such circumstances as to render it not a voluntary act, by reason of force *applied either to the body or to the mind.* It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded." [1] And —

Command from a Superior. — There are other cases which recognize the doctrine, that threats,[2] or a command from one who stands in a relation entitling him to command,[3] requiring an act dangerous in itself, and not necessary to be performed, in consequence of which the person threatened or commanded does what causes his death, may lay the foundation for an indictment.

§ 563. **Mental Force in Homicide, continued.** — These cases may not be deemed to meet directly and fully the point of our present inquiry, but they do in effect. When one, who sustains to another a relation entitling him to command, compels by a mere unlawful order, accompanied or not by threats of violence, the person in subjection to do an act which causes his death, he applies mental force alone. The person threatened is not moved by external physical impulses to obey; the threat, indeed, is no more a physical force than is a lecture from a moralist, who inculcates the doctrine of physical suffering following immoral acts; but the force is purely mental, from mind to mind.

§ 564. **Distinguished from Act through Another.** — This doctrine, of the indictability of mental force, is not related to the familiar one, that he whose will contributes to an act performed by the physical volition of another is in law guilty. As resting on the latter doctrine, —

Procuring Capital Conviction by Perjury — (Homicide). — The old common law held it to be murder intentionally to cause the death of a human being, on trial for his life, by appearing as a witness against him, and committing perjury.[4] So all the books

[1] Erskine, J. in Reg. *v.* Pitts, Car. & M. 284.

[2] Rex *v.* Evans, 1 Russ. Crimes, 3d Eng. ed. 489.

[3] United States *v.* Freeman, 4 Mason, 505.

[4] 1 Russ. Crimes, 3d Eng. ed. 494. And see 1 Hawk. P. C. 6th ed. c. 31, § 7

say; but there is room for doubt whether this was ever truly the law. Perjury is an offence distinct from murder: the inflicting of a capital punishment, by officers of the law, in conformity to a judicial record, can hardly be deemed the act of the false witness; and, should we undertake to regard the government as the innocent agent of the witness,[1] there is a difficulty in making the act and intent appear concurrent in point of time,[2] because he has lost power over this agent, and he cannot prevent the execution if he repents. Probably this old doctrine is not to be deemed law at the present day.[3]

[1] Ante, § 310.

[2] Ante, § 207.

[3] 1. 1 Russ. Crimes, 3d Eng. ed. 494, 495; Commissioners Phillips & Walcott's Report on the Penal Code of Massachusetts A. D. 1844, tit. Homicide, p. 11, note; Rex v. Macdaniel, 1 Leach, 4th ed. 44. See, as illustrative, Peckham v. Tomlinson, 6 Barb. 253.

2. **Statutory Offences within this Sub-title.** — My endeavor, in the text, has been to present a view of the common law of the subject. Probably every one of the offences there mentioned has been more or less legislated upon. Arson, for example, which by the common law can be committed only of a house, has been made to include the burning of shops, and other structures not used for habitation. And burglary has been extended in like manner. These extensions are considered, in connection with the common-law offences, in the second volume. And there are more or less distinct crimes, created by statutes, discussed in "Statutory Crimes." Two, of considerable consequence, not included within either of those volumes, yet not such as it is deemed best to occupy much space with, are the Slave Trade and Revolt.

3. **The Slave Trade.** — There are statutes, English and American, intended to suppress the carrying away of slaves from Africa, and the trading in them. See R. S. of U. S. § 629, 1046, 5375, 5382, 5551–5569. But questions do not often arise under these statutes, therefore a mere reference to the adjudications is sufficient. Besides, the slave trade, with slavery, is passing away. The Josefa Segunda, 5 Wheat. 338; The Emily, 9 Wheat. 381; The St. Jago de Cuba, 9 Wheat. 409; The Antelope, 10 Wheat. 66; United States v. Gooding, 12 Wheat. 460; United States v. Preston, 3 Pet. 57; United States v. The Garonne, 11 Pet. 73; United States v. The Amistad, 15 Pet. 518; United States v. Schooner Kitty, Bee, 252; United States v. Smith, 4 Day, 121; Fales v. Mayberry, 2 Gallis. 560; United States v. La Coste, 2 Mason, 129; La Jeune Eugénie, 2 Mason, 409; The Brig Alexander, 3 Mason, 175; United States v. Battiste, 2 Sumner, 240; United States v. Libby, 1 Woodb. & M. 221; The Brig Caroline, 1 Brock. 384; United States v. Kennedy, 4 Wash. C. C. 91; Brig Tryphenia v. Harrison, 1 Wash. C. C. 522; The Porpoise, 2 Curt. C. C. 307; United States v. Darnaud, 3 Wal. Jr. 143; Strohm v. United States, Taney, 413; The Slavers, 2 Wal. 350, 375, 383; United States v. Smith, 3 Blatch. 255; United States v. The Isla de Cuba, 2 Clif. 295, 458, 2 Sprague, 26; United States v. Catharine, 2 Paine, 721; United States v. Smith, 2 Mason, 143; United States v. Kelly, 2 Sprague, 77; The State v. Caroline, 20 Ala. 19; Neal v. Farmer, 9 Ga. 555; Commonwealth v. Greathouse, 7 J. J. Mar. 590; Commonwealth v. Griffin, 7 J. J. Mar. 588; Commonwealth v. Nix, 11 Leigh, 636; The State v. Turner, 5 Harring. Del. 501; Commonwealth v. Jackson, 2 B. Monr. 402; Commonwealth v. Griffin, 3 B. Monr. 208. For the English law, see 1 Russ. Crimes, 3d Eng. ed. 163; Reg. v. Zulueta, 1 Car. & K. 215 Reg. v. Serva, 1 Den. C. C. 104, 2 Car. & K. 53.

4. **Revolt.** — Making and endeavoring to make a revolt or mutiny on shipboard are also statutory offences against the United States. R. S. of U. S. § 5359, 5360. But a simple reference to authorities relating to these offences will be sufficient. United States v. Kelly, 11 Wheat. 417; United States v. Savage, 5 Mason, 460; United States v. Smith, 3 Wash. C. C. 525; United States v. Smith, 3 Wash. C. C. 78; United States v. Smith, 1 Mason, 147; United States v. Keefe, 3 Mason, 475; United States v. Hamilton, 1 Mason, 443; United States v. Barker, 5 Mason, 404; United States v. Gardner, 5 Mason, 402; United States v. Haines, 5 Mason, 272; United States v. Morrison, 1 Sumner, 448; United States v. Matthews, 2 Sumner, 470; United States v. Ashton, 2 Sumner, 13; United States v. Cassedy, 2 Sumner, 582; United States v. Forbes, Crabbe, 558; United States v. Borden, 1 Sprague, 374; United States v. Nye, 2 Curt. C. C. 225; Ely v. Peck, 7 Conn. 239; Galloway v. Morris, 3 Yeates, 445.

II. *Offences against the Right of acquiring and retaining Property.*

§ 565. **Order of this Discussion.** — We shall first call to mind, by name, the several common-law offences within this sub-title, and the definition or a general description of each, then inquire after the rules of law which govern them, as viewed in a sort of collective way. And, as we proceed, we shall now and then bring within our vision some statutory modification of the common law, or analogous statutory crime.

§ 566. *The Several Offences:* —

Larceny. — Larceny is the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.[1]

Compound Larcenies. — A larceny committed under certain circumstances of aggravation is termed a compound larceny.[2] Thus, —

From the Person — from Shop — from Dwelling-house — Robbery. — Of this class are larcenies from the person,[3] from the dwelling-house, from the shop,[4] robbery,[5] and the like; a part of which, however, exist in their aggravated form only by force of statutes. Again, —

§ 567. **Receiving Stolen Goods.** — Under the old common law, it

[1] For other definitions, and authorities to sustain them and this one, see Vol. II § 758, note.

[2] Vol. II. § 892 et seq.

[3] 2 East P. C. 700, 703–706; Commonwealth v. Dimond, 3 Cush. 235; Rex v. Thompson, 1 Moody, 78; Reg. v. Walls, 2 Car. & K. 214.

[4] See Stat. Crimes, § 233; Reg. v. Ashley, 1 Car. & K. 198; The State v. Chambers, 6 Ala. 855.

[5] Ante, § 553; Vol. II. § 892, 1158.

was an indictable misprision to receive stolen goods knowing them to be stolen; but, before this country was settled, the receiver was by statute made an accessory after the fact.[1] In our States generally, the receiving is now, by statute, a substantive offence.

Embezzlement. — Embezzlement is a sort of statutory larceny, committed by servants and other like persons where there is a trust reposed, and therefore no trespass, so that the act would not be larceny at the common law.[2]

§ 568. **Malicious Mischief.** — There is an offence at the common law known as malicious mischief; but it has been so much legislated upon, and some of the statutes are of dates so early, that its common-law limits are indistinct. Blackstone says, that it "is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for, as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though only a *trespass* at common law, is now by a multitude of statutes made penal in the highest degree." And he goes on to enumerate several statutes which have elevated it to *felony*.[3]

§ 569. **How in our States — (Misapprehension from "Trespass").** — As accurate a writer as Blackstone would, at the present day, use, in a passage like the above, the word "misdemeanor," where he has "trespass."[4] But if we consider the slight change which the current language of the law has undergone, the passage is plain. Some judges, however, not rightly apprehending it, and relying on his authority, have denied that this offence exists under the common law of this country;[5] but the prevailing and better opinion is, that it does.[6]

[1] Post, § 699.

[2] See, as illustrating the nature of this offence, Rex *v.* Grove, 1 Moody, 447; People *v.* Dalton, 15 Wend. 581; Reg. *v.* Chapman, 1 Car. & K. 119; Rex *v.* Taylor, 3 B. & P. 596; Reg. *v.* Jackson, 1 Car. & K. 384; Rex *v.* Hall, Russ. & Ry. 463, 3 Stark. 67; Commonwealth *v.* Simpson, 9 Met. 138; Reg. *v.* Creed, 1 Car. & K. 63; Commonwealth *v.* Libbey, 11 Met. 64; Rex *v.* Murray, 5 Car. & P. 145, 1 Moody, 276; Reg. *v.* Norman, Car. & M. 501; Rex *v.* Headge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; The State *v.* Snell, 9 R. I. 112; Vol. II. § 318 et seq.

[3] 4 Bl. Com. 243, 244.

[4] See post, § 625.

[5] The State *v.* Wheeler, 3 Vt. 344. And see Illies *v.* Knight, 3 Texas, 312; Black *v.* The State, 2 Md. 376.

[6] People *v.* Smith, 5 Cow. 258; Loomis *v.* Edgerton, 19 Wend. 419; People *v.* Moody, 5 Parker, C. C. 568; Commonwealth *v.* Leach, 1 Mass. 59; The State *v.* Simpson, 2 Hawks, 460; The State *v.* Landreth, 2 Car. Law Repos. 446; The State *v.* Robinson, 3 Dev. & Bat. 130; Respublica *v.* Teischer, 1 Dall. 335; The State *v.* Council, 1 Tenn. 305. And see Commonwealth *v.* Taylor, 5 Binn. 277. Shell *v.* The State, 6 Humph. 283, can hardly be understood as opposing our doctrine, but rather as indicating one of its limits. **How in Scotland.** — A standard Scotch law writer says: "It may be affirmed generally, with respect to every act of great and wilful damage done to the property of another, and whether done from malice or misapprehension of right, that it is cognizable with us as a crime at common law; if it is done, as ordinarily happens, with circumstances of tumult and disorder, and of contempt and indignity to the owner. For instance, to enter a neighbor's lands, with a convocation of servants and dependants, and cast down the houses, or root out or spoil the woods, or throw open and deface the enclosures; to break down, in the like fashion, the sluices and aqueducts of a mill; to break or burn the boats and nets at a fishery, to tear and destroy the peats, turf, and fuel in a heath or moss; all these are competent articles of dittay. The same is true even of the bare usurpation of possession, though without any great damage done to the property, if it is accomplished with the show of a masterful force; so as to have a mixture of *riot*, as well as molestation or intrusion." 1 Hume Crim. Law, 2d ed. 119.

Limits of the Offence. — One of the doubtful questions is, whether this offence extends at the common law to real property, or is limited to personal. The North Carolina court defined it to be, "the wilful destruction of some article of personal property, from actual ill-will or resentment towards its owner."[1] And this definition, thus limiting it, is sustained alike by considerable authority[2] and legal reason. Other courts, with great force, maintain that it includes also injuries to real estate.[3] The statutes on this subject have generally, perhaps universally, extended it to real estate, the same as to personal.

§ 570. **How Limits in Reason.** — This question is of a sort which can be settled by no judicial reasoning; it must depend on authority.[4] On the one hand, it may be said that malicious mischief is of like nature with larceny; and, as the latter can be committed only of personal property, so therefore can the former. On the other hand, we have the view that all wrongful and wanton injuries to another's property, whether real or personal, are, when of a certain degree of turpitude,[5] and with certain exceptions, an assumption of unfair ground toward him;[6] and, as such, are

[1] The State *v.* Robinson, 3 Dev. & Bat. 130.

[2] The State *v.* Helmes, 5 Ire. 364; Brown's Case, 3 Greenl. 177. And see The State *v.* Burroughs, 2 Halst. 426; Commonwealth *v.* Powell, 8 Leigh, 719. See, as to destroying an account stated, Reg. *v.* Crisp, 6 Mod. 175 and notes.

[3] Loomis *v.* Edgerton, 19 Wend. 419; Comfort *v.* Fulton, 39 Barb. 56. And see Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach 4th ed. 12; Rex *v.* Joyner, J. Kel. 29. For a fuller view of this question, see Vol. II. § 984, 985.

[4] Vol. II. § 984, 985.

[5] Ante, § 212 et seq.

[6] Post, § 574, 575.

indictable. The injury called larceny was by the common law separated from the mass and elevated to felony (so the reasoning will run); leaving the other injuries, whether to real or personal property, indictable as misdemeanors.[1] To repeat, then, this question cannot be settled by legal argumentation.

[1] **Statutory Malicious Mischiefs.** — As to statutory malicious mischiefs, see Vol. II. § 983, 986–991, 994, 995, 997, 1000; and particularly Stat. Crimes, § 156, note, 246, 314, 431–449. There is one form of malicious mischief not there discussed; namely, —

Destroying Vessels: —

Under United States Laws. — The Revised Statutes of the United States make punishable, by fine and imprisonment, a conspiracy to destroy a vessel in order to defraud underwriters or persons having a lien upon it, and the building or fitting out of a vessel to be so destroyed. And they make it a capital offence actually to cast away or otherwise destroy the vessel for this purpose; also, without reference to underwriters and persons having liens, they make it capital for one not the owner "corruptly" to cast away or otherwise destroy a vessel "to which he belongs" on the high seas. And they make the unsuccessful attempt punishable, but less severely. These provisions are a mere re-enactment, with unimportant changes, of former ones; as see Act of March 26, 1804, and Act of March 3, 1825, 2 Stats. at Large, 290, and 4 Ib. 122. And see, as perhaps relating to some changes in phraseology, Roberts *v.* The State, 2 Head, 501; United States *v.* Johns, 1 Wash. C. C. 363, 4 Dall. 412. For English statutes which served as the originals of our own, see 2 East P. C. 1095 et seq. The meanings of some of the terms employed in this statute are explained in Statutory Crimes. Thus, "**Destroy.**" — This word does not require an irreparable disruption of the parts; it is satisfied when the vessel is unfitted for service beyond recovery by ordinary means. Stat. Crimes, § 224. And see § 214 and note, 223, 446. Therefore, when holes were bored in a vessel's bottom, and she filled and was abandoned, but the crew of another vessel, finding her, pumped her out and towed her to port, she was held to have been destroyed. United States *v.* Johns, 1 Wash. C. C. 363, 4 Dall. 412. And see United States *v.* Vanranst, 3 Wash. C. C. 146. But, says Mr. East, "If the ship be only run aground or stranded upon a rock, and be afterwards got off in a condition to be capable of being easily refitted, she cannot be said to be 'cast away or destroyed.'" De Londo's Case, 2 East P. C. 1098. "**To injure any Person that may have underwritten,**" &c. — A corporation is a "person" within this provision. Stat. Crimes, § 212. And, on a trial, the act of incorporation being proved, it is only further necessary to show that the company was *de facto* organized, and conducting as a corporation, and persons usually doing business as its officers signed the policy. It was also observed: "The law punishes the act when done with an intent to prejudice; it does not require that there should be an actual prejudice. The prejudice intended is to be to a person who has underwritten, or who shall underwrite, a policy thereon, which, for aught the prisoner knows, is valid; and does not prescribe that the policy should be valid so that a recovery could be had thereon. It points to the intended prejudice of an underwriter *de facto*." United States *v.* Amedy, 11 Wheat. 392, 410, opinion by Story, J. **Conspiring.** — The act of March 3, 1825, making a conspiring punishable, was intended to protect the commerce on our rivers and lakes as well as on the high seas; and, as such, it does not exceed the constitutional power of Congress. United States *v.* Cole, 5 McLean, 513. **The Procedure.** — See, as to the form of the indictment and further as to the proofs, United States *v.* McAvoy, 4 Blatch. 418; United States *v.* Johns, 1 Wash. C. C. 363; Reg. *v.* Kohn, 4 Fost. & F. 68.

Under State Laws. — It seems to fol

§ 571. **Cheat at Common Law.** — The common-law cheat is important to be understood, though practically it is nearly superseded by the statutes against false pretences. It is a fraud accomplished through the instrumentality of some false symbol or token,[1] of a nature against which common prudence cannot guard,[2] to the injury[3] of one in some pecuniary interest. And there are indictable public wrongs analogous to cheat.[4] The English statute, 33 Hen. 8, c. 1,[5] against obtaining money or goods by a false privy token or counterfeit letter, affirmed the prior common law, to which it seems to have added little, if any thing;[6] and it is common law in this country.[7]

False Pretences. — Later English and American legislation has extended the doctrine to false pretences, where no symbol or token is employed.[8]

§ 572. **Forgery.** — One class of common-law cheats, including as well the unsuccessful attempt[9] as the executed act, is forgery.

low, from principles already discussed (see ante, § 152, and other places), that it is not competent for the States to punish offences of this sort, committed beyond their territorial limits. For illustration: The Massachusetts statute provides, that "whoever wilfully casts away, burns, sinks, or otherwise destroys a ship or vessel, with intent to injure or defraud any owner of such ship or vessel, or the owner of any property laden on board the same, or an insurer of such ship, vessel, or property, or of any part thereof, shall be punished," &c. Mass. Gen. Stats. c. 161, § 76. But though the writer is not able to refer to any decision of the question, it would seem the courts should not construe this statute to apply to acts committed out of the State; and, should they do so, the construction would render the statute so far unconstitutional.

[1] Rex *v.* Lara, 2 Leach, 4th ed. 647, 2 East P. C. 819, 6 T. R. 565; Commonwealth *v.* Boynton, 2 Mass. 77; Reg. *v.* Jones, 2 Ld. Raym. 1013; Anonymous, Lofft, 146; Anonymous, 7 Mod. 40; Rex *v.* Govers, Say. 206; The State *v.* Grooms, 5 Strob. 158; People *v.* Stone, 9 Wend. 182; Commonwealth *v.* Warren, 6 Mass. 72; Respublica *v.* Teischer, 1 Dall. 335; Commonwealth *v.* Speer, 2 Va. Cas. 65; The State *v.* Patillo, 4 Hawks, 348; People *v.* Gates, 13 Wend. 311, 319; Respublica *v.* Powell, 1 Dall. 47; The State *v.* Wilson, 2 Mill, 135, 139; Hartmann *v.* Commonwealth, 5 Barr, 60; Rex *v.* Fowle, 4 Car. & P. 592; Rex *v.* Fawcett, 2 East P. C. 862.

[2] Anonymous, 6 Mod. 105; People *v.* Babcock, 7 Johns. 201; Cross *v.* Peters, 1 Greenl. 376, 387; Commonwealth *v.* Warren, 6 Mass. 72; People *v.* Stone, 9 Wend. 182; The State *v.* Stroll, 1 Rich. 244; The State *v.* Patillo, 4 Hawks, 348; Respublica *v.* Powell, 1 Dall. 47. And see Rex *v.* Flint, Russ. & Ry. 460.

[3] Rex *v.* Fawcett, 2 East P. C. 862; Commonwealth *v.* Davidson, 1 Cush. 33; Rex *v.* Dale, 7 Car. & P. 352; The State *v.* Little, 1 N. H. 257, 258; People *v.* Thomas, 3 Hill, N. Y. 169; People *v.* Galloway, 17 Wend. 540. As to the limit of the doctrine on this point, see The State *v.* Mills, 17 Maine, 211.

[4] Vol. II. § 161–164.

[5] Anonymous, 6 Mod. 105, note; 2 East P. C. 826.

[6] 1 Gab. Crim. Law, 206.

[7] Commonwealth *v.* Warren, 6 Mass. 72. And see Respublica *v.* Powell, 1 Dall. 47.

[8] Vol. II. § 409 et seq.

[9] Ante, § 434, 437. It is said that forgery was indictable as a cheat at common

It is the false[1] making or materially altering,[2] with intent to defraud,[3] of any writing which, if genuine, might apparently be[4] of legal efficacy, or the foundation of a legal liability.[5] And the act may be equally forgery, though the person purporting to become liable in the writing is a mere fictitious name, because this may be equally an attempt to defraud.[6]

law only when successful. 2 East P. C. 825; 1 Gab. Crim. Law, 205. Clearly this must be so, owing to the distinction between a complete offence and an indictable attempt. Stat. Crimes, § 225 and note. But this distinction refers only to the form of the indictment; an unsuccessful forgery being an attempt to cheat. That there need be no fraud actually effected, see The State v. Washington, 1 Bay, 120; Rex v. Crocker, 2 Leach, 4th ed. 987, Russ. & Ry. 97, 2 New Rep. 87; Rex v. Ward, 2 Ld. Raym. 1461, 2 East P. C. 861; Commonwealth v. Ladd, 15 Mass. 526. Contra, Reg. v. Boult, 2 Car. & K. 604.

[1] Rex v. Story, Russ. & Ry. 81; Reg. v. Inder, 1 Den. C. C. 325; Rex v. Webb, 3 Brod. & B. 228, Russ. & Ry. 405, cited 6 Moore, 447; Rex v. Aickles, 1 Leach, 4th ed. 438, 2 East P. C. 968; The State v. Shurtliff, 18 Maine, 368; Mead v. Young, 4 T. R. 28.

[2] The State v. Floyd, 5 Strob. 58; The State v. Robinson, 1 Harrison, 507; Reg. v. Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531; Rex v. Dawson, 1 Stra. 19, 2 East P. C. 978; Rex v. Post, Russ. & Ry. 101; Rex v. Treble, 2 Leach, 4th ed. 1040, 2 Taunt. 328, Russ. & Ry. 164; The State v. McLeran, 1 Aikens, 311; Rex v. Kinder, 2 East P. C. 855; The State v. Waters, 2 Tread. 669; The State v. Gherkin, 7 Ire. 206; The State v. Thornburg, 6 Ire. 79; The State v. Greenlee, 1 Dev. 523; People v. Fitch, 1 Wend. 198.

[3] Blake v. Allen, Sir F. Moore, 619; The State v. Odel, 3 Brev. 552; Reg. v. Cooke, 8 Car. & P. 582; Reg. v. Beard, 8 Car. & P. 143, 148; Grafton Bank v. Flanders, 4 N. H. 239, 242; People v. Peabody, 25 Wend. 472; Rex v. Crocker, Russ. & Ry. 97, 2 New Rep. 87, 2 Leach, 4th ed. 987; Reg. v. Page, 8 Car. & P. 122; Jackson v. Weisiger, 2 B. Monr. 214; The State v. Givens, 5 Ala. 747. As to principles which limit this intent, see Reg. v. Hill, 2 Moody, 30; Rex v. Whiley, Russ. & Ry. 90; Reg. v. Beard, 8 Car. & P. 148; Reg. v. Wilson, 2 Car. & K. 527, 1 Den. C. C. 284; Rex v. Forbes, 7 Car. & P. 224; Reg. v. Parish, 8 Car. & P. 94.

[4] People v. Galloway, 17 Wend. 540, 542; Rex v. Teague, Russ. & Ry. 33, 2 East P. C. 979; De Bow v. People, 1 Denio, 9; Reg. v. Pike, 2 Moody, 70; Rex v. Deakins, 1 Sid. 142; Rex v. McIntosh, 2 East P. C. 942; s. c. nom. Rex v. Mackintosh, 2 Leach, 4th ed. 883; Commonwealth v. Linton, 2 Va. Cas. 476. Yet see People v. Fitch, 1 Wend. 198.

[5] Ames's Case, 2 Greenl. 365; Rex v. Jones, 2 East P. C. 991; Reg. v. Toshack, 1 Den. C. C. 492; Commonwealth v. Ayer, 3 Cush. 150; The State v. Smith, 8 Yerg. 150; Rex v. Knight, 1 Salk. 375, 1 Ld. Raym. 530; Reg. v. King, 7 Mod. 150; Rex v. O'Brian, 7 Mod. 378; Rex v. Harris, 1 Moody, 393; People v. Shall, 9 Cow. 778; People v. Harrison, 8 Barb. 560; Harris v. People, 9 Barb. 664; The State v. Van Hart, 2 Harrison, 327; Van Horne v. The State, 5 Pike, 349; Reg. v. Boult, 2 Car. & K. 604; Commonwealth v. Chandler, Thacher Crim. Cas. 187; Rex v. Burke, Russ. & Ry. 496; Commonwealth v. Mycall, 2 Mass. 136; Barnum v. The State, 15 Ohio, 717; Rex v. Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Rex v. Harris, 6 Car. & P. 129; Rex v. Wall, 2 East P. C. 953; Rex v. Gade, 2 Leach, 4th ed. 732, 2 East P. C. 874; Upfold v. Leit, 5 Esp. 100; Foulkes v. Commonwealth, 2 Rob. Va. 836; The State v. Jones, 1 Bay, 207; The State v. Gutridge, 1 Bay, 285; People v. Cady, 6 Hill, N. Y. 490.

[6] Rex v. Marshall, Russ. & Ry. 75; Rex v. Taft, 1 Leach, 4th ed. 172, 2 East P. C. 959; People v. Peabody, 25 Wend. 472; Rex v. Peacock, Russ. & Ry. 278; Rex v. Bontien, Russ. & Ry. 260; Reg. v. Hill, 2 Moody, 30; Rex v. Francis, Russ. & Ry. 209; Rex v. Shepherd, 2 East P.

§ 572 *a*. **Fraudulent Conveyance — (Secreting — Mortgaged, &c.)** — The statute of 13 Eliz. c. 5, against fraudulent conveyances, is very familiar in our civil jurisprudence. It is, in its principal provisions, common law in our States.[1] By § 3, "all and every the parties" to the fraudulent conveyance, "and being privy and knowing of the same," who "shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same" as being true "and upon good consideration," or "shall alien, &c., any the lands, &c., goods, leases, or other things to him, &c., conveyed as is aforesaid, &c., shall incur the penalty and forfeiture, &c., and also being thereof lawfully convicted shall suffer imprisonment for one-half year without bail or mainprise." An indictment lies upon this statute in England,[2] and there is no reason why it should not also in our States. But the author is unable to refer to any case in which this proceeding has actually been attempted. Yet, in some of our States, there are similar statutes, generally in broader terms, and extending to secreting property, selling it when mortgaged, and the like, on which there have been indictments.[3]

C. 967; s. c. nom. Rex v. Sheppard, 1 Leach, 4th ed. 226; Rex v. Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992; Rex v. Bolland, 1 Leach, 4th ed. 83, 2 East P. C. 958; Rex v. Lewis, 2 East P. C. 957, Foster, 116; Rex v. Whiley, Russ. & Ry. 90; Commonwealth v. Chandler, Thacher Crim. Cas. 187; The State v. Givens, 5 Ala. 747; Rex v. Wilks, 2 East P. C. 957; Reg. v. Avery, 8 Car. & P. 596; Rex v. Dunn, 1 Leach, 4th ed. 57.

[1] 1 Bishop Mar. Women, § 737–740; Report of Judges, 3 Binn. 595, 621; Kilty Rep. Stats. 234.

[2] Reg. v. Smith, 6 Cox C. C. 31.

[3] People v. Underwood, 16 Wend. 546; People v. Morrison, 13 Wend. 399; Commonwealth v. Brown, 15 Gray, 189; Commonwealth v. Strangford, 112 Mass. 289; Commonwealth v. Damon, 105 Mass. 580; The State v. Marsh, 36 N. H. 196; The State v. Small, 31 Texas, 184; The State v. Devereaux, 41 Texas, 383; Stow v. People, 25 Ill. 81; People v. Stone, 16 Cal. 369; People v. Garnett, 35 Cal. 470; Goodenough v. Spencer, 46 How. Pr. 347. And see Christopher v. Van Liew, 57 Barb. 17. Of the like kind with the offences mentioned in our text are —

Frauds against Bankrupt Acts. — It is not proposed to discuss these frauds. There have long been statutes in England against them and the like, under the insolvent laws; as see 1 Hawk. P. C. Curw. ed. p. 586, 588; 2 Russ. Crimes, 3d Eng. ed. 228 et seq., 235; 4 Bl. Com. 156. And the English books contain various reported cases on this subject, as — Rex v. Mitchell, 4 Car. & P. 251; Rex v. Walters, 5 Car. & P. 138; Reg. v. Radcliffe, 2 Moody, 68; Reg. v. Marner, Car. & M. 628; Reg. v. Lands, Dears. 567, 33 Eng. L. & Eq. 536; Reg. v. Gordon, Dears. 586; Reg. v. Sloggett, Dears. 656, 36 Eng. L. & Eq. 620; Reg. v. Scott, Dears. & B. 47, 36 Eng. L. & Eq. 644; Reg. v. Milner, 2 Car. & K. 310; 1 Gab. Crim. Law, 441; Rex v. Page, 1 Brod. & B. 308, Russ. & Ry. 392, 3 Moore, 656, 7 Price, 616; Ratcliffe's Case, 2 Lewin, 57, 82; Rex v. Forsyth, Russ. & Ry. 274; Reg. v. Harris, 1 Den. C. C. 461, 3 Cox C. C. 565, Reg. v. Jones, 4 B. & Ad. 345, 1 Nev. & M. 78; Rex v. Frith, 1 Leach, 4th ed. 10; Rex v. Burraston, Gow, 210; Rex v. Punshon, 3 Camp. 96; Rex v. Britton, 1 Moody & R. 297; Rex v. Evani, 1 Moody, 70; Reg. v. Dealtry, 1 Den. C.

§ 573. **Extortion.** — Extortion is defined by Blackstone to "consist in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due." [1]

§ 574. *General Rules of Law governing the foregoing Offences:* —

Physical Force. — Recurring to the two kinds of force, physical and mental,[2] directed against the property-rights of individuals, we have seen,[3] that, whenever one intentionally injures another in his person, by physical force, he must answer for his act as a crime; because the law deems, that, in employing this instrumentality, he places himself toward the other on unfair ground. Therefore, —

As injuring Property. — In reason, this rule is not restricted to injuries to the person; it applies to injuries to the property as well. And this doctrine of reason has a sort of status in the adjudged law. But, —

§ 575. **Limitations of Doctrine.** — As applied to property, the rule meets with many qualifying rules, intercepting it, and cutting it short; [4] and, unless we bear them in mind, we shall go astray. Indeed, these qualifying rules are so numerous, and some are so wide in their influence, that, overlying at places the rule which they qualify, they render it an unsafe guide to a practitioner not well versed in this department of our law. In other words, the rule is theoretically correct, but practically it should be applied

C. 287; Reg. *v.* Hill, 1 Car. & K. 168; Reg. *v.* Hillam, 12 Cox C. C. 174, 2 Eng. Rep. 227; Reg. *v.* Beaumont, 12 Cox C. C. 183; Reg. *v.* Watkinson, 12 Cox C. C. 271, 4 Eng. Rep. 547; Reg. *v.* Widdop, Law Rep. 2 C. C. 3; s. c. nom. Reg. *v.* Widdup, 12 Cox C. C. 251. We have had some American statutes of the like sort; as to which see Dyott *v.* Commonwealth, 5 Whart. 67; Guldin *v.* Commonwealth, 6 S. & R. 554; United States *v.* Dickey, Morris, 412. Under the penalties of the present Bankrupt Act of the United States, some questions have arisen; as to which see — United States *v.* Prescott, 2 Abb. U. S. 169; United States *v.* Prescott, 2 Dillon, 405; United States *v.* Frank, 2 Bis. 263; United States *v.* Latorre, 8 Blatch. 134; United States *v.* Clark, 1 Lowell, 402, 4 Bankr. Reg. 59; United States *v.* Pusey, 6 Bankr. Reg. 284.

[1] 4 Bl. Com. 141; 1 Russ. Crimes, 3d Eng. ed. 142; 1 Hawk. P. C. c. 68, § 1; Reg. *v.* Tracy, 6 Mod. 30; Rex *v.* Burdett, 1 Ld. Raym. 148, 149; Runnells *v.* Fletcher, 15 Mass. 525; Respublica *v.* Hannum, 1 Yeates, 71; The State *v.* Stotts, 5 Blackf. 460; People *v.* Whaley, 6 Cow. 661; Reg. *v.* Best, 2 Moody, 124; Smythe's Case, Palmer, 318; Rex *v.* Baines, 6 Mod. 192; Commonwealth *v.* Bagley, 7 Pick. 279; Shattuck *v.* Woods, 1 Pick. 171; Reg. *v.* Woodward, 11 Mod. 137. See Vol. II. § 890, for a definition differing slightly from this in terms.

[2] Ante, § 546.

[3] Ante, § 550, 556.

[4] Stat. Crimes, § 86–90, 123 et seq.

cautiously, and only by one somewhat familiar with the doctrines of the criminal law and with the adjudged cases. Let us call to mind some of the qualifying rules.

§ 576. **Claim of Ownership.** — It is familiar doctrine, that a man may do what he will with his own if he does not injure his neighbor.[1] This doctrine, illumined by the principles relating to the intent, shows, that what one does of damage or destruction to another's property, under the *bona fide* belief of being himself its owner, does not subject him to criminal liability, however it may to civil.[2]

§ 577. **Real Estate.** — Again, real estate, being stable and firm, is deemed by the common law not to require protection in the criminal courts; therefore no offence to it, other than perhaps malicious mischief,[3] is indictable. But, upon the doctrine of this proposition great innovations have been made by statutes. It originated in rude times, when such estate consisted chiefly in lands and castles; and it is not adapted to modern conditions. We have indeed seen,[4] that —

Arson. — Arson is a crime at common law; but, though the thing burned is realty, the offence is rather against the security of the habitation than the property in it. Therefore, if the lessee of a house burns it, he does not commit common-law arson.[5] Also —

Burglary. — Burglary is an offence against the security of the habitation, not at all against the dwelling-house as property. And —

Forcible Entries and Detainers. — These are indictable, not to protect the realty, but because of their disturbing the public peace.[6]

§ 578. **Choses in Action — (Larceny).** — Once more: a man cannot at common law commit larceny, for example, by taking and carrying away a mere evidence of indebtedness; as a promissory note, bank-note, or bond, termed a *chose in action;* because he does not thereby get either the money due, or the right to

[1] Bloss *v.* Tobey, 2 Pick. 320, 325; ante, § 260.

[2] Ante, § 303; Vol. II. § 851, 998.

[3] Ante, § 568–570.

[4] Ante, § 559.

[5] McNeal *v.* Woods, 8 Blackf. 485; Rex *v.* Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1023; Rex *v.* Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025.

[6] Vol. II. § 489, 490.

receive it.[1] This exception has also been abrogated by statutes in most or all of the States.[2] So —

Wild Animals. — Animals *feræ naturæ* and unreclaimed are not sufficiently property to be the subjects of common-law larceny;[3] and, of this doctrine, only a few[4] statutory modifications have been made.

§ 579. **Too Small — (Larceny).** — Lastly, we have the extensive influence of the maxim, that the law does not regard small things.[5] In applying this maxim, we are to be guided rather by what has been held, than by any abstract reasoning. For example, while it is indictable to steal a chattel of the smallest value,[6] it is not to take the mere use[7] of one even of large worth; yet it would be difficult to sustain this distinction by any abstract reasoning which would be generally accepted as satisfactory.

§ 580. **Whether other Exceptions.** — The foregoing are such exceptions as occur to the writer to the rule, that physical force wrongly directed against the property rights of individuals is indictable at the common law. There may be others. This consideration of rule and exceptions is useful in a general way, but practitioners will need to consult the minuter expositions in our second volume.

§ 581. **Mental Force.** — We come now to consider the question of mental force, applied to the injury of individuals in their

[1] 2 Russ. Crimes, 3d Eng. ed. 70, 73; 2 East P. C. 597; Reg. *v.* Murtagh, 1 Crawf. & Dix C. C. 355; Spangler *v.* Commonwealth, 3 Binn. 533; Rex *v.* Pearson, 5 Car. & P. 121, 1 Moody, 313; Ratcliffe's Case, 2 Lewin, 57, 96; Culp *v.* The State, 1 Port. 33; Vol. II. § 769.

[2] Damewood *v.* The State, 1 How. Missis. 262; Greeson *v.* The State, 5 How. Missis. 33; Commonwealth *v.* Rand, 7 Met. 475; Boyd *v.* Commonwealth, 1 Rob. Va. 691; The State *v.* Dobson, 3 Harring. Del. 563; Sylvester *v.* Girard, 4 Rawle, 185; McDonald *v.* The State, 8 Misso. 283; Pomeroy *v.* Commonwealth, 2 Va. Cas. 342; The State *v.* Tillery, 1 Nott & McC. 9; The State *v.* Casados, 1 Nott & McC. 91; Culp *v.* The State, 1 Port. 33; Cummings *v.* Commonwealth 2 Va. Cas. 128; Commonwealth *v.* Messinger, 1 Binn. 273; Rich *v.* The State, 8 Ohio, 111; People *v.* Wiley, 3 Hill, N. Y. 194, 211; The State *v.* Allen, R. M. Charl. 518; Vol. II. § 782, 783, 785.

[3] 2 Russ. Crimes, 3d Eng. ed. 84; Norton *v.* Ladd, 5 N. H. 203; Reg. *v.* Cheafor, 2 Den. C. C. 361, 8 Eng. L. & Eq. 598; The State *v.* Murphy, 8 Blackf. 498; McConico *v.* Singleton, 2 Mill, 244; Broughton *v.* Singleton, 2 Nott & McC. 338; Wallis *v.* Mease, 3 Binn. 546; Pierson *v.* Post, 3 Caines, 175; Rex *v.* Searing, Russ. & Ry. 350; Reg. *v.* Cox, 1 Car. & K. 494; Rex *v.* Brooks, 4 Car. & P. 131; Vol. II. § 771–779.

[4] Stat. Crimes, § 232.

[5] Ante, § 212 et seq.

[6] Ante, § 224.

[7] Rex *v.* Philipps, 2 East P. C. 662; and ante, § 566.

property. And although such force, thus applied, is indictable under some circumstances, we find the rule relating to it not so broad as prevails respecting physical force. Men acquire physical strength by the cultivation of the soil, and by the various other active labors and pleasures of life, without exercising themselves upon one another; while mind is developed almost solely by collision with mind. Therefore in such collision the government, consulting the general good, allows its subjects free scope, if no one assumes toward another what we have called unfair ground.[1] Thus, —

§ 582. **Cheats — Breach of Contract — Enticing Apprentice.** — When one injures his neighbor by telling him a falsehood, the common law says, the neighbor should not have believed him;[2] when, by a breach of contract, or of a duty in the nature of contract, the injured person is admonished that he should have learned better than to trust him:[3] and so, in these and other like cases, as, where an apprentice is enticed from his master's service,[4] the government merely permits the party injured to carry on, in its courts, a suit for civil redress,[5] but declines itself to interfere by a criminal prosecution. What would be the consequence if the like injuries were produced by physical force may not be quite plain; yet, —

Robbery — Larceny. — Where one gets away the personal property of another by the use, actual or even sometimes only threatened, of physical force, he commits robbery or larceny;[6] while,

[1] Ante, § 252, 546.

[2] Anonymous, 6 Mod. 105; Reg. *v.* Jones, 2 Ld. Raym. 1013, 1 Salk. 379; Commonwealth *v.* Warren, 6 Mass. 72; The State *v.* Delyon, 1 Bay, 353; Rex *v.* Bower, Cowp. 323; People *v.* Babcock, 7 Johns. 201; The State *v.* Justice, 2 Dev. 199; People *v.* Miller, 14 Johns. 371; Reg *v.* Hannon, 6 Mod. 311; Rex *v.* Lewis, Say. 205; Rex *v.* Driffield, Say. 146; Rex *v.* Botwright, Say. 147; Rex *v.* Grantham, 11 Mod. 222; Rex *v.* Osborn, 3 Bur. 1697; Rex *v* Bryan, 2 Stra. 866.

[3] Rex *v.* Channell, 2 Stra. 793; Rex *v.* Dunnage, 2 Bur. 1130; Rex *v.* Bradford, 1 Ld. Raym. 366; Commonwealth *v.* Hearsey, 1 Mass. 137; Rex *v.* Wheatley, 1 W. Bl. 273; s. c. nom. Rex *v.* Wheatly, 2 Bur. 1125; Rex *v.* Watson, 2 T. R. 199.

[4] Reg. *v.* Daniel, 6 Mod. 182, 1 Salk. 380, 3 Salk. 191; s. c. nom. Reg. *v.* Daniell, 6 Mod 99; Rex *v.* Pettit, Jebb, 151.

[5] Ante, § 251.

[6] Rex *v.* Blackham, 2 East P. C. 711; Rex *v.* Taplin, 2 East P. C. 712; Reg. *v.* Walls, 2 Car. & K. 214; Rex *v.* Macauley, 1 Leach, 4th ed. 287; Rex *v.* Robins, 1 Leach, 4th ed. 290, note; Rex *v.* Horner, 1 Leach, 4th ed. 270; Rex *v.* Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557, 708; Rex *v.* Frances, 2 Comyns, 478, 2 Stra. 1015; s. c. nom. Rex *v.* Francis, Cas. temp. Hardw. 113; Rex *v.* Simons, 2 East P. C. 712; Rex *v.* Spencer, 2 East P. C. 712; ante, § 261, 553–566. And see Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; The State *v.* Vaughan, 1 Bay, 282.

if he obtains it by any fraud, short of what will presently be explained,[1] his act is not a crime.[2]

§ 583. **Larceny, continued — (Possession of Property — Cheat).** — The little regard which the common law of crimes pays to mental force directed against property rights appears from a distinction in the law of larceny. If one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny[3] nor any other crime by the taking, unless the transaction amounts to an indictable cheat.[4] But if, with the like intent, he fraudulently gets leave to take the possession only, and takes and converts the whole to himself, he becomes guilty of larceny; because, while his intent is thus to appropriate the property, the consent, which he fraudulently obtained, covers no more than the possession.[5] Again, —

§ 584. **Forgery — Cheat.** — According to a doctrine apparently just in reason, and sustained by numerous authorities, while yet they are conflicting,[6] one does not commit forgery,[7] who, fraudulently misrepresenting the contents of an unexecuted instrument, or misreading or altering it, thereby prevails on another to sign it, supposing himself executing what is different.[8] Yet circum-

[1] Post, § 585.
[2] Post, § 583.
[3] Rex v. Coleman, 2 East P. C. 672; Rex v. Nicholson, 2 Leach, 4th ed. 610, 2 East P. C. 669; Rex v. Parkes, 2 Leach, 4th ed. 614; s. c. nom. Rex v. Parks, 2 East P. C. 671; Reg. v. Barnes, 1 Eng. L. & Eq. 579, 2 Den. C. C. 59, Temp. & M. 387; Wilson v. The State, 1 Port. 118; Rex v. Adams, Russ. & Ry. 225; Reg. v. Adams, 1 Den. C. C. 38; Reg. v. Thomas, 9 Car. & P. 741; Reg. v. Wilson, 8 Car. & P. 111; Rex v. Hawtin, 7 Car. & P. 281; Mowrey v. Walsh, 8 Cow. 238; Ross v. People, 5 Hill, N. Y. 294; Lewer v. Commonwealth, 15 S. & R. 93; Vol. II. § 808.
[4] Ante, § 571; post, § 585.
[5] Rex v. Semple, 1 Leach, 4th ed. 420, 2 East P. C. 691; Rex v. Hench, Russ. & Ry. 163; Rex v. Aickles, 1 Leach, 4th ed. 294, 2 East P. C. 675; Rex v. Pear, 1 Leach, 4th ed. 212, 2 East P. C. 685, 697; Rex v. Tunnard, 2 East P. C. 687, 1 Leach, 4th ed. 214, note; Rex v. Wilkins, 1 Leach, 4th ed. 520, 2 East P. C. 673; Rex v. Patch, 1 Leach, 4th ed. 238, 2 East P. C. 678; Rex v. Marsh, 1 Leach, 4th ed. 345; Rex v. Watson, 2 Leach, 4th ed. 640, 2 East P. C. 680; Rex v. Pearce, 2 East P. C. 603; Reg. v. Johnson, 14 Eng. L. & Eq. 570, 2 Den. C. C. 310; Rex v. Robson, Russ. & Ry. 413; The State v. Gorman, 2 Nott & McC. 90; The State v. Thurston, 2 McMullan, 382; Commonwealth v. James, 1 Pick. 375; Starkie v. Commonwealth, 7 Leigh, 762; Rex v. Longstreeth, 1 Moody, 137; Rex v. Pratt, 1 Moody, 250; Rex v. Summers, 3 Salk. 194; Anonymous, J. Kel. 35, 81, 82; The State v. Lindenthall, 5 Rich. 237. Contra, in Tennessee, Felter v. The State, 9 Yerg. 397. And see Vol. II. § 809, 818, 814.
[6] See Vol. II. § 156, 589–591.
[7] Ante, § 572.
[8] Reg. v. Chadwick, 2 Moody & R. 545; Reg. v. Collins, 2 Moody & R. 461; Woodward's Case, cited 2 Leach, 4th ed. 782; Reg. v. White, 1 Den. C. C. 208; Marvin's Case, 3 Dy. 288, pl. 52; Rex v

stances may arise in which this kind of fraud will be indictable as a cheat of a different character.[1]

§ 585. **Cheat, continued — (False Token — Larceny — Forgery).** — When, however, one makes use of a false token, of such a nature that, according to the necessary customs and order of society, men must place confidence in it, and thereby persuades another to part with property, he is indictable, as we have seen, for the cheat;[2] though the act is not larceny.[3] Some of the cases imply that the token must be a public one;[4] but, according to the better view, it need only be calculated to deceive men generally;[5] for we have seen,[6] that the criminal common law is not administered on the principle of extending a particular protection to the weak and feeble. Such a cheat, indeed, is forgery;[7] which need not be of a public document.

§ 586. **False Pretences.** — We have seen,[8] that various modern statutes make it indictable to obtain goods by false pretences, though no false token is employed; for the extended trade and more refined culture of modern times[9] require a certain degree of universal confidence to be placed in mere verbal representations. Yet these statutes are interpreted in the spirit of the common law and by its reasons;[10] and they do not, therefore, extend, as the non-professional reader might suppose, to every imaginable kind of false pretence.[11] So that, notwithstanding the

Maddocks, 2 Russ. Crimes, 3d Eng. ed. 499; Putnam v. Sullivan, 4 Mass. 45; Commonwealth v. Sankey, 10 Harris, Pa. 390; Hill v. The State, 1 Yerg. 76. Contra, The State v. Shurtliff, 18 Maine, 368. And see Vol. II. § 156, 589–591.
[1] Ante, § 571; Hill v. The State, 1 Yerg. 76. And see Rex v. Hevey, Russ. & Ry. 407, note, 2 East P. C. 856, 1 Leach, 4th ed. 229; Rex v. Webb, 3 Brod. & B. 228, Russ. & Ry. 405, cited 6 Moore, 447; 1 Hawk. P. C. Curw. ed. p. 818, § 1. But see The State v. Justice, 2 Dev. 199; Vol. II. § 156.
[2] Ante, § 571.
[3] Ante, § 583.
[4] The State v. Stroll, 1 Rich. 244; People v. Stone, 9 Wend. 182.
[5] People v. Babcock, 7 Johns. 201; Cross v. Peters, 1 Greenl. 376, 387; Commonwealth v. Warren, 6 Mass. 72; Rex v. Osborn, 3 Bur. 1697; Rex v. Atkinson, 2 East P. C. 673; ante, § 571. And see and compare Rex v. Jackson, 3 Camp. 370, and Rex v. Lara, 2 Leach, 4th ed. 647, 2 East P. C. 819, 827, 6 T. R. 565.
[6] Ante, § 251.
[7] Ante, § 572; Butler v. Commonwealth, 12 S. & R. 237.
[8] Ante, § 571.
[9] Ante, § 252.
[10] Stat. Crimes, § 123, 133, 141, 154, 155.
[11] Rex v. Fuller, 2 East P. C. 837; People v. Williams, 4 Hill, N. Y. 9; The State v. Simpson, 3 Hawks, 620; Commonwealth v. Wilgus, 4 Pick. 177, 178; People v. Crissie, 4 Denio, 525; People v. Haynes, 14 Wend. 546, 557; McKenzie v. The State, 6 Eng. 594; Burrow v. The State, 7 Eng. 65; Rex v. Wavell, 1 Moody, 224 Rex v. Goodhall, Russ. & Ry. 461.

statutes, there are cheats and frauds not indictable either under them or at the common law.[1]

§ 587. **Officer — (Extortion).** — Moreover, when one in office takes advantage of his official position to extort money, he is indictable for this, as we have seen;[2] because, in drawing thus on the obedience due from the subject to the government and its agents, he places himself on unfair ground toward the person whom he injures.[3] Perhaps this offence may be traced also to the general obligation of the officer to discharge well his official duties.[4] Likewise, —

False Personating. — It seems, that, if a man cozens another by falsely representing himself to be an officer, he is indictable for this;[5] and he may be so though the one personated is a mere private individual.[6]

§ 588. **Abusing Legal Proceedings.** — One not an officer may subject himself to punishment by an oppressive use of legal proceedings. When, therefore, a man purchased three several promissory notes against another, and brought on them three separate suits instead of one; and, on obtaining judgment, caused the executions to be levied oppressively; the court considered, that, though this was not barratry,[7] it was an indictable common-law offence.[8] Perhaps this conduct may be deemed an exercise rather of physical force than of mental.[9]

§ 589. **Perjury.** — Perjury, in a criminal proceeding, is an offence against the public, rather than the individual.[10] And this may be also one ground on which it is cognizable criminally, though committed in a civil cause;[11] since the government furnishes courts for the redress of private wrongs. But it is also an offence against the individual; it is such, even in a criminal cause, if committed to the injury of the prisoner; for he who thus wrongs him does it standing toward him on an unequal ground.[12]

[1] Commonwealth *v.* Eastman, 1 Cush. 189, 223; The State *v.* Roberts, 34 Maine, 320.

[2] Ante, § 573; Vol. II. § 390.

[3] Ante, § 252.

[4] Ante, § 459.

[5] Serlested's Case, Latch, 202; ante, § 468.

[6] 2 East P. C. 1010; Vol. II. § 152-155, 439.

[7] Ante, § 541.

[8] Commonwealth *v.* McCulloch, 15 Mass. 227.

[9] And see ante, § 564.

[10] Ante, § 468.

[11] Ante, § 467.

[12] Ante, § 252.

§ 590. **Summary, as to Mental Force.** — This doctrine of mental force, employed to injure men in their property, is briefly thus: When minds combat with one another, a strength is generated useful to the community. This is the general rule; and, so long as the conflict is of this sort, the one who obtains an advantage over the other is not indictable. But, when one of the parties, assuming an unfair ground toward the other, changes the combat from a strengthening to a destructive process, he commits a public offence.[1]

III. *Offences against Personal Reputation.*

§ 591. **Damage to Reputation not punishable.** — It is the policy of the law to leave the care of men's reputations to themselves. No damage done to a reputation, therefore, at least by a single individual,[2] is foundation for a criminal prosecution.

Libel and Slander — (Obscene). — In libel and slander,[3] the exception to this proposition is apparent, not real. For the courts, whether correctly or not in principle, hold these wrongs to be indictable, not because of injury to the reputation, but by reason of their tending to create breaches of the peace.[4] Thus it is of libels against the individual; but obscene libels are indictable as tending to corrupt the public morals.[5] Hence the common-law rule, that it is immaterial whether what is said in a libel is true or false,[6] — a question vital in the suit for damages, — but, the tendency to disturb the public tranquillity or corrupt the public morals being the same in either alternative, the offence is the same. This legal rule is somewhat modified by other doctrines, but not so as to impair it for the present illustration.[7] And modern legis-

[1] Ante § 230 et seq., 258-260.

[2] **Conspiracy against Reputation.** — A conspiracy, see post, § 592, to charge one with an indictable offence, or with being the father of a bastard child, is indictable; but possibly this is not on the ground of injury to the reputation. Commonwealth *v.* Tibbets, 2 Mass. 536; Reg. *v.* Best, 2 Ld. Raym. 1167, 6 Mod. 137, 185; Timberly *v.* Childe, 1 Sid. 68; Rex *v.* Armstrong, 1 Vent. 304; 1 Gab. Crim. Law, 252. Yet, on the whole, the doctrine seems pretty clearly to be, that a conspiracy to injure one's reputation is indictable. Rex *v.* Rispal, 1 W. Bl. 368, 3 Bur. 1320. And see Vol. II. § 216, 217, 235.

[3] Ante, § 540.

[4] Vol. II. § 907, 909.

[5] Ante, § 500, 504; Vol. II. § 910.

[6] Vol. II. § 918.

[7] Cropp *v.* Tilney, Holt, 422; Commonwealth *v.* Clap, 4 Mass. 163, 168, 169; The State *v.* Burnham, 9 N. H. 34; People *v.* Croswell, 3 Johns. Cas. 336; Commonwealth *v.* Blanding, 3 Pick. 304; Rex *v.* Draper, 3 Smith, 390; The State *v.* Lehre, 2 Tread. 809; Rex *v.* Halpin, 9 B. & C. 65.

lation has, to a still further extent, permitted the truth of a libel against the individual to be given in evidence by the accused.[1]

IV. *Combinations to commit Private Injuries.*

§ 592. **Conspiracy.** — In the foregoing discussion we have assumed, that the wrongful thing is done by one only. But often numbers combine for wrong; and then the combination may be criminal, even where the thing contemplated would not be so if actually performed by one.[2] Because obviously two or more persons, united in skill and endeavor, may stand toward another on unfair ground; while, if one alone had undertaken the same thing, there would be no inequality. Therefore, in the former instance, a criminal liability is incurred, whether what was agreed upon is accomplished or not; but not in the latter, even though the thing is actually done.[3] This combination is called conspiracy.[4] The offence is not confined to injuries to individuals; but it extends also to those injuries which concern directly the public.[5]

§ 593. **Witchcraft.** — Like conspiracy, is the antiquated offence of witchcraft. "Of offenders of this nature there are said to be three kinds, — first, conjurers, who by force of certain magic words endeavor to raise the Devil, and compel him to execute

[1] Commonwealth v. Bonner, 9 Met. 410; Barthelemy v. People, 2 Hill, N. Y. 248; The State v. White, 7 Ire. 180; People v. Croswell, 3 Johns. Cas. 336; Rex v. Burdett, 3 B. & Ald. 717, 4 B. & Ald. 95; Vol. II. § 920.

[2] Vol II. § 172, 173, 178, 181, 182.

[3] Twitchell v. Commonwealth, 9 Barr, 211, 212; Reg. v. Orbell, 6 Mod. 42; Rex v. Macarty, 2 East P. C. 823, 6 Mod. 301; s. c. nom. Rex v. Mackarty, 2 Ld. Raym. 1179; 2 East P. C. 824; People v. Stone, 9 Wend. 182; People v. Babcock, 7 Johns. 201; Commonwealth v. Warren, 6 Mass. 72; Anderson v. Commonwealth, 5 Rand. 627; The State v. Burnham, 15 N. H. 396; The State v. Murphy, 6 Ala. 765; Commonwealth v. Judd, 2 Mass. 329; Lambert v. People, 7 Cow. 166, 9 Cow. 578; Commonwealth v. Hunt, 4 Met. 111, 131; The State v. Rowley, 12 Conn. 101; Sydserff v. Reg., 11 Q. B. 245, 12 Jur. 418; Rex v. Hilbers, 2 Chit. 168; Commonwealth v. Ward, 1 Mass. 473; Patten v. Gurney, 17 Mass. 182, 184; Bean v. Bean, 12 Mass. 20, 21; Commonwealth v. Eastman, 1 Cush. 189; Rhoads v. Commonwealth, 3 Harris, Pa. 272; People v. Fisher, 14 Wend. 9; Commonwealth v. Ridgway, 2 Ashm. 247; Rex v. Cope, 1 Stra. 144; Reg. v. Gompertz, 9 Q. B. 824; Mifflin v. Commonwealth, 5 Watts & S. 461; Commonwealth v. Tibbetts, 2 Mass. 536; Reg. v. Best, 6 Mod. 137, 185, 2 Ld. Raym. 1167, Holt, 151; Timberly v. Childe, 1 Sid. 68; Rex v. Armstrong, 1 Vent. 304; The State v. Buchanan, 5 Har. & J. 317; Rex v. Worrall, Skin. 106; Reg. v. Blacket, 7 Mod. 39; The State v. De Witt, 2 Hill, S. C. 282. Contra, The State v. Rickey, 4 Halst. 293, 300.

[4] And see ante, § 482.

[5] For the full discussion, see Vol. II. § 169 et seq.

their commands; secondly, witches, who by way of friendly conference are said to bargain with an evil spirit to do what they desire of him; thirdly, sorcerers or charmers, who, by the use of certain superstitious forms of words, or by means of images or other odd representations of persons or things, &c., are said to produce strange effects, above the ordinary course of nature."[1] This offence appears to have been misdemeanor at the common law;[2] but, by 1 Jac. 1, c. 12, it was elevated to felony.[3] Belief in the existence of the thing called witchcraft having become obsolete, —

Falsely pretending Witchcraft. — Later English legislation, not in force with us, abolished the crime of real witchcraft and created another of falsely pretending to it.[4]

How in our States. — In this country, witchcraft is in effect no offence, because its existence is not believed. But if the opinion should again become general, that spirits hold intercourse with mortals, and have such power over them as to render conspiracies between the embodied and disembodied to the injury of their victims practicable, no reason appears why such confederations would not be indictable by force of the common law. It might be difficult to seize and bring to punishment the rogues out of the flesh, yet this would furnish no reason why those in the flesh should escape.

[1] 1 Hawk. P. C. 6th ed. c. 3, § 1. "Witchcraft seems to be the skill of applying the plastic spirit of the world unto some unlawful purpose, by means of a confederacy with evil spirits." Cotton Mather's Wonders of the Invisible World, Eng. ed. of 1862, p. 161. For interesting matter on witchcraft, see Smith's Case, 2 Howell St. Tr. 1049; The Essex Witches' Case, 4 Howell St. Tr. 817; The Suffolk Witches' Case, 6 Howell St. Tr. 647; The Devon Witches' Case, 8 Howell St. Tr. 1017; The trial of Witches, before Sir Matthew Hale, bound up among other papers with Jacob's Supp. to Hale P. C. And see 3 Inst. 43.

[2] Hawk. ut sup. § 2. But see 1 Hale P. C. 429.

[3] 1 Hawk. P. C. 6th ed. c. 3, § 4.

[4] 1 East P. C. 5.

CHAPTER XLI.

PROTECTION TO THE LOWER ANIMALS.

§ 594. **Malicious Mischief, distinguished.** — Malicious mischief[1] to personal property, wherein commonly and by the old rules the intent is to injure the owner,[2] can be committed as well by doing damage to an animal considered as property as to any other subject of ownership. Protection to the creature as a sensitive being is not the thing sought, either under this branch of the unwritten law, or under the malicious-mischief statutes.[3] As to the animals themselves, —

No direct Protection. — Man has always held in subjection the animals below him, to be used or destroyed at will, for his advantage or pleasure. The right to take their life, and to make property of them, includes all other rights of theirs; so that the common law recognizes as indictable no wrong, and punishes no act of cruelty, which they may suffer, however wanton or unnecessary.[4] Contrary to this, some, misinterpreting cases of malicious mischief to animals, and cases of public cruelty amounting to

[1] Ante, § 568, 569.

[2] Ante, § 298; Vol. II. § 996–998; Stat. Crimes, § 430, 433–436.

[3] Stat. Crimes, § 432, 437–448; Brown v. The State, 26 Ohio State, 176; The State v. Rector, 34 Texas, 565; Reid v. The State, 8 Texas, Ap. 430; Reg. v. Welch, 1 Q. B. D. 23, 13 Cox C. C. 121; Lott v. The State, 9 Texas Ap. 206; The State v. Linde, 54 Iowa, 139; Street v. The State, 7 Texas Ap. 5; The State v. Simpson, 73 N. C. 269; The State v. Hill, 79 N. C. 656; Shubrick v. The State, 2 S. C. 21; Gaskill v. The State, 56 Ind. 550; The State v. Butler, 65 N. C. 309; Thomas v. The State, 30 Ark. 433; Oviatt v. The State, 19 Ohio State, 573; Branch v. The State, 41 Texas, 622; The State v. Heath, 41 Texas, 426; Hayworth v. The State, 14 Ind. 590; The State v. Painter, 70 N. C. 70; Commonwealth v. Falvey, 108 Mass. 304; Rex v. Mogg, 4 Car. & P. 363; Burgess v. The State 44 Ala. 190; Swartzbaugh v. People, 85 Ill. 457; Caldwell v. The State, 49 Ala. 34; Duncan v. The State, 49 Missis. 331; Darnell v. The State, 6 Texas Ap. 482; The State v. Parker, 81 N. C. 548. And see Rex v. Buck, 1 Stra. 679. "It is an *oppression*, &c., to cut or cause to be cut out the tongue of any tame beast, being alive, of *any other persons*." Pulton de Pace, 104 *a*. Among lawful assemblies are those "at the baiting of a bull or bear." Ib. 25 *b*. And see Ex parte Hill, 3 Car. & P. 225 and note.

[4] See Stat. Crimes, § 1093, 1094.

nuisance,[1] and the like, have, therefore, deemed mere cruelty to animals punishable at the common law.[2] But even —

§ 595. **In Malicious Mischief,** — there must be other malice than simply against the animal to make any injury to it indictable either by the common law or under the statutes. Equally under the old statutory and the unwritten law, no malice would suffice except against the owner; and, though the construction of some of the modern enactments is not quite so, there is nothing in the interpretation of any of them favoring the idea that mere cruelty to animals, regarded as creatures susceptible to pleasure and pain, is a common-law offence.[3] Now, —

Conclusive as to Cruelty. — The doctrine thus stated relating to malicious mischief to animals is conclusive as to this of cruelty. If, in the numerous cases wherein the indictment failed because, though malice was proved toward a cruelly-abused animal, none appeared toward its owner, the law had made cruelty to animals punishable, there would have been convictions for this offence; the indictments being, in this view, sufficient, and the prosecutor's misnaming the offence making no difference.[4] For the rule is universal, that, whenever an indictment sets out an offence, whether the one really meant by the prosecuting power or not, there may be a conviction upon it. So that, as often as cruelty to an animal was alleged as malicious mischief, without an averment of malice against the owner, if the cruelty alone had been punishable, the prosecution would have been sustained on this ground. Each of the decisions referred to in the last paragraph is, therefore, a direct adjudication that cruelty to animals is not indictable at the common law. But —

§ 596. **Collateral Effect.** — A learned judge once observed, that "cruelty to a domestic animal has, in some cases, been held to change what otherwise would have been a simple trespass into a criminal offence;"[5] and from other judges have fallen words

[1] Post, § 597.

[2] Stage Horse Cases, 15 Abb. Pr. N. S. 51; Ross's Case, 3 City Hall Rec. 191.

[3] The State v. Pierce, 7 Ala. 728; The State v. Wilcox, 3 Yerg. 278; The State v. Jackson, 12 Ire. 329; Rex v. Austen, Russ. & Ry. 490; The State v. Latham, 13 Ire. 33; Rex v. Pearce, 1 Leach, 4th ed. 527, 2 East P. C. 1072; Rex v. Kean, 2 East P. C. 1073; s. c. nom. Rex v. Hean, 1 Leach, 4th ed. 527, note; Ranger's Case, 2 East P. C. 1074; Rex v. Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; Stat. Crimes, § 433, 435; Vol. II. § 996, 997; Reg. v. Tivey, 1 Car. & K. 704; Stat. Crimes, § 434.

[4] Crim. Proced. I. § 416, 417.

[5] Beardsley, C. J., in Kilpatrick v. People, 5 Denio, 277, 279.

approximating more or less nearly to the same meaning.[1] We cannot find in the common law itself any general doctrine of this nature; though perhaps cruelty to such animals may enter into the consideration when an act is sought to be made punishable as corrupting to the public morals,[2] and the like. So —

Statutory Cruelty. — Cruelty to animals is in modern times a statutory offence in England and perhaps all our States.[3] And, —

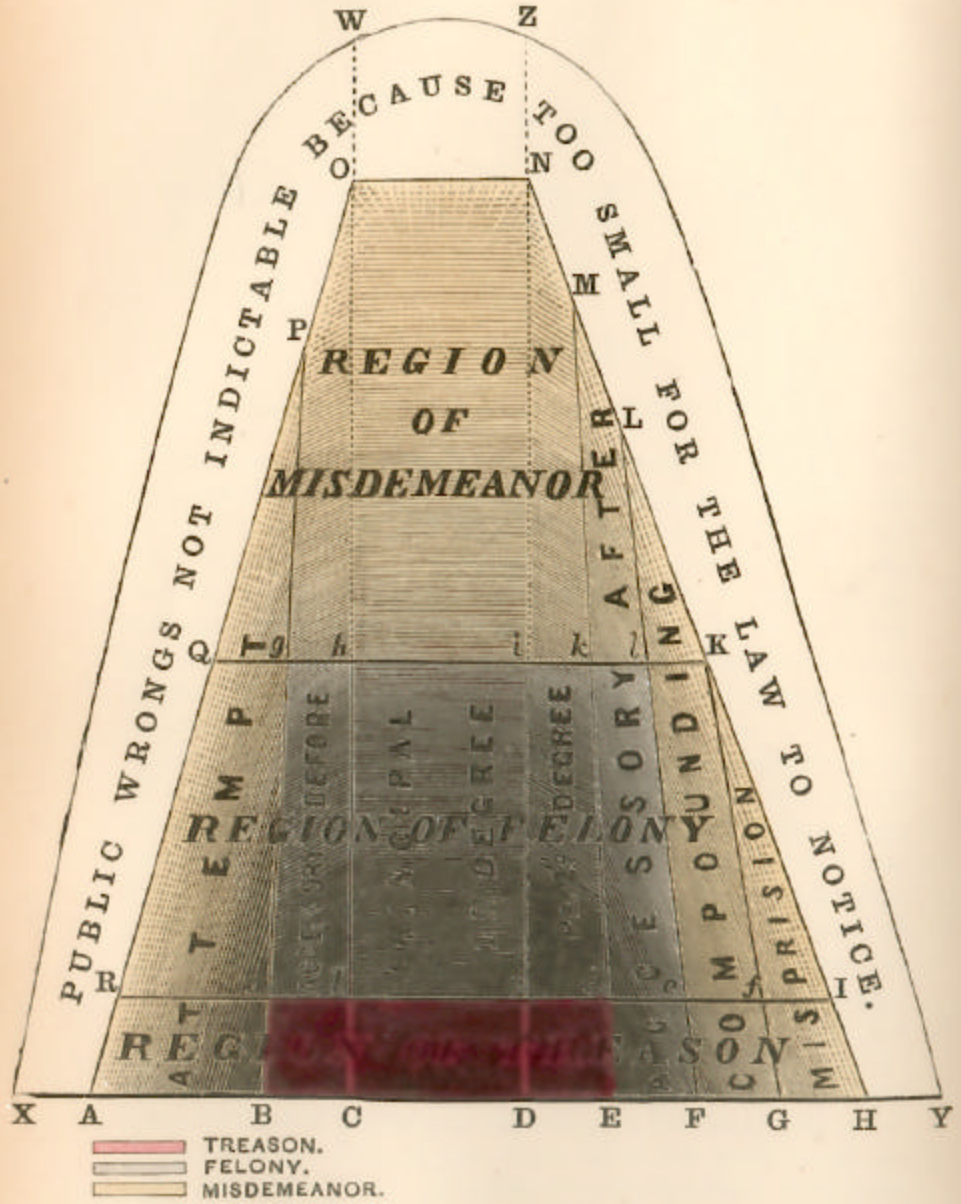
§ 597. **Public Cruelty.** — Quite consistently with the foregoing doctrines, the public, cruel beating of a cow or other animal in a street of a city has been held to be indictable at the common law as a public nuisance. "The gist of the offence," said the learned judge in a case in the District of Columbia, "was the public cruelty to the common nuisance, and it was not necessary for the United States to prove that the cow died of the beating."[4] The same was adjudged, during slavery, of the beating of a slave in the streets of a city, in public view.[5]

§ 597 *a*. **Conspiracies against Animals.** — A conspiracy, to be indictable, does not, we have seen,[6] require that the contemplated wrong shall be such as would be punishable criminally if performed by one. Nor need its purpose be to injure an individual. Equally, also, if its aim is the disturbance of any public interest, of a sort within the care of the law, it will, where the other essential elements are present, be a crime.[7] And, within these and the other principles of the law of conspiracy, plainly it would be punishable to conspire to do such cruelty to any part of the animate creation as would constitute a public, or even a private nuisance. We have no authorities on this question; but, so far, the steps in the argument are plain, and the reasoning is conclusive. Here the contemplated end is, in the language of the books, "unlawful." Still again, in all conspiracies, for an indictment to lie, either the means or the end proposed must be of a sort which, though not necessarily criminal, is indicated by the word "unlawful."[8] Within this distinction would fall, on the indictable side, various cruel shooting-matches, not only in the nature of nuisance, as just said, but of gaming,[1] and of unlawful sport.[2] So far, again, the steps of the argument are, in a general way, plain and conclusive; but into the particulars it is not proposed here to descend. Nor are these intimations meant to indicate absolutely the outer limits of the doctrine. Conspiracy is an offence of gradual growth in the law.[3] Undoubtedly it has not yet reached its maturity, and precisely what it will be when it has no one can say. So that, though dumb animals have no direct protection in our unwritten law of crime, they have much of what may be termed indirect. And at last the written laws have come pretty fully to their defence.

[1] Commonwealth *v.* Tilton, 8 Met. 232, 234.
[2] Ante, § 495 et seq.
[3] For a discussion of the statutory offence, see Stat. Crimes, § 1093 et seq.
[4] United States *v.* Jackson, 4 Cranch C. C. 483; People *v.* Stakes, 1 Wheeler Crim. Cas. 111.
[5] United States *v.* Cross, 4 Cranch C. C. 603.
[6] Ante, § 592.
[7] Vol. II. § 181, 196–234.
[8] Vol. II. § 171, 172, 175, 178.

[1] Stat. Crimes, § 848–851; Bishop Con. § 489, 490.
[2] For something of the distinction between lawful and unlawful sports, see 1 Russ. Crimes, 5th Eng. ed. 818–821.
[3] Vol. II. § 176.

DIAGRAM OF CRIME.



NOTE. — E F *e d*, in England, is treason; but, according to the views presented in this book, it is felony in the States, and misdemeanor under the laws of the United States.

Entered, according to Act of Congress, in the year 1856, by Joel Prentiss Bishop, in the Clerk's Office of the District Court of the District of Massachusetts.

itself not unfrequently makes an offender more heavily punishable who adds to a specified offence an aggravation which it points out; but, in this instance, he becomes guilty of another and distinct crime. Thus, —

In Homicide. — At an early period in the history of this offence, it was punishable with death to kill a man by any of the unjustifiable means which now render the killing manslaughter. If the killing was also of "malice aforethought," which now makes it murder, it was worse in morals but not in law. Afterward the law adopted the rule of morals, by making the killing murder when done of "malice aforethought;" while, if it was without such malice, it was called by the name of manslaughter; and punished only murder with death, manslaughter less severely. Still, if the malice aforethought with which a murder was committed was "deliberately premeditated," it was in morals more aggravated, not in law. Of such a circumstance, the law took no cognizance. At last, however, the law has in most of our States taken this aggravation also into account; punishing the murder capitally only when thus aggravated, while a milder punishment is provided for simple murder, called murder in the second degree. Yet there remain aggravations, recognized in morals, of which the law even now takes no notice.

§ 601. **Aggravations as to Discretionary Punishment.** — Yet where the punishment is discretionary with the tribunal, the considerations which aggravate an offence in morals may be taken into the account. In the instances depending on positive law, the aggravations must be set out in the indictment;[1] in these they need not be, though sometimes in practice they are. Let us now proceed to consider —

§ 602. *The larger Technical Divisions:* —

Diagram. — The other technical divisions of the criminal field are displayed on the accompanying "Diagram of Crime." The colored part represents what is indictable, and around it there is a space to denote "public wrongs not indictable, because too small for the law to notice." Let us look a little into the indictable part.

§ 603. **Treason — Felony — Misdemeanor.** — At the common law, every crime is treason, or felony, or misdemeanor. Treason is the heaviest, misdemeanor the lightest, and felony holds an inter-

[1] Crim. Proced. I. § 77 et seq., 95 et seq., II. § 562–589.

mediate ground. These three gradations are represented by three distinct *colors* on the Diagram.

§ 604. **Degrees of Participation.** — As there are thus grades in crime, so also there are degrees of participation in the criminal thing. These degrees are represented on the Diagram by what lies within the nearly vertical lines; as, —

Attempt. — If a man undertakes to do a thing which in law is a crime, and, after proceeding a certain way in the doing, is interrupted, or if his effort otherwise miscarries, so that the intended crime is not committed, he is still indictable for what he does, under the name of "Attempt." This sort of wrong is indicated, in the Diagram, by A B P. Now, A B P does not extend quite to the top of the indictable space. The explanation is, that some of the lesser misdemeanors are of too small magnitude in the criminal field to draw the indictable quality to the mere attempt to commit them.

Accessory before. — Persuasion is one form of attempt. It is, therefore, indictable to persuade or hire a person to commit a crime, especially of the heavier sort, though he declines to do it, or undertakes it and fails. Yet if this person actually does what he is persuaded or hired to do, the effort of the procurer ceases to be called an attempt, because it has become a success. If the thing is felony, the procurer is now termed an "Accessory before the Fact;" or, if it is treason or misdemeanor, his conduct is still in its nature accessorial, though in strict law he is a principal offender. His position on the Diagram is indicated by B C O P. Yet here we come to a mere point at O, indicating that there may be some small misdemeanors for which even the procurer is not indictable, the quality of indictability being restricted to the actual doer.

Principal of First Degree. — The offence of the actual doer appears next on the Diagram, indicated by C D N O. It requires no special observation. He is called "Principal of the First Degree."

Principal of Second Degree. — Next we have the offence of him who stands by, encouraging the act of crime, while the hand of another performs it. Such an offender is "Principal of the Second Degree." Yet, even in felony, this sort of principal may, in strict law, be regarded the same as the other, if the prosecuting power chooses. His crime is indicated on the Diagram by D E

M N. This region comes to a point at N, denoting that there are inferior misdemeanors for which one in the position of principal of the second degree is not indictable.

Accessory after. — One harboring another who has committed a crime, to screen him from justice, incurs legal guilt. He is termed an "Accessory after the Fact." In the Diagram, his position is represented by E F L M. His guilt is less intense than that of him who stands by encouraging the other; and there are more crimes to which it does not attach. Consequently the space devoted to this form of offence ends at M, not extending to the top, at N.

Compounding. — "Compounding a Crime," or agreeing not to prosecute it, is a participation in it after the fact, of the same nature as last described, except that the guilt is less intense. On the Diagram, therefore, it is placed further from the principal offence; and it extends less far among the misdemeanors, showing that there are more offences here, than under the last specification, which do not subject this sort of participant to indictment. It is represented by F G K L.

Misprision. — Finally, we have "Misprision." The reader will see, on looking at the Diagram, that it attaches to treason and felony, but not to misdemeanor. It is represented by G H K. It is a criminal neglect, and consists either in not preventing the crime, or in forbearing to take steps to bring the perpetrator to justice.

§ 605. **Treason, Felony, and Misdemeanor, again.** — Looking once more at the Diagram, the reader perceives that A H I R is marked "Region of Treason." But this "Region" is divided into the various parts just specified. Beginning at the left hand, we have A B *a* R, which represents the "attempt" to commit a treason. Observing the coloring, we see that this attempt is not treason, but misdemeanor. The coloring also indicates, that the accessory before the fact in treason is a traitor; as, of course, is the principal, whether of the first or second degree. But E F *e d*, denoting the guilt of the accessory after the fact in treason, is, on this Diagram, colored for felony. So, according to views in this work, is the law in our States. But in England the crime of the accessory after is treason. Compounding treason, and misprision of treason, are, as the coloring shows, misdemeanors. It is not necessary to go over the "Region of Felony" in this way, the

reader can do it for himself. He will notice that all of it is felony, except attempt, compounding, and misprision, — these three are misdemeanors. All the "Region of Misdemeanor" is misdemeanor.

§ 606. **Course of the Discussion.** — What is thus given in outline in this chapter will, in a series of chapters next following, be presented in detail, sustained by the authorities. It will be most convenient, however, to proceed in an order differing from that in the foregoing sections.

Heavier and Lighter Offences. — Since offences differ in turpitude, the heavier and lighter are, on the Diagram, distinguished in a general way by the heavier and lighter shadings from the ink. But this, which is palpable both to the eye and the understanding, requires no particular explanation.

CHAPTER XLIII.

THE DIVISION OF CRIMES INTO TREASON, FELONY, AND MISDEMEANOR.

§ 607. **Uses of Division.** — Divisions and classifications are essential to the orderly disposition and mastery of every science. It is so in the law. Those of the criminal department are more than mere helps to the learner; they adhere in the law itself. And though some of them are quite technical, even they are practically promotive of justice.

§ 608. **Division into Treason, Felony, and Misdemeanor.** — An old division is into treason, felony, and misdemeanor. Though technical, it proceeds on the reasonable idea of classifying crime according to its turpitude; what is most reprehensible being treason, felony occupying a middle ground, and the rest being misdemeanor.

§ 609. **Importance of this Division.** — Technical as this division is, it is one of the most important in our law. In other pages of this work, and in the works on Criminal Procedure and Statutory Crimes, the reader will see numerous instances in which questions the most grave turn on this division. Let us note some of them. A man may be guilty of a misprision of felony, but not of a misprision of misdemeanor.[1] One, in misdemeanor or treason, may commit the crime of a principal by procuring another to do the act in his absence; but in felony such a procurer is only an accessory before the fact.[2] A person against whose property a misdemeanor has been committed may immediately sue the offender; but, when the wrongful act is felony, he must, according to the

[1] Post, § 717.

[2] Post, § 673, 675, 681, 682, 685.

better opinion, wait until he has set on foot a criminal prosecution.[1] These illustrations might be continued to great length; and, among them, uncertainties and contradictions of doctrine would appear, more than on any other line of inquiry in the entire criminal field.

§ 610. **How this Chapter divided.** — We shall consider, I. Treason; II. Felony; III. Misdemeanor.

I. *Treason.*

§ 611. **English Treasons — High and Petit.** — When our ancestors brought the common law from England, treasons were numerous there. And they were divided into high and petit. But what is now meant by the simple word treason, is high treason. By the ancient common law, there were several forms of petit treason, which, by 25 Edw. 3, stat. 5, c. 2, were reduced to three. They were the killing, by a servant, of his master; the killing, by a wife, of her husband; and the killing of a prelate by an ecclesiastic owing obedience to him.[2] In 1828, these petit treasons were abolished.[3]

How with us. — Treason, with us, is reduced to a single form of what was formerly termed high treason.[4] And petit treason is unknown to our laws.

§ 612. **Treason is also Felony.** — In the language of Mr. East, "all treason is felony, though it may be something more."[5] Consequently, —

What was Treason. — An offence which, on the settlement of this country, was in England treason, is here, when the traitorous quality is taken from it, felony.

§ 613. **Does not follow Rules of Felony.** — Since, therefore, treason is composed of felony and the aggravation which makes it treason, we might suppose it would follow rather the rules of felony than of misdemeanor. But we shall see, further on, that it more resembles misdemeanor than felony.

[1] Ante, § 264 et seq.

[2] 1 Hawk. P. C. Curw. ed. p. 105.

[3] By 9 Geo. 4, c. 31, § 2, providing, that "every offence which, before the commencement of this act, would have amounted to petit treason, shall be deemed to be murder only." This provision is continued by 24 & 25 Vict. c. 100, § 8.

[4] Ante, § 456.

[5] 1 East P. C. 334, 336; 1 Hawk. P. C. Curw. ed. p. 71, § 2; 4 Bl. Com. 94, 95. And see Co. Lit. 391 *a*.

II. *Felony.*

§ 614. **Difficulties — Statutes.** — The common-law doctrine of felony is in some particulars difficult, but in the general it is plain. We shall see that, in some of our States, statutes have been passed to remove obscurities, creating others of their own.

§ 615. **How defined.** — Felony is any offence which by the statutes or by the common law is punishable with death, or to which the old English law attached the total forfeiture of lands or goods or both, or which a statute expressly declares to be such.[1]

Exposition of Doctrine. — Gabbett says: "The word *felon* is (according to the best opinions) derived from two northern words,[2] *fee* which signifies fief, feud, or beneficiary estate, and *lon*, which signifies price or value; and the word 'felony' imports rather the feudal forfeiture, or act by which an estate is forfeited or escheats to the lord of the fee, than the capital punishment to which lay or unlearned offenders were formerly liable in all cases of felony. In proof of this, —

Suicide — Homicide — Heresy — Treason. — "Suicide has been always considered to be a felony, because it subjected the person committing it to forfeiture, though the party, being already dead, could not be the object of capital punishment: and homicide by misadventure, or in self-defence, is, strictly speaking, a felony also, being followed with forfeiture, though according to the better opinions it never was punished with death; while heresy, which was a capital offence by the common law,[3] but not a felony, never worked any forfeiture of goods.[4] And, as a further proof, treason was anciently held to be a felony; which can only be accounted for upon the principle that forfeiture was one of the consequences of attainder in high treason. Though this is the

[1] See and compare, 1 Gab. Crim. Law, 15, 16; 1 Hawk. P. C. Curw. ed. p. 71–73; Co. Lit. 391 *a*. See also 4 Bl. Com. 94, 95; Gray *v.* Reg. 6 Ir. Law Rep. 482, 502; Adams *v.* Barrett, 5 Ga. 404; Foxley's Case, 5 Co. 109 *a*; Finch's Case, 6 Co. 63, 68; Reg. *v.* Whitehead, 2 Moody, 181, 9 Car. & P. 429; Whitaker *v.* Wisbey, 9 Eng. L. & Eq. 457; United States *v.* Jacoby, 12 Blatch. 491; United States *v.* Cross, 1 McAr. 149.

[2] Spelman Glos. tit. Felon; 4 Bl. Com. 94, 95.

[3] The life, however, was taken by burning, not by hanging, 3 Inst. 43; and possibly this difference was what prevented the offence from being a felony.

[4] 4 Bl. Com. 97; 3 Inst. 43, where it appears, however, that there was forfeiture for this offence by Stat. 2 Hen. 5, c. 7, which was repealed by Stat. 1 Eliz. c. 1.

proper definition of felony, yet this term has been so generally connected with the idea of capital punishment, that, . . . whenever a statute made any new offence a felony, the law implied that it should be punished with death by hanging, as well as forfeiture, unless the offender prayed the benefit of clergy." [1]

§ 616. **How under our Common Law.** — Now, forfeitures and corruptions of blood, consequent upon crimes, are almost [2] unknown in this country; [3] yet the distinction between felonies and the other two grades is a part of our common law.[4] The punishment of felony with us is neither always nor usually death, and the same is now true also in England. In both countries, therefore, the term, at the present day, simply denotes "the degree or class of crime committed." [5] And the former test to determine what is felony, and what is not, has little or no practical use in either country. Consequently, where no statute has defined felony, we look into the books upon common-law crimes, and see what was felony and what was not under the older laws of England. And, though we have lost the old test, we hold that to be felony which was such when the test was operative. For, with us, if a statute reduces the punishment of a capital felony to imprisonment, it does not cease to be a felony.[6]

§ 617. **Continued.** — The general rule, therefore, is, that what is felony under the English common law is such also under ours. But there may be exceptions,[7] founded on special reasons. Also we have seen,[8] that, if what is treason at the common law is cut off from being such by a constitutional or legislative provision, it will then be felony.

§ 618. *Statutes regulating the Question:* —

Punishable by Death or Imprisonment. — In a considerable number of our States, statutes have defined, that all offences punishable either by death or by imprisonment in the State prison shall be felonies.[9]

[1] 1 Gab. Crim. Law, 15, 16.

[2] See Wooldridge *v.* Lucas, 7 B. Monr. 49.

[3] Ante, § 273; post, § 970.

[4] "The rule once fixed must remain until altered by the legislature." Lord Campbell in Reg. *v.* Gray, 3 Crawf. & Dix C. C. 238, 243. And see ante, § 275.

[5] 1 Russ. Crimes, 3d Eng. ed. 44.

[6] The State *v.* Dewer, 65 N. C. 572. See post, § 621.

[7] Commonwealth *v.* Newell, 7 Mass. 245; A. *v.* B., R. M. Charl. 228, 232, 234, note. And see Commonwealth *v.* Lester, 2 Va. Cas. 198.

[8] Ante, § 612.

[9] Weinzorpflin *v.* The State, 7 Blackf. 186, 188; Wilson *v.* The State, 1 Wis. 184; The State *v.* Smith, 8 Blackf. 489; People *v.* Brigham, 2 Mich. 550; Randall *v.* Commonwealth, 24 Grat. 644; Nichols *v.* The State, 35 Wis. 308; Buford *v.* Commonwealth, 14 B. Monr. 24, and the cases cited in the next three notes.

[1] The State *v.* Smith, 32 Maine, 369; Johnston *v.* The State, 7 Misso. 183; Ingram *v.* The State, 7 Misso. 293; People *v.* Van Steenburgh, 1 Parker C. C. 39; People *v.* War, 20 Cal. 117; The State *v.* Mayberry, 48 Maine, 218; Chandler *v.* Johnson, 39 Ga. 85; Smith *v.* The State, 33 Maine, 48. Contra in Illinois, Lamkin *v.* People, 94 Ill. 501.

[2] People *v.* Park, 41 N. Y. 21.

[3] Stat. Crimes, § 154 et seq.

[4] Drennan *v.* People, 10 Mich. 169.

[5] Ward *v.* People, 3 Hill, N. Y. 395; yet see Carpenter *v.* Nixon, 5 Hill, N. Y. 260.

[6] Shay *v.* People, 22 N. Y. 317. See Fassett *v.* Smith, 23 N. Y. 252.

[7] Nathan *v.* The State, 8 Misso. 631; Tharp *v.* Commonwealth, 3 Met. Ky. 411; People *v.* War, 20 Cal. 117.

[8] The State *v.* Scott, 24 Vt. 127; R. S. of 1839, c. 102.

[9] The State *v.* Wheeler, 3 Vt. 344, 347.

§ 619. **Effect of Discretion as to Punishment.** — If, by the terms of the statute, the court or jury is at liberty to inflict some milder punishment instead of imprisonment or death, this discretion, it is held, does not prevent the offence from being felony. That the heavier punishment *may* be imposed is sufficient.[1] And the majority of the New York court adjudged, that the case is not different, though, by reason of immature age, the particular defendant is by law subject only to a milder penalty.[2]

§ 620. **Effect of Statutes on Common-law Felonies.** — There may be an offence which at common law is felony, while yet it is punishable neither by death nor by imprisonment in the State prison. What is the effect, upon it, of this sort of statute? By a general rule of interpretation, a statute without negative words does not abrogate the common law, but both stand together.[3] On this sound principle, the Michigan court has held, that common-law felonies, punishable less severely than the statutory standard, do not cease to be felonies because of this provision.[4] So also it has been said in New York; [5] but later authority there, is possibly (the author does not say it is) the other way.[6] And special terms in a statute may require an interpretation contrary to what we have thus seen to be the better general doctrine. It is so in some of the States, or the ordinary words are so construed.[7]

§ 621. **How in Particular States — (Vermont — Louisiana — South Carolina).** — The judge in a Vermont case intimated, that, in this State, common-law felony is unknown, things indictable being divided simply into crimes and misdemeanors.[8] Yet, from other cases,[9] and a consideration of the statutes and jurisprudence of the State, it seems not improbable that the question is here much as in the States just mentioned, where capital offences, and all punishable in the State prison, are felonies. Even in Louisiana,

whose jurisprudence is not purely of the common law, the distinction of felony and misdemeanor prevails.[1] In South Carolina, the act of 1801 made forgery a felony; that of 1845 changed the punishment from death to whipping, imprisonment, and a fine; and the court held, that forgery was still, according to the act of 1801, a felony.[2]

§ 622. **What Statutory Words create Felony.** — The statutes thus far discussed are in terms express; but, where a statute is not so, it will not create a felony except by necessary implication.[3] If, however, it makes the penalty for its violation death by hanging;[4] or provides for the punishment of accessories after the fact, there being in law none in misdemeanor;[5] or declares that one doing the forbidden thing "shall be deemed to have feloniously committed such act;"[6] the effect will be to create a felony.[7] "But an offence shall never be made a felony by any doubtful or ambiguous words; as, when an act is prohibited under pain 'of forfeiting all that a man has,' or 'of forfeiting body and goods,' or 'of being at the king's will for body and lands and goods;' for such words will only make the offence a high misdemeanor."[8] So, where the provision was, that one assaulting another as pointed out should "be deemed a felonious assaulter," and punished by imprisonment, it was held not to create a felony; for "the word 'felonious' may be applied to the disposition of the mind of the offender, as aggravating a misdemeanor, and not as descriptive of the offence."[9]

III. *Misdemeanor.*

§ 623. **How defined.** — All crime less than felony is misdemeanor.[10]

[1] The State *v.* Rohfrischt, 12 La. An. 382.

[2] The State *v.* Rowe, 8 Rich. 17. And see ante, § 616.

[3] 1 Hawk. P. C. Curw. ed. p. 72, § 5, 6; ante, § 128. And see United States *v.* Lancaster, 2 McLean, 431; Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439; Commonwealth *v.* Simpson, 9 Met. 138.

[4] 1 Hale P. C. 703; 3 Inst. 91; 1 Hawk. P. C. Curw. ed. p. 72, § 5.

[5] Commonwealth *v.* Macomber, 3 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439. And see Hughes *v.* The State, 12 Ala. 458.

[6] Rex *v.* Johnson, 3 M. & S. 539, 556.

[7] See also Rex *v.* Wyer, 1 Leach, 4th ed. 480, 2 East P. C. 753, 2 T. R. 77; Rex *v.* Solomons, 1 Moody, 292; Rex *v.* Cale, 1 Moody, 11.

[8] 1 Gab. Crim. Law, 17; 1 Hawk. P. C. Curw. ed. p. 72, § 6; 1 Co. Lit. 391; Bac. Abr. Statute, I. 1.

[9] Commonwealth *v.* Barlow, 4 Mass. 439. See Mead *v.* Boston, 3 Cush. 404.

[10] 1 Russ. Crimes, 3d Eng. ed. 45; Commonwealth *v.* Callaghan, 2 Va. Cas. 460; Rex *v.* Powell, 2 B. & Ad. 75.

§ 624. **Further of the Word "Misdemeanor."** — The word misdemeanor is sometimes loosely used in meanings less broad than as thus defined.[1] But its employment in the sense of our definition is sufficiently established. Russell[2] observes: "The word misdemeanor, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine, or imprisonment, or both.[3] A misdemeanor is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances.[4] Misdemeanors have been sometimes termed —

"'**Misprisions.**' — Indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please.[5] But generally misprision of felony is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law or by statute."[6]

§ 625. **"Trespass" — (Escape).** — The word trespass sometimes, in the older law writings, and occasionally in those of recent date,[7] means substantially misdemeanor, in distinction from felony;[8] or, more especially, a misdemeanor of the less aggra-

[1] On the other hand, the word "misdemeanor" may even denote a mere civil trespass. The State *v.* Mann, 21 Wis. 692.

[2] 1 Russ. Crimes, 3d Eng. ed. 45. I copy, in connection with the extract, the author's notes.

[3] 3 Burn Just. tit. Misdemeanor, citing Barrow Just. tit. Misdemeanor.

[4] 4 Bl. Com. 5, note 2; 3 Burn Just. tit. Misdemeanor.

[5] 1 Hawk. c. 20, § 2, and c. 59, § 1, 2; Burn Just. tit. Felony.

[6] 1 Hawk. P. C. c. 59, § 5.

[7] See, for a modern illustration, 1 Russ. Crimes, 3d Eng. ed. 675, where it is said, that, though rape was anciently a felony, the statute of Westm. 1, c. 13, "reduced the *offence to a trespass*, and subjected the party to two years' imprisonment, and a fine at the king's will." The word "trespass" is also used in the same sense by Parsons, C. J., in Commonwealth *v.* Newell, 7 Mass. 245, 248. So also by the court in Commonwealth *v.* Miller, 2 Ashm. 61, 68; Chanet *v.* Parker, 1 Tread. 333. And see Wortham *v.* Commonwealth, 5 Rand. 669; The State *v.* Hurt, 7 Misso. 321.

[8] For example, in Reg. *v.* Tracy, 6 Mod. 30, 32, Holt, C. J., said: "It is known, that a fact which would make one accessory in felony, in *trespass* and in treason makes him a principal." In Rex *v.* Westbeer, 1 Leach, 4th ed. 12, 14, we are informed, that the question arose,

vated kind, or embracing some such element as is signified by the same term in the civil department. Thus it is used in various places by Blackstone; as, where, speaking of officers who voluntarily suffer prisoners to escape, he says: "It is generally agreed, that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or *trespass*."[1] Since there are civil trespasses, and this is our only word to designate them, the precision of legal language is best preserved by limiting its use to the civil wrong, and employing instead of it the term misdemeanor when treating of the criminal law.

"whether the prisoner should be discharged, or receive judgment as for a *trespass*." In an argument in favor of the latter course, "it was answered, that the prisoner would, in this case, lose many advantages to which, if he were indicted for *the misdemeanor*, he would in law be entitled." Examples without end might be added. The reader may refer to Rex *v.* Joyner, J. Kel. 29; Rex *v.* Newton, 2 Lev. 111; 2 Hawk. P. C. Curw. ed. p. 55, § 63; 2 East P. C. 743; or he may open at random the old books of criminal law, and the collections of ancient statutes.

[1] 4 Bl. Com. 130. See also 4 Bl. Com. 36.

CHAPTER XLIV.

PROXIMITY OF THE OFFENDER TO THE COMPLETED CRIME.

§ 626. **Nearness of Participant.** — We saw, in the last chapter, that the law makes three degrees of crime, as to its enormity. Now, in like manner, we shall in a series of chapters consider how the law regards crime as to the nearness of the several participants in its commission. For example, one man may undertake to commit a crime but not accomplish what he meant, a second may excite a third to go elsewhere and do it, the third may stand by and encourage a fourth, and the fourth may with his own hands accomplish what all intended should be done. And we say that these four persons, all of whom incurred legal guilt, stand in different degrees of proximity to the completed crime. Does the law treat them alike? This is what is to be explained in the chapters on which we are now to enter.

§ 627. **In what Order discussed.** — But, before we enter upon the direct inquiries thus suggested, we shall examine, in the next chapter, the general doctrine of the combination of persons in crime, as to the degree and nature of the participation which, when it is committed, will make one, in any form, guilty. The transition will then be easy, in subsequent chapters, to the degree and nature of his guilt. Further on, we shall consider compounding and misprision, wherein one, without combining with another, still incurs a guilt in respect of the other's wrong-doing. Afterward, under the title Attempt, we shall consider how a man, not combining with another, becomes guilty in respect of an offence which neither he nor any one else in fact commits.

CHAPTER XLV.

COMBINATIONS OF PERSONS IN CRIME.

§ 628. **In General.** — If one employs another to do a thing, we commend or blame him precisely as though it were done with his own hands. In like manner, we commend or blame the other, if his will concurred, the same as though he had proceeded self-moved. And if two act together in the doing, it is the same as to each. To illustrate this principle, as seen in the criminal law, is the purpose of the present chapter.

§ 629. **Doctrine defined.** — The doctrine of combination in crime is, that, when two or more persons unite to accomplish a criminal object, whether through the physical volition of one, or of all, proceeding severally or collectively, each individual whose will contributes to the wrong-doing is in law responsible for the whole, the same as though performed by himself alone. It may be particularized thus, —

§ 630. **Acting jointly — Severally.** — If persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone;[1] and it is the same if, the act being divided into parts, each proceeds with his several part unaided.[2] And, —

§ 631. **Acting by Agent.** — Since an act by an agent has in law the effect of a personal act,[3] if one employs another to do a criminal thing for him, he is guilty the same as though he had done it himself.[4] Nor is his guilt the less if the agent

[1] People *v.* Mather, 4 Wend. 229, 259; Reg. *v.* Haines, 2 Car. & K. 368; Reg. *v.* Mazeau, 9 Car. & P. 676.

[2] Rex *v.* Lockett, 7 Car. & P. 300; Reg. *v.* Nickless, 8 Car. & P. 757; Reg. *v.* Whittaker, 1 Den. C. C. 310; Reg. *v.* Hurse, 2 Moody & R. 360; Rex *v.* Standley, Russ. & Ry. 305; Reg. *v.* Gerrish, 2 Moody & R. 219; Rex *v.* Passey, 7 Car. & P. 282; Reg. *v.* Rogers, 2 Moody, 85, 2 Lewin, 119, 297; Reg. *v.* Kelly, 2 Cox C. C. 171; Smith *v.* People, 1 Col. Ter. 121.

[3] Broom Leg. Max. 2d ed. 643.

[4] United States *v.* Morrow, 4 Wash. C. C. 733; Reg. *v.* Williams, Car. & M. 259; Schmidt *v.* The State, 14 Misso. 137; Adams *v.* People, 1 Comst. 173; Commonwealth *v.* Stevens, 10 Mass. 181; Commonwealth *v.* Nichols, 10 Met. 259;

proceeds equally from his own desires or on his own account.[1] Finally, —

§ 632. **Will contributing.** — By this sort of reasoning we reach the conclusion, that every person whose corrupt intent contributes to a criminal act, in a degree sufficient for the law's notice,[2] is in law guilty of the whole crime.[3] Thus, —

Present countenancing — (Prize-fight). — It may be said in a sort of general way, that all who by their presence countenance a riot or a prize-fight or any other crime, — especially if ready to help should necessity require,[4] — are liable as principal actors.[5] But this statement needs to be made more exact.

§ 633. **Mere Presence — What more.** — A mere presence is not sufficient;[6] nor is it alone sufficient in addition, that the person present, unknown to the other, mentally approves what is done.[7] There must be something going a little further;[8] as, for example, some word or act.[9] The party to be charged "must," in the language of Cockburn, C. J., "incite, or procure, or encourage the act."[10]

Rex *v.* Dyson, Russ. & Ry. 523; The State *v.* Dow, 21 Vt. 484; Commonwealth *v.* Hill, 11 Mass. 136. And see Ewing *v.* Thompson, 13 Misso. 132; Caldwell *v.* Sacra, Litt. Sel. Cas. 118; Leggett *v.* Simmons, 7 Sm. & M. 348.

[1] Rex *v.* Russell, 1 Moody, 356; Ross *v.* Commonwealth, 2 B. Monr. 417.

[2] Ante, § 212 et seq.

[3] Lord Mohun's Case, Holt, 479; 1 East P. C. 89; Rex *v.* Plummer, J. Kel. 109, 114, 118; Rex *v.* Whithorne, 3 Car. & P. 394; United States *v.* Jones, 3 Wash. C. C. 209; The State *v.* Heyward, 2 Nott & McC. 312; Howlett *v.* The State, 5 Yerg. 144; Reg. *v.* Howell, 9 Car. & P. 437; Collins *v.* Commonwealth, 3 S. & R. 220; The State *v.* Caldwell, 2 Tyler, 212; Reg. *v.* Swindall, 2 Car. & K. 230; Reg. *v.* Harris, Car. & M. 661, note; Green *v.* The State, 13 Misso. 382; Reg. *v.* Young, 8 Car. & P. 644; Rex *v.* Skerritt, 2 Car. & P. 427; Rex *v.* Douglas, 7 Car. & P. 644.

[4] Doan *v.* The State, 26 Ind. 495.

[5] Rex *v.* Hunt, 1 Keny. 108; Rex *v.* Perkins, 4 Car. & P. 537; Rex *v.* Billingham, 2 Car. & P. 234; Rex *v.* Murphy, 6 Car. & P. 103; Rex *v.* Fursey, 6 Car. & P. 81; The State *v.* Straw, 33 Maine, 554; Williams *v.* The State, 9 Misso. 270. And see Reg. *v.* Young, 8 Car. & P. 644.

[6] Butler *v.* Commonwealth, 2 Duvall, 435; The State *v.* Farr, 33 Iowa, 553; The State *v.* Hardy, Dudley, S. C. 236; People *v.* Woodward, 45 Cal. 293; People *v.* Ah Ping, 27 Cal. 489. So mere knowledge that an offence is about to be committed will not involve in guilt a person who takes no part in it, and is not present at its commission. Tullis *v.* The State, 41 Texas, 598.

[7] Clem *v.* The State, 33 Ind. 418; Plummer *v.* Commonwealth, 1 Bush, 76. And see Thompson *v.* Commonwealth, 1 Met. Ky. 13; Ring *v.* The State, 42 Texas, 282; People *v.* Ah Ping, 27 Cal. 489; Smith *v.* The State, 37 Ala. 472.

[8] Burrell *v.* The State, 18 Texas, 713. And see United States *v.* Poage, 6 McLean, 89.

[9] Reg. *v.* Atkinson, 11 Cox C. C. 330; Commonwealth *v.* Cooley, 6 Gray, 350. And see The State *v.* Cockman, Winston, No. 2, 95; The State *v.* David, 4 Jones, N. C. 353; Huling *v.* The State, 17 Ohio State, 583; Cabbell *v.* The State, 46 Ala. 195.

[10] Reg. *v.* Taylor, Law Rep. 2 C. C. 147, 149, 13 Cox C. C. 68, 12 Eng. Rep

His will must in some degree contribute to what is done. To illustrate, —

False Pretence — Conspiracy. — If one of several persons utters a false pretence in the presence of the others who concur in it, all are guilty.[1] And if several conspire to seize and run away with a vessel, and death comes to one opposing, all who are present abetting are punishable criminally for the murder.[2]

§ 634. *Applications of the Doctrine in Varying Circumstances :* —

Sometimes Difficult. — It is believed that the foregoing illustrations sufficiently explain the general doctrine ; but its application is sometimes difficult ; and, as to this, further views will be helpful.

Persons Lawfully together — Crime by One. — From the proposition that mere presence at the commission of a crime does not render a person guilty,[3] it results, that, if two or more are lawfully together, and one does a criminal thing without the concurrence of the others, they are not thereby involved in guilt.[4] But, however lawful the original coming together, the after conduct may satisfy a jury that all are guilty of what is done.[5]

Unlawfully together. — Even where persons are unlawfully together, and by concurrent understanding are in the actual perpetration of some crime, if one of them, of his sole volition, and not in pursuance of the main purpose, does a criminal thing in no way connected with what was mutually contemplated, he only is liable.[6] Thus, —

Robbery after joint Wounding — Resisting Arrest. — If, in England, poachers join in an attack on the gamekeeper, and leave him

636, and Moak's note. Compare this case with Vol. II. § 311.

[1] Young *v.* Rex, 3 T. R. 98. And see Reg. *v.* Tisdale, 20 U. C. Q. B. 272.

[2] United States *v.* Ross, 1 Gallis. 624.

[3] Ante, § 633.

[4] J. Kel. 47 ; 1 East P. C. 334 ; Anonymous, 6 Mod. 43 ; The State *v.* Stalcup, 1 Ire. 30 ; United States *v.* Jones, 3 Wash. C. C. 209, 223 ; Reg. *v.* Luck, 3 Fost. & F. 483. And see Reg. *v.* Howell, 9 Car. & P. 437.

[5] Vol. II. § 1150 ; The State *v.* St. Clair, 17 Iowa, 149. See also Kelly *v.* Commonwealth, 1 Grant, Pa. 484 ; Brown *v.* The State, 28 Ga. 199 ; Strawhern *v.* The State, 37 Missis. 422.

[6] Rex *v.* Hodgson, 1 Leach, 4th ed. 6 ; s. c. nom. Rex *v.* Hubson, 1 East P. C. 258 ; Rex *v.* Mastin, 6 Car. & P. 396 ; Rex *v.* Collison, 4 Car. & P. 565 ; Rex *v.* Hawkins, 3 Car. & P. 392 ; Rex *v.* Plummer, J. Kel. 109, 111, 113 ; United States *v.* Gibert, 2 Sumner, 19, 29 ; Rex *v.* McIlhone, 1 Crawf. & Dix C. C. 156 ; Reg. *v.* Soley, 2 Salk. 594, 595 ; Anonymous, 6 Mod. 43 ; Rex *v.* Southern, Russ. & Ry. 444 ; Reg. *v.* Price, 8 Cox C. C. 96 ; Reg. *v.* Doddridge, 8 Cox C. C. 335 ; Commonwealth *v.* Campbell, 7 Allen, 541 ; Reg. *v.* Luck, 3 Fost. & F. 483 ; Manier *v.* The State, 6 Baxter, 595 ; Mercersmith *v.* The State, 8 Texas Ap. 211. And see Reg. *v.* Howell, 9 Car. & P. 437.

senseless, — then, if one of them returns and steals his money, this one alone can be convicted of the robbery.[1] So, if two have committed a larceny together, and one suddenly wounds an officer attempting to arrest both, the other one cannot be convicted of this wounding unless the two had conspired, not only to steal, but to resist also, with extreme violence, any who might attempt to apprehend them.[2] Again, —

§ 635. **Maiming by one to prevent Arrest.** — If several are out committing a felony, and, on alarm, run different ways, and one to avoid being taken maims a pursuer, the others are not guilty parties in the mayhem.[3] And —

Assault ending in Mayhem. — It has been even held, that, where two join in an assault, and one commits mayhem, the other is not liable for the latter offence, unless he also intended to maim.[4] But the correctness of this decision is doubtful.[5] So, —

Homicide by One. — If two are riding rapidly along a highway as in racing, and one of them passes a third without harming him, but the other rides against his horse and it throws and kills him, this one alone is responsible for the manslaughter.[6] Yet a man who invites another to a place to be murdered by an accomplice is accessory to the homicide when committed.[7] Again, —

Robbery by One. — Where a statute had made the obtaining of goods on a false charge of sodomy[8] a different offence from robbery,[9] and two combined thus to obtain goods of a third, and, while they were jointly in the execution of this plan, one of them without the other's concurrence got possession of the goods by force, the one only was held to have committed robbery.[10]

§ 636. **Acts within Common Plan.** — But, as we saw in another connection,[11] a man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally from some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of

[1] Rex *v.* Hawkins, 3 Car. & P. 392. And see Sloan *v.* The State, 9 Ind. 565.

[2] Rex *v.* Collison, 4 Car. & P. 565. And see Reg. *v.* Howell, 9 Car. & P. 437.

[3] Rex *v.* White, Russ. & Ry. 99.

[4] The State *v.* Absence, 4 Port. 397. And see Frank *v.* The State, 27 Ala. 37 ; Brennan *v.* People, 15 Ill. 511 ; Thompson *v.* The State, 25 Ala. 41.

[5] Post, § 636.

[6] Rex *v.* Mastin, 6 Car. & P. 396.

[7] Reg. *v.* Manning, 2 Car. & K. 887.

[8] See Vol. II. § 1172.

[9] In a subsequent case, it was doubted whether the statute — 1 Vict. c. 87, § 3 — did so operate. Reg. *v.* Stringer, 2 Moody, 261.

[10] Reg. *v.* Henry, 9 Car. & P. 309, 2 Moody, 118.

[11] Ante, § 313–336.

one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable.[1]

§ 637. **Degree of Departure from Plan.** — There is a degree, not exactly definable, in which a departure, by a confederate, from the contemplated plan will relieve the rest from responsibility for what he does, and another less degree which will not relieve. Some instances are the following, —

Rioters, and Homicide by those suppressing. — If there is a riot, and an innocent third person is accidentally killed by those suppressing it, the rioters are not guilty of the homicide; for in no way did they concur in or encourage the act which caused death.[2] But, —

Killing Person opposing. — If several are committing a crime together, and one of them kills an officer or other person who opposes or attempts to arrest them, the rest are not necessarily, as we have seen,[3] to be deemed participants in the homicide; but in various circumstances they are, although it was not their original design to take life.[4]

Libel. — If one requests another to write a libel, which he does, but swells it beyond the matter contemplated, the former is responsible for the whole.[5]

Homicide not contemplated. — If two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable.[6]

§ 638. **Changing Means to agreed End — (Treason).** — "If," in

[1] United States *v.* Ross, 1 Gallis. 624; Rex *v.* Plummer, J. Kel. 109, 114, 118; United States *v.* Gibert, 2 Sumner, 19, 29; Mansell's Case, 2 Dy. 128 *b*, pl. 60; Rex *v.* Murphy, 6 Car. & P. 103; Ashton's Case, 12 Mod. 256; Rex *v.* Keat, 5 Mod. 288, 292; Sir C. Stanley's Case, J. Kel. 86; Rex *v.* Edmeads, 3 Car. & P. 390; 1 East P. C. 258; Reg. *v.* Tyler, 8 Car. & P. 616; Reg. *v.* Howell, 9 Car. & P. 437; Brennan *v.* People, 15 Ill. 511; Thompson *v.* The State, 25 Ala. 41; Reg. *v.* Bernard, 1 Fost. & F. 240; Reg. *v.* Jackson, 7 Cox C. C. 357; Reg. *v.* Caton, 12 Cox C. C. 624, 10 Eng. Rep. 506; Reg. *v.* Harrington, 5 Cox C. C. 231; Ferguson *v.* The State, 32 Ga. 658. But see Frank *v.* The State, 27 Ala. 37; The State *v.* Absence, 4 Port. 397.

[2] Commonwealth *v.* Campbell, 7 Allen, 541.

[3] Ante, § 635.

[4] Ruloff *v.* People, 45 N. Y. 213, 11 Abb. Pr. n. s. 245, 5 Lans. 261; Moody *v.* The State, 6 Coldw. 299.

[5] Reg. *v.* Cooper, 1 Cox C. C. 266.

[6] Reg. *v.* Caton, 12 Cox C. C. 624, 10 Eng. Rep. 506. And see Watts *v.* The State, 5 W. Va. 532; Reg. *v.* Skeet, 4 Fost. & F. 931; Reg. *v.* Lee, 4 Fost. & F. 63; Reg. *v.* Phillips, 3 Cox C. C. 225, The State *v.* Shelledy, 8 Iowa, 477.

the words of Popham, C. J., "many do conspire to execute treason against the prince in one manner, and some of them do execute it in another manner, yet their act, though different in the manner, is the act of all them who conspire, by reason of the general malice of the intent."[1] Thus, also, —

§ 639. **Joining in Part — (Rescue — Homicide).** — If a person is present aiding in the commencement of an assault with intent to rescue a prisoner, he does not cease to be guilty though his fears prevent him from going all lengths with his party.[2] Yet East observes, that, "in order to make the killing, by any, murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done, or in contemplation, it must happen during the actual strife or endeavor, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened."[3]

§ 640. **Prompting to a Crime.** — It is within a principle already stated,[4] that, if one purposely excites another to commit an offence, — as, if he harangues people inflaming them to a riot, — and the offence is accordingly committed, he is guilty, though he personally takes no part in it. But the connection between what is done by him and them must be reasonably apparent.[5] And it may be a nice question what departures from the plan will relieve from responsibility the person who sets it on foot.[6]

[1] Blunt's Case, 1 Howell St. Tr. 1409, 1412. And see 1 East P. C. 98.

[2] The State *v.* Morris, 3 Hawks, 388; Reg. *v.* Wallis, 1 Salk. 334, Holt, 484; Rex *v.* Warner, 1 Moody, 380, 5 Car. & P. 525.

[3] 1 East P. C. 259.

[4] Ante, § 631.

[5] Reg. *v.* Sharpe, 3 Cox C. C. 288; Vol. II. § 1146, 1153.

[6] Hawkins says: "If a man command another to commit a felony on a particular person or thing, and he do it on another: as, to kill A, and he kill B; or, to burn the house of A, and he burn the house of B; or, to steal an ox, and he steal an horse; or, to steal such an horse, and he steal another; or, to commit a felony of one kind, and he commit another of a quite different nature, — as, to rob J. S. of his plate as he is going to market, and he break open his house in the night and there steal the plate, — it is said, that the commander is not an accessory, because the act done varies in substance from that which was commanded. But it is observable, that Plowden, in his report of Saunders's Case (Reg. *v.* Saunders, 2 Plow. 473, 475), which seems to be the chief foundation of what is said by others concerning these points, in putting the case of a command to burn the house of A, which shall not make the commander an accessory to the burning of the house of B unless it were caused by burning that of A, states in this manner: 'If I command a man to burn the house of such an one, which he well knows, and he burn the house of another, there I shall not be accessory, because it is another distinct thing, to which I did not give assent,' &c. By which it seems to be implied, that it is a necessary ingredient in such a case to make B no accessory, that he knew the house which he was commanded to burn; for, if he did not know it, but mis-

§ 641. **Rules to determine Responsibility.** — The true view is doubtless as follows: One is responsible for what of wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced in a manner he did not contemplate. If he did not contemplate it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But, if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein, merely because, when it was done, he meant to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to cases arising, yet they seem to furnish the true rules.

§ 642. **Joining in Act partly performed.** — If, while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole; because he contributed to the result.[1] Should the offence be one requiring a specific intent,[2] and the charge be that he was present abetting the others, his knowledge of their intent must also be shown.[3] If, in these cases, there is no mutual understanding of each other's purpose, then each who contributed in act to the result will be responsible simply for what he personally meant.[4]

After Offence completed. — When a crime has been fully committed, one not already guilty is too late to be a sharer in it;[5] though, if it is a felony, he may become an accessory after the

took another for it, and, intending only to burn the house which he was commanded to burn, happen by such mistake to burn the other, it may probably be argued, that the commander ought to be esteemed an accessory to such burning; because it was the direct and immediate effect of an act wholly influenced by his command, and intended to have pursued it." 2 Hawk. P. C. Curw. ed. p. 444, § 21, 22.

[1] People *v.* Mather, 4 Wend. 229, 259; Sir Charles Stanley's Case, J. Kel. 86; Anonymous, 6 Mod. 43; 1 East P. C. 70; Reg. *v.* Simpson, Car. & M. 669; Keithler *v.* The State, 10 Sm. & M. 192.

[2] Ante, § 320, 342.

[3] Reg. *v.* Cruse, 8 Car. & P. 541. And see Rex *v.* Southern, Russ. & Ry. 444; Brown *v.* The State, 28 Ga. 199.

[4] Beets *v.* The State, Meigs, 106; Rex *v.* Murphy, 6 Car. & P. 103; Reg. *v.* Howell, 9 Car. & P. 437.

[5] Rex *v.* Hawkins, 3 Car. & P. 392; Rex *v.* King, Russ. & Ry. 332; Rex *v.* McMakin, Russ. & Ry. 333, note.

fact.[1] Therefore, it appearing on an indictment against three for cutting and wounding, that the third came to the spot only after one of the others had gone away, and there kicked the wounded man struggling on the ground with the remaining one, he was deemed entitled to an acquittal.[2]

§ 643. **Conclusion.** — Having thus seen under what circumstances the law holds different persons responsible for a crime committed by more than one, we are prepared to inquire what is the particular form of guilt which it attributes to each.

[1] Rex *v.* Lee, 6 Car. & P. 536.

[2] Reg. *v.* McPhane, Car. & M. 212.

CHAPTER XLVI.

THE PRINCIPAL ACTOR.[1]

§ 644. **Scope of this Chapter — (Principals of First and Second Degrees).** — On the "Diagram of Crime,"[2] the scope of this chapter is indicated by C E M N O. It includes principals of the first and second degrees in felony, and those who sustain the like relation in treason and misdemeanor. But participants who are treated as principals in treason and misdemeanor, by reason of their having advised what another performs in their absence, will be considered in the next chapter.

§ 645. **How the Chapter divided.** — We shall examine the doctrine, I. As to Felony; II. As to Treason; III. As to Misdemeanor.

I. *As to Felony.*

§ 646. **Participants how named.** — A mere attempt to commit felony,[3] or a compounding[4] or misprision[5] of it, is misdemeanor. But there are four differing methods of participation in it which make the participant a felon.[6] He may be an accessory before the fact,[7] or an accessory after the fact,[8] or a principal of the first, or a principal of the second degree. The last two are now for consideration.

§ 647. **Contribution of Will.** — We saw, in the last and preceding chapters, that, for a man to be criminal in respect of an act performed either by his own physical volitions or another's, his will must contribute to it. In these chapters, we assume that the will does thus contribute.

[1] See Crim. Proced. II. § 1 et seq.
[2] Ante, § 602.
[3] Post, § 728 et seq.
[4] Post, § 709 et seq.
[5] Post, § 716 et seq.
[6] And see Vaux's Case, 4 Co. 44.
[7] Post, § 672 et seq.
[8] Post, § 692 et seq.

§ 648. **Two degrees of Principals.** — In felony, there are two degrees in which men become principal offenders.

Principal First Degree defined. — A principal of the first degree is one who does the act, either himself directly, or by means of an innocent agent.[1]

Principal Second Degree. — A principal of the second degree is one who is present lending his countenance and encouragement, or otherwise aiding, while another does the act.[2]

Distinction Formal — (Its Origin — How the Indictment). — But the distinction between the two degrees is without practical effect.[3] Its origin is, that anciently those only who are now called principals of the first degree were deemed principals at all: persons present abetting were accessories at the fact. But when the courts came to hold the latter to be principals, they termed them principals of the second degree.[4] And now an indictment against one as principal of the first degree is sustained by proof of his being principal of the second; and, on the contrary, an indictment against him as principal of the second degree is supported by proof that he is principal of the first.[5] The distinction is in all respects without a difference;[6] and it should not be preserved in the books.

[1] See ante, § 310; post, § 649, 651.
[2] Williams v. The State, 47 Ind. 568, 574.
[3] Crim. Proced. II. § 3.
[4] 1 Russ. Crimes, 3d Eng. ed. 26; Griffith's Case, 1 Plow. 97, 98; Foster, 347, 348.
[5] Crim. Proced. II. § 8; The State v. Mairs, Coxe, 458; The State v. Anthony, 1 McCord, 285; Rex v. Cunningham, 1 Crawf. & Dix C. C. 196; Rex v. Greene, 1 Crawf. & Dix C. C. 198; The State v. Cameron, 2 Chand. 172; Bauson v. Offley, 3 Salk. 38; Reg. v. Wallis, 1 Salk. 334; Reg. v. Crisham, Car. & M. 187; Rex v. Towle, Russ. & Ry. 314, 3 Price, 145; Rex v. Gogerly, Russ. & Ry. 343; Foster, 351; Shaw v. The State, 18 Ala. 547; Archb. New Crim. Proced. 13. The State v. Hill, 72 N. C. 345; Young v. Commonwealth, 8 Bush, 366; People v. Ah Fat, 48 Cal. 61. But see Reg. v. Tylar, 8 Car. & P. 616.
[6] The State v. Fley, 2 Brev. 338; Reg. v. Rogers, 2 Moody, 85; Griffith's Case, 1 Plow. 97, 98, 100; Reg. v. Phelps, Car. & M. 180; Rex v. Taylor, 1 Leach, 4th ed. 360; Shaw's Case, 1 East P. C. 351; Rex v. Folkes, 1 Moody, 354; Reg. v. Williams, Car. & M. 259; Rex v. Gray, 7 Car. & P. 164; Rex v. Potts, Russ. & Ry. 353; Rex v. Royce, 4 Bur. 2073; Rex v. Moore, 1 Leach, 4th ed. 314, 2 East P. C. 679; Dennis v. The State, 6 Pike, 230; Fugate v. The State, 2 Humph. 397; The State v. Arden, 1 Bay, 487; Hately v. The State, 15 Ga. 346; McCarty v. The State, 26 Missis. 299, 303; United States v. Wilson, Bald. 78; The State v. Ross, 29 Misso. 32; Hill v. The State, 28 Ga. 604; The State v. Simmons, 6 Jones, N. C. 21; The State v. McGregor, 41 N. H. 407; King v. The State, 21 Ga. 220; The State v. Ellis, 12 La. An. 390; Brown v. The State, 28 Ga. 199; The State v. Merritt, Phillips, 134; Common-

Under Exceptional Statutes. — Occasionally, however, we meet with a statute so drawn upon this distinction as necessarily to keep it alive for its particular purpose.[1]

§ 649. **Who a Principal.**—It being, therefore, unimportant to draw any nice distinctions between the two sorts of principal, let us see where the line separates the principal of either degree from the accessory. One plain proposition is, that there can be no crime without a principal. There may be more principals than one; but there must be, at least, one. Therefore a man whose sole will procures a criminal transaction is principal, whatever physical agencies he employs,[2] and whether he is present or absent[3] when the thing is done. Or, if he is present abetting while any act necessary to constitute the offence is being performed through another,[4] though not the whole thing necessary, — and perhaps, while any act is being done which may enter into the offence,[5] though not strictly necessary, — he is a principal. But he is not such if what is accomplished in his presence is in no sense a part of the offence.[6] Again, —

§ 650. **Distinct Acts to one End — (Forgery).** — Where several acts constitute together one crime, if each is separately performed by a different individual in the absence of the rest, all are principals as to the whole.[7] For example, where forgery is a statutory felony, if persons make distinct parts of a forged instrument, each is a principal as to the whole, even though he does not know by whom the other parts are executed, and one finishes it alone while the rest are absent.[8] Were the law not so, no one could be punished; for a person whose own hand does

wealth *v.* Fortune, 105 Mass. 592; The State *v.* Jenkins, 14 Rich. 215; Clay *v.* The State, 40 Texas, 67; The State *v.* Squaires, 2 Nev. 226; The State *v.* Dyer, 59 Maine, 303; The State *v.* Center, 35 Vt. 378; Washington *v.* The State, 36 Ga. 222; People *v.* Cotta, 49 Cal. 166.

[1] And see Foster, 355 et seq.; Brennan *v.* People, 15 Ill. 511; Reg. *v.* Whistler, 11 Mod. 25, 2 Ld. Raym. 842; Warden *v.* The State, 24 Ohio State, 148.

[2] See post, § 651.

[3] Pinkard *v.* The State, 30 Ga. 757.

[4] Reg. *v.* Kelly, 2 Car. & K. 879; Reg. *v.* Simpson, Car. & M. 669; Rex *v.* Jordan, 7 Car. & P. 432; Rex *v.* Harding, Russ. & Ry. 125; Rex *v.* Palmer, Russ. & Ry. 72, 2 Leach, 4th ed. 978, 1 New Rep. 96; Rex *v.* Standley, Russ. & Ry. 305; Rex *v.* County, 2 Russ. Crimes, 3d Eng. ed. 118; Rex *v.* Butteris, 6 Car. & P. 147; Cornwal's Case, 2 Stra. 881; Hawkins's Case, cited 2 East P. C. 485; Rex *v.* Harris, 7 Car. & P. 416; ante, § 642.

[5] Rex *v.* Dyer, 2 East P. C. 767; Rex *v.* Hornby, 1 Car. & K. 305.

[6] Rex *v.* King, Russ. & Ry. 332; Rex *v.* McMakin, Russ. & Ry. 333, note; Rex *v.* Badcock, Russ. & Ry. 249.

[7] See, as illustrative, Rex *v.* Cope, 1 Stra. 144. And see post, § 653.

[8] Rex *v.* Kirkwood, 1 Moody, 304; Rex *v.* Dade, 1 Moody, 307; Rex *v.* Bingley, Russ. & Ry. 446.

the criminal act, either wholly or in part, is not an accessory.[1]

§ 651. **Act through Innocent Agent.** — And because there must always be a principal,[2] one is such who does the criminal thing through an innocent agent,[3] though personally absent. If a dose of poison,[4] or an animate object like a human being, with[5] or without[6] general accountability, but not criminal in the particular instance, inflicts death or other injury in the absence of him whose will set the force in motion, the latter is deemed in law a principal offender, for there is no other. But, if the agent employed incurs guilt, then the employer is simply an accessory before the fact.[7]

§ 652. **Counselling to Suicide.** — If one counsels another to suicide, and it is done in his presence, the adviser is, in every view, guilty as principal.[8] Accordingly where two persons, agreeing to commit suicide together, employ means which take effect on one only, the survivor is a principal in the murder of the other.[9] But does the person who takes his own life occupy the position

[1] In an English jury case, Cresswell, J., on consultation with Patteson, J., ruled, that, if one of two confederates unlocks the door of a room in which a larceny is to be committed, then goes away, and the other confederate comes and steals the goods, the former is not a principal in the theft. Reg. *v.* Jeffries, 8 Cox C. C. 85. I doubt the soundness of this ruling. If sustainable, it must be on the ground that the unlocking of the door constituted no part of the crime. But it seems to me that it was a part of the criminal transaction, distinctly contributing to the end. In Ohio, one of several confederates enticed the owner of a store a mile away and detained him, while the others broke open the store and took the goods; and the court held, it seems to me correctly, that he was a principal. The decision was put upon the ground that he was constructively present. He not merely advised, but bore a part in the criminal transaction; that constitutes a principal, whether we call it being constructively present or not. Breese *v.* The State, 12 Ohio State, 146. In these two cases, which seem on principle alike, but decided differently by different courts, it would appear not unreasonable to hold, that, as the unlocking of the door in the one, and the enticing away of the owner in the other, were not *necessarily* parts of the crime, it would have been competent for the prosecuting power, at its election, to deal with these persons as accessories before the fact. See post, § 663, 664.

[2] Ante, § 649.

[3] Ante, § 310.

[4] Vaux's Case, 4 Co. 44; Reg. *v.* Michael, 9 Car. & P. 356, 2 Moody, 120.

[5] Rex *v.* Giles, 1 Moody, 166, Car. Crim. Law, 3d ed. 191; Commonwealth *v.* Hill, 11 Mass. 136; Adams *v.* People, 1 Comst. 173; Reg. *v.* Mazeau, 9 Car. & P. 676; Reg. *v.* Saunders, 2 Plow. 473; The State *v.* Fulkerson, Phillips, 233, and other cases cited ante, § 310.

[6] Anonymous, J. Kel. 53. And see Reg. *v.* Tyler, 8 Car. & P. 616; Reg. *v.* Michael, 9 Car. & P. 356, 2 Moody, 120.

[7] Wixson *v.* People, 5 Parker C. C 119; Reg. *v.* Manley, 1 Cox C. C. 104.

[8] Vol. II. § 1187; Rex *v.* Dyson, Russ & Ry. 523; Reg. *v.* Alison, 8 Car. & P 418.

[9] Reg. *v.* Alison, 8 Car. & P. 418. And see 1 East P. C. 229; The State *v* Ludwig, 70 Misso. 412.

of an innocent or a guilty agent? The latter is the English doctrine; so that, if the adviser is absent at the commission of the act, he is only an accessory before the fact, who cannot be convicted except after or with his principal, — which is never.[1] It is not quite certain whether this is the American doctrine also; or whether, with us, the person committing suicide is to be deemed an innocent agent in inflicting the violence on himself,[2] so that the adviser will be principal, though absent when the deed is done. In Massachusetts, two prisoners being confined in adjoining cells within hearing of each other, one advised the other to take his own life, which he did; and it was ruled, that, if the advice was the cause moving to the deed, the adviser was guilty of murder.[3] To some extent, at present, this question is regulated by statutes.

§ 653. **In Presence of Principal of First Degree.** — Some of the foregoing doctrines, the reader perceives, grow out of the necessity of there being a principal. But where there is unquestionably a principal of the first degree, — that is, a responsible person in the actual commission of the offence through his own volition, — no other person will be a principal as abetting him, unless in a position to render, if necessary, some personal assistance. If the will of the other contributes to the act,[4] the test, to determine whether he is a principal rather than an accessory,[5] is, whether he is so near, or otherwise so situated, as to make his personal help, if required, to any degree available.[6] He need not be in the actual presence of the other principal; but, if he is constructively there, as thus explained, it is enough.[7] And, for reasons already

[1] Rex v. Russell, 1 Moody, 356; Reg. v. Leddington, 9 Car. & P. 79. See Reg. v. Fretwell, Leigh & C. 161; 9 Cox C. C. 152.

[2] And see Vol. II. § 1187.

[3] Commonwealth v. Bowen, 13 Mass. 356. See, as perhaps illustrative, Berry v. The State, 10 Ga. 511, 518.

[4] Ante, § 628 et seq.

[5] Post, § 663.

[6] Commonwealth v. Knapp, 9 Pick. 496, 516–519; Rex v. Manners, 7 Car. & P. 801; Rex v. Stewart, Russ. & Ry. 363; Green v. The State, 13 Misso. 382; Rex v. Soares, Russ. & Ry. 25, 2 East P. C. 974; Rex v. Kelly, Russ. & Ry. 421; Reg. v. Jones, 9 Car. & P. 761; Tate v. The State, 6 Blackf. 110; Rex v. Davis, Russ. & Ry. 113; The State v. Wisdom, 8 Port. 511; Norton v. People, 8 Cow. 137; Reg. v. Perkins, 12 Eng. L. & Eq. 587; Breese v. The State, 12 Ohio State, 146, 154; Wixson v. People, 5 Parker C. C. 119; Trim v. Commonwealth, 18 Grat. 983; The State v. Nash, 7 Iowa, 347; Doan v. The State, 26 Ind. 495; Selvidge v. The State, 30 Texas, 60.

[7] Tate v. The State, 6 Blackf. 110; The State v. Heyward, 2 Nott & McC. 312; Coyles v. Hurtin, 10 Johns. 85; Commonwealth v. Lucas, 2 Allen, 170; Reg. v. Vanderstein, 16 Ir. Com. Law, 574, 10 Cox C. C. 177; The State v. Hamilton, 13 Nev. 386.

seen,[1] this is especially so when he does something which enters into the offence, as constituting a part of it.[2] Thus, —

§ 654. **In Larceny — Duelling — Uttering Forgeries.** — A person waiting outside of a house to receive goods which his confederate is stealing within, is a principal of the second degree in the larceny.[3] So may one be who is in a lower room while his confederate is operating in an upper room.[4] And if death occurs in a duel, the seconds are principals in the murder.[5] But it was held not sufficient in evidence to convict one as principal in the uttering of a forged note (assumed to be felony), that he came with the utterer to town, put up at the same inn with him, walked out with him; and, two hours later, the other alone passed off the note; in twenty minutes more, the two came together; and, when he saw that the utterer was arrested, he ran from the officer, and each affected ignorance of the other.[6]

II. *In Treason.*

§ 655. **In General.** — We shall see, in the next chapter, that, in treason, not only are they principals who would be such if the offence were felony, but they also who would be accessories before the fact. There is, therefore, relating to treason, nothing which demands consideration in this chapter.

III. *As to Misdemeanor.*

§ 656. **In General.** — Likewise, in misdemeanor, the distinction between principals of the first and second degree is unknown. Neither is there any distinction between accessories before the fact and principals; all participants being principals, the same as in treason,[7] — a question for the next chapter.

[1] Ante, § 649.

[2] Rex v. Passey, 7 Car. & P. 282; Rex v. Lockett, 7 Car. & P. 300; Rex v. Franklyn, 1 Leach, 4th ed. 255, Cald. 244. And see Rex v. Borthwick, 1 Doug. 207; Rex v. Harris, 7 Car. & P. 416.

[3] Rex v. Owen, 1 Moody, 96. And see Rex v. Skerrit, 2 Car. & P. 427.

[4] Commonwealth v. Lucas, 2 Allen, 170.

[5] Rex v. Cuddy, 1 Car. & K. 210; Reg. v. Young, 8 Car. & P. 644; Reg. v. Baronet, Dears. 51; Vol. II. § 811.

[6] Rex v. Davis, Russ. & Ry. 113. And see for similar facts, Rex v. Else, Russ. & Ry. 142. The judges, in both of these cases, were under the misapprehension that the offence was felony; it was really misdemeanor, therefore the cases were wrongly decided, but they are good in illustration of the doctrines of the text.

[7] Ante, § 655.

Persons acting together. — If persons are proceeding together in the commission of a misdemeanor, the act of each is the act of all, the same as in felony; for the same reasons control the one case as the other.[1] And the possession of a thing by one, contrary to the prohibition of a statute, is the possession of all.[2]

§ 657. **Lighter Misdemeanors distinguished.** — But when we ascend among the lighter misdemeanors, we find some differences occasioned by the smaller degree of blameworthiness involved in an offence, or the special terms of the statute creating it. The cases are neither sufficiently numerous nor uniform to enable an author to state precisely and fully what the doctrine of the courts is on this subject; but the principle is reasonably plain, as follows. If the terms of a statute distinctly limit the penalty to persons who participate in the act only in a certain way, those terms furnish the rule for the court. Or, if the expression is general, then, if the offence is of minor turpitude, and especially if the thing is only *malum prohibitum*, the courts, by construction, will limit its operation to those persons who are more particularly within the reason or the express words of the enactment. And there are misdemeanors of such a nature, and so small in turpitude, that even a person present and lending the support of his will to the commission of the act is, nevertheless, not punishable.[3] Thus, —

§ 658. **Retailing Liquor.** — Under the statutes making it penal for unlicensed persons to retail intoxicating liquor, it is generally held[4] that one who, as purchaser, lends the concurrence of his will to what is done, and tempts the seller with his money, and is present encouraging him, is still not liable to punishment. But —

[1] And see Edelmuth *v.* McGarren, 4 Daly, 467; The State *v.* Potter, 30 Iowa, 587.

[2] Reg. *v.* Thompson, 11 Cox C. C. 362, 364; Reg. *v.* Goodfellow, 1 Den. C. C. 81, 1 Car. & K. 724.

[3] See ante, § 212 et seq.

[4] **Why? And Connected Views.** — In Commonwealth *v.* Willard, 22 Pick. 476, the purchaser of intoxicating liquor sold without license was held not to be excusable from testifying against the seller, on the ground that he would criminate himself. In delivering the opinion of the court, Shaw, C. J., after observing that "no precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers," proceeded: "It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to counsel, entice, or induce another to commit a crime, and where it does not. In general, it has been considered as applying to cases of felony, though it has been held that it does not depend upon the mere legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offence proposed to be committed by the counsel, advice, or enticement of another is of a high and aggravated character, tending to breaches of the peace or other great disorder and violence, being what are usually considered *mala in se*, or criminal in themselves, in contradistinction to *mala prohibita*, or acts otherwise indifferent than as they are restrained by positive law." p. 478. And see, as confirming this doctrine, The State *v.* Hopkins, 4 Jones, N. C. 305; The State *v.* Wright, 4 Jones, N. C. 308. And see Rawles *v.* The State, 15 Texas, 581. The question thus adjudged in the Massachusetts court was decided in the same way in New Hampshire. The State *v.* Rand, 51 N. H. 361. Smith, J., who delivered the opinion, put the result in part upon a consideration of the general scope and purpose of the statute. And, referring to the Massachusetts case, he said: "We are not prepared to adopt the view there advanced, that one who approximates so nearly to the direct act, as a purchaser does, is not liable as an aider or accessory because of the comparatively insignificant character of the main offence." p. 366. But, while he thus disclaimed, he affirmed a doctrine not differing essentially from this, as follows: "The rules of statute interpretation, enunciated prior to the enactment of the prohibitory liquor law, and still recognized as sound, justify the court in giving weight to the above considerations. In cases of *mala prohibita*, the fact that the penalty is in terms imposed upon only one of two parties whose concurrence is requisite to the commission of the offence, and that the statute was made for the protection of the other party, who is generally regarded as the less culpable of the two, has repeatedly been considered good ground for giving the statute a construction exempting the party not named from criminal liability." p. 364. As sustaining this doctrine he referred to Browning *v.* Morris, Cowp. 790; Williams *v.* Hedley, 8 East, 378; Tracy *v.* Talmage, 14 N. Y. 162, 181-186; Curtis *v.* Leavitt, 15 N. Y. 9; Buffalo City Bank *v.* Codd, 25 N. Y. 168; Richardson, C. J., in Roby *v.* West, 4 N. H. 285, 288, 289; Perley, C. J., in Prescott *v.* Norris, 32 N. H. 101, 105; White *v.* Franklin Bank, 22 Pick. 181; Sargent, J., in Butler *v.* Northumberland, 50 N. H. 33, 38, 39. Now, as we have seen (ante, § 333), the substance of the distinction between *malum in se* and *malum prohibitum* is that the former is more intensely evil than the latter; so that in essence this New Hampshire doctrine does not differ from what is held elsewhere. And see, as confirming in a general way the foregoing views, Commonwealth *v.* Wood, 11 Gray, 85; Commonwealth *v.* Boynton, 116 Mass. 343. On the other hand, there is a Tennessee case, the reporter's headnote to which is as follows: "The sale of liquor by a slave is a criminal offence, and a white man who tempts him to commit the offence, by purchasing liquor from him, is an aider and abettor, and as much guilty, as a principal offender, of a misdemeanor, as if the seller had been of his own color." And McKinney, J., said: "In the case of a *white man*, we suppose it cannot be seriously controverted, that, upon general principles, the *purchaser* of spirituous liquors, in violation of the statutes passed to suppress tippling, is as much guilty of the violation of the law, and as much amenable to criminal prosecution and punishment, as the *seller*. They are, in all respects, *particeps criminis;* they are alike wilful violators of the law. The express prohibition to sell, upon every just principle of construction, must be considered as implying a prohibition to purchase. The purchaser — whether we regard his intent, or the effect and consequences of his act — is no less guilty, no less within the mischief intended to be suppressed, than the seller. It matters not that the former is not placed under the obligation of a bond or oath. This takes nothing from the force of the argument. He still stands guilty of wilfully participating in, and aiding

Agent of Retailer. — One is indictable who himself sells as another's servant, though without compensation.[1] And —

Participants in Riots, &c. — All who by their presence countenance a riot,[2] or an affray,[3] are criminally responsible.[4]

§ 659. **Treason and Fornication compared.** — Another illustration, distinguishing the lighter offences from the heavier, is the following: The statute of 25 Edw. 3, stat. 5, c. 2, made it high treason "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir;" and the construction was, that the woman, if consenting, was guilty as well as the man.[5] But when, in Tennessee, it was enacted, that, "if any white man or woman shall presume to live with any negro or mulatto man or woman, as man and wife, each and every of the parties so offending shall be liable to forfeit and pay the sum of five hundred dollars to any person

and encouraging the commission of, a criminal offence. Does not this, upon the soundest principles of criminal law, constitute him a *principal* in the offence? We think it does. And perhaps it would scarcely be going too far to say, that he ought to be regarded as less excusable than the seller. He has not the poor pretext of the latter, that the forbidden traffic is in part his means of procuring a living." The State *v.* Bonner, 2 Head, 135, 137. For further views on this topic, see, as respects small things, ante, § 212 et seq. See also Brown *v.* Perkins, 1 Allen, 89; Stamper *v.* Commonwealth, 7 Bush, 612. **Malicious Shooting.** — In the case last cited it was held, that one who abets at the fact a malicious shooting is not pursuable under the Kentucky statute, which provides only for the punishment of the principal offender. The statutory words are, that, "if any person shall wilfully and maliciously shoot at and wound another, with an intention to kill him, so that he does not die thereby, . . . he shall be confined in the penitentiary not less than one nor more than five years." Said Hardin, J.: "As a general rule, where a statute creates a felony and prescribes a particular punishment therefor, or where a statute provides a punishment for a common-law felony *by name*, those who were present, aiding and abetting in the commission of the crime, are held to be included by the statute, although not mentioned as such in the statute. But where, as in this case, the punishment is imposed by the statute upon the *person* alone who actually committed the acts constituting the offence, and not in general terms upon those who were *guilty* of the offence, according to common-law rules mere aiders and abettors, will not be deemed to be within the act." P. 614, referring to Rosc. Crim. Ev. 215. I do not propose to inquire how far these views would be generally accepted as sound.

[1] The State *v.* Bugbee, 22 Vt. 32 And see Commonwealth *v.* Hadley, 11 Met. 66; Geuing *v.* The State, 1 McCord, 578; Hays *v.* The State, 18 Misso. 246; The State *v.* Bryant, 14 Misso. 340; Roberts *v.* O'Conner, 33 Maine, 496; Vaughn *v.* The State, 4 Misso. 530.

[2] Rex *v.* Hunt, 1 Keny. 108; Williams *v.* The State, 9 Misso. 270; ante, § 628 et seq.

[3] Hawkins *v.* The State, 13 Ga. 322.

[4] **Participants in Gaming.** — And see, as to gaming, Smith *v.* The State, 5 Humph. 168; Howlett *v.* The State, 5 Yerg. 144; The State *v.* Smitherman, 1 Ire. 14. **In Perjury.** — As to perjury, United States *v.* Staats, 8 How. U. S. 41.

[5] 1 East P. C. 65; 1 Hale P. C. 89, 128; 3 Inst. 1, 2, 9; Eden Penal Law, 3d ed. 125.

who shall or will sue for the same, by action of debt, and moreover be liable to be indicted and punished at the discretion of the court;" the white person only was held to be liable, not also the colored.[1] So, —

Hiring Time. — In North Carolina, a former statute to prevent slaves from hiring their time of the owners, was construed to make the slave alone guilty in case of its violation.[2] Now, —

Reason why. — The different degree of wrong in the offences created by these statutes accounts for the different construction given them; and this result comes in spite of what might seem to be the opposing rule,[3] that the graver the offence created by a legislative enactment, the stricter must be its interpretation.

[1] The State *v.* Brady, 9 Humph. 74. And see Rawles *v.* The State, 15 Texas, 581.

[2] The State *v.* Clemons, 3 Dev. 472.

[3] Stat. Crimes, § 190.

CHAPTER XLVII.

THE ACCESSORY BEFORE THE FACT, AND THE LIKE.[1]

§ 660. **Scope of this Chapter.** — On the "Diagram of Crime,"[2] the subject of this chapter is indicated by B C O P. It embraces the accessory before the fact, properly so called, in felony; the party who sustains the like relation in treason, being himself, in law, a principal offender; and the one thus related in misdemeanor, also regarded, in law, as a doer.

§ 661. **How the Chapter divided.** — We shall consider, I. The General Doctrine of Accessory, whether before or after the Fact; II. Before the Fact in Felony; III. In Treason; IV. In Misdemeanor.

I. *The General Doctrine of Accessory, whether before or after the Fact.*

§ 662. **Limit of Term "Accessory."** — The word accessory properly refers only to one who participates as such in a felony. In this chapter, for convenience, we consider also the party who sustains the like relation in treason and misdemeanor.

§ 663. **How defined.** — An accessory is one who participates in a felony too remotely to be deemed a principal.[3]

Distinguished from Principal. — If the participant is a principal, though but of the second degree, he cannot be held under an

[1] See Crim. Proced. II. § 1 et seq.
[2] Ante, § 602.
[3] See ante, § 653.

indictment charging him as accessory;[1] if he is an accessory, he cannot be held as principal.[2]

§ 664. **Separate Acts — (Both Principal and Accessory).** — Yet, by separate acts, one may become both principal and accessory in the same felony: as, by commanding another to kill a third person, rendering him an accessory when the murder is done; and afterward joining with the person commanded in doing it, which makes him a principal:[3] Also, —

Accessory both Before and After. — By separate acts, a person may be both an accessory before, and an accessory after, the fact.[4]

§ 665. **In Statutory Felonies.** — And, in a statutory felony, one may be an accessory, precisely as in a felony at the common law, unless special terms in the statute preclude this construction.[5]

§ 666. **Accessory follows Principal.** — An accessory follows, like a shadow, his principal.[6] Thus, —

Guilt not exceed Principal's. — He can neither be guilty of a higher offence than his principal; nor at all guilty as accessory,[7] unless his principal is guilty. For illustration, —

In Petit Treason and Murder. — When petit treason was an offence separate from murder,[8] "if a wife or servant cause a stranger to murder the husband or master, and are absent when the murder is committed, they cannot be said to be accessories to petit treason, but to murder only; because the offence of the principal is but murder. But if such wife or servant had been present when the murder was committed, they would have been guilty of petit treason, and the stranger of murder; because, in respect to

[1] Rex v. Gordon, 1 Leach, 4th ed. 515, 1 East P. C. 352; Reg. v. Perkins, 12 Eng. L. & Eq. 587; The State v. Larkin, 49 N. H. 39. That in some respects this was formerly thought otherwise by some writers, see Foster, 361, 362.
[2] Course's Case, cited Foster, 349; Hughes v. The State, 12 Ala. 458; Hately v. The State, 15 Ga. 346; The State v. Dewer, 65 N. C. 572; McCoy v. The State, 52 Ga. 287; Wicks v. The State, 44 Ala. 398; The State v. Larkin, supra; Reg. v. Munday, 2 Fost. & F. 170. And see Rex v. Plant, 7 Car. & P. 575.
[3] 2 Hawk. P. C. Curw. ed. p. 436, § 1; 3 Inst. 139; Reg. v. Hilton, Bell C. C. 20, 8 Cox C. C. 87.
[4] Rex v. Blackson, 8 Car. & P. 43; The State v. Coppenburg, 2 Strob. 278. And see Rex v. Dannelly, 2 Marshall, 471; Norton v. People, 8 Cow. 137; Stoops v. Commonwealth, 7 S. & R. 491; Bibithe's Case, 4 Co. 43 b.
[5] Stat. Crimes, § 139, 145, 775; Rex v. Bear, 2 Salk. 417, 418.
[6] Broom Leg. Max. 2d ed. 374; 4 Bl Com. 36; 3 Inst. 139.
[7] See ante, § 651. And see People v. Collins, 53 Cal. 185.
[8] Ante, § 611.

such presence, they would have been principals[1] in killing."[2] Again, —

§ 667. **Convicted only with or after Principal.** — Where no change in common-law rules has been made by statute, not only is it impossible for one to be guilty as accessory unless there is a guilty principal, but he cannot be convicted except jointly with or after the principal, whose acquittal acquits him.[3] According to what Hawkins esteems the better opinion, he may be indicted and arraigned before, yet can be tried before only with his consent.[4] After his conviction, judgment will not be arrested though the indictment does not allege the attainder of the principal.[5] If there are several principals, the accessory may be tried in respect of such as are already attainted, before the attainder of the rest.[6] But if, without his consent, he is tried as to all, and convicted generally, the conviction will not be good.[7] Some of these doctrines, as concerns merely the procedure, are perhaps doubtful on authority, though believed to be as above stated. Indeed the earlier and later cases are not quite harmonious. In matter of evidence, —

Proof of Principal's Guilt. — Where the accessory is tried after the principal, it is *prima facie* sufficient, in proof of the latter's guilt, to produce the record of his conviction.[8]

§ 668. **Omitting to sentence Principal.** — The accessory is at common law so completely attached to his principal, that, if sentence is not passed on the latter's conviction (the consequence of which is called in the English law attainder), no judgment can

[1] Ante, § 653.

[2] 2 Hawk. P. C. Curw. ed. p. 442, § 15.

[3] The State *v.* Pybass, 4 Humph. 442; United States *v.* Crane, 4 McLean, 317; Whitehead *v.* The State, 4 Humph. 278; Commonwealth *v.* Woodward, Thacher Crim. Cas. 63; 2 Hawk. P. C. Curw. ed. p. 483, § 47; Baron *v.* People, 1 Parker C. C. 246; The State *v.* Yancy, 1 Tread. 241; Sampson *v.* Commonwealth, 5 Watts & S. 385; Smith *v.* The State, 46 Ga. 298. See Loyd *v.* The State, 45 Ga. 57; Brown *v.* The State, 18 Ohio State, 496.

[4] 2 Hawk. P. C. Curw. ed. p. 451, § 45; 2 Hale P. C. 224. See, for the contrary doctrine as to the arraignment, Gittin's Case, 1 Plow. 98, 99; Commonwealth *v.* Andrews, 8 Mass. 126; Commonwealth *v.* Woodward, Thacher Crim. Cas. 63.

[5] Harty *v.* The State, 3 Blackf. 386. But see, on this point, Stoops *v.* Commonwealth, 7 S. & R. 491.

[6] Stoops *v.* Commonwealth, 7 S. & R. 491; Commonwealth *v.* Knapp, 10 Pick. 477; Starin *v.* People, 45 N. Y. 333. And see The State *v.* Pybass, 4 Humph. 442; Whitehead *v.* The State, 4 Humph. 278; Commonwealth *v.* Woodward, Thacher Crim. Cas. 63.

[7] Stoops *v.* Commonwealth, 7 S. & R. 491; Starin *v.* People, supra.

[8] The State *v.* Chittem, 2 Dev. 49; Commonwealth *v.* Knapp, 10 Pick. 477; Crim. Proced. II. § 12.

be pronounced against the accessory. Thus, said Lord Hardwicke: "Before the statute of 1 Anne, stat. 2, c. 9, if the principal was convicted only of a clergyable felony, and had his clergy allowed;[1] or stood mute, or peremptorily challenged above the number of twenty jurors; the accessory could not be arraigned. By this means accessories to very flagrant crimes frequently avoided all manner of punishment."[2] This statute is of a date too recent to be generally received as common law in this country.[3] It provides, among other things, that, "if any principal offender shall be convicted of any felony, or shall stand mute, or peremptorily challenge above the number of twenty persons returned to serve of the jury, it shall and may be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding any such principal felon shall be admitted to the benefit of his clergy, pardoned, or otherwise delivered before attainder." But, —

Death or Escape of Principal. — Since this provision was enacted, as well as before, if, for a cause not mentioned in it, as the escape or death of the principal, he is not attainted, the accessory cannot be proceeded against.[4] Yet —

Attainder Erroneous. — An erroneous attainder of the principal unreversed justifies proceedings against the accessory,[5] though a reversal of it discharges him.[6]

Pardon. — A pardon of the principal, after he is not only convicted but attainted, will in no way avail the accessory.[7]

American Statutes. — This common-law impediment is in some of our States removed by statute.[8]

§ 669. **Deny Principal's Guilt.** — Though the record of the principal's attainder is, as against an accessory tried separately, *prima facie* evidence of the guilt of the former,[9] it

[1] Stevens's Case, Cro. Car. 566, 567.

[2] Rex *v.* Burridge, 3 P. Wms. 439, 485. And see 2 Hawk. P. C. Curw. ed. p. 450, § 41. See, as to Georgia, Loyd *v.* The State, 45 Ga. 57.

[3] See post, § 700 and note.

[4] Commonwealth *v.* Phillips, 16 Mass. 423; The State *v.* McDaniel, 41 Texas, 229.

[5] Rex *v.* Baldwin, 3 Camp. 265, Russ. & Ry. 241, 2 Leach, 4th ed. 928, note; The State *v.* Duncan, 6 Ire. 236.

[6] Marsh's Case, 1 Leon. 325.

[7] Syer's Case, 4 Co. 43*b*; Bibithe's Case, 4 Co. 43*b*; s. c. nom. Goff *v.* Ryby, Cro. Eliz. 540.

[8] As to Virginia, see Commonwealth *v.* Williamson, 2 Va. Cas. 211. And see post, § 670.

[9] Ante, § 667.

is not conclusive,[1] being in a proceeding between other parties.

§ 670. **Statutes making Accessory a Principal.** — If a contrary rule would be unjust; so, in natural reason, it is unjust to hold the State concluded, in its prosecution of one person, by its failure to convict another. Therefore, as already observed, legislation has in some of the States directed, that proceedings may be carried on against the accessory, irrespective of the case against the principal offender.[2] The statutes are not all in these terms; but, in Massachusetts,[3] Maine,[4] Missouri,[5] Illinois,[6] Ohio,[7] Iowa,[8] California,[9] Nevada,[10] Kansas,[11] and probably some of the other States, the accessory before the fact is in law, as in reason, either actually or substantially a principal.[12] So he is in England, since the statute of 11 & 12 Vict. c. 46.[13]

"Counsel or Procure." — In England, 24 & 25 Vict. c. 94, § 2, makes it felony to "counsel, procure, or command any other person to commit any felony;" and this is held to include only those cases in which the felony persuaded to is committed; the mere attempt, through solicitation, remaining a misdemeanor.[14]

"Before or after Principal." — The Indiana statute, after providing punishments for persons abetting or counselling to a felony, and being accessories after the fact, proceeds: "Every person who shall be guilty of any crime punishable by the [above] provi-

[1] Rex v. Smith, 1 Leach, 4th ed. 288; Commonwealth v. Knapp, 10 Pick. 477; Rex v. Turner, 1 Moody, 347; Keithler v. The State, 10 Sm. & M. 192; The State v. Duncan, 6 Ire. 98.

[2] Crim. Proced. II. § 4.

[3] R. S. c. 133, § 2; Gen. Stats. c. 168, § 4; as to the construction of which see The State v. Ricker, 29 Maine, 84. As to the earlier law in Massachusetts, see Commonwealth v. Knapp, 9 Pick. 496.

[4] The State v. Ricker, 29 Maine, 84.

[5] Loughridge v. The State, 6 Misso. 594.

[6] Baxter v. People, 3 Gilman, 368; Brennan v. People, 15 Ill. 511, 516; Dempsey v. People, 47 Ill. 323; Yoe v. People, 49 Ill. 410.

[7] Noland v. The State, 19 Ohio, 131.

[8] Bonsell v. United States, 1 Greene, Iowa, 111.

[9] People v. Bearss, 10 Cal. 68; People v. Trim, 39 Cal. 75; People v. Campbell, 40 Cal. 129; People v. Outeveras, 48 Cal. 19; People v. Shepardson, 48 Cal. 189.

[10] The State v. Jones, 7 Nev. 408; The State v. Chapman, 6 Nev. 320.

[11] The State v. Cassady, 12 Kan. 550.

[12] As to North Carolina, see The State v. Groff, 1 Murph. 270; The State v. Goode, 1 Hawks, 463. As to Kentucky, see Able v. Commonwealth, 5 Bush, 698.

[13] Reg. v. Manning, 2 Car. & K. 887, 903; Reg. v. Hughes, Bell C. C. 242. The statute now regulating the subject in England is 24 & 25 Vict. c. 94. See Greaves Crim. Law Acts, 2d ed. 18; Reg. v. Gregory, Law Rep. 1 C. C. 77.

[14] Reg. v. Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459.

sions, may be indicted and convicted before or after the principal offender is indicted and convicted." And this is construed not to take away the common-law right of an accessory to be exempt from prosecution if the principal has been tried and acquitted. Even if a verdict has been rendered against him, then, if the principal is acquitted, the accessory may show the acquittal in bar of judgment, and demand his discharge.[1]

§ 671. **Further of the Statutes.** — In Massachusetts, a statute in force before the present enactments provided, that, "if any person shall aid, assist, abet, counsel, hire, command, or procure any person to commit the crime, &c., he is and shall be considered as an accessory before the fact to the principal offender or offenders, and, being thereof convicted, shall suffer the like punishment as is by law assigned for the crime to the commission of which he shall be so accessory;" and this was held, not to impair the common-law distinction between principal and accessory. Consequently it did not refer to persons aiding and abetting at the fact, as principals of the second degree.[2] Moreover, statutes like these do not supersede the necessity of proving the guilt of the principal; for, in the nature of things, one cannot procure what is not done, or receive the doer of what was never performed.[3] Where the accessory is indicted separately from the principal, the latter's confession does not prove his guilt as against the former; for, in this issue, it is mere hearsay.[4]

II. *Before the Fact in Felony.*

§ 672. **Doctrines of last Sub-title.** — What is said in the last subtitle belongs also under this. It was separated from this because relating equally to the accessory after the fact.

§ 673. **How defined.** — An accessory before the fact is a person whose will contributes[5] to a felony committed by another as principal,[6] while himself too far away to aid in the felonious act.[7]

Nature and Origin. — The distinction between such accessory and a principal rests solely in authority; being without founda-

[1] McCarty v. The State, 44 Ind. 214.

[2] Commonwealth v. Knapp, 9 Pick. 496. And see Stat. Crimes, § 142.

[3] Simmons v. The State, 4 Ga. 465; Ogden v. The State, 12 Wis. 532.

[4] Ogden v. The State, supra.

[5] Ante, § 628 et seq.

[6] Ante, § 651.

[7] Ante, § 653.

tion either in natural reason or the ordinary doctrines of the law. The general rule of the law is, that what one does through another's agency is to be regarded as done by himself.[1] And, even in felonies, the common law makes no distinction in the punishment between a principal and an accessory, — the crime of each being felony, of which the penalty was originally death.[2] So likewise in morals, there are circumstances in which we attach more blame to the accessory before the fact than to his principal; as where a husband commands his wife,[3] or a master his servant, to do for his benefit a criminal thing which, in his absence,[4] is done reluctantly through fear or affection overpowering a subject mind. How this distinction, then, came into the law, can only be conjectured; probably it originated in the same confused legal apprehension from which sprang the now exploded distinction between principals and accessories *at* the fact.[5] Having, however, become established as a technical rule, it cannot be removed by the courts.[6]

§ 674. **Not favored — (Statute interpreted).** — Since, however, this distinction rests on no good foundation, our judges usually permit it to extend no further than compelled by the authorities. Consequently, where a statute in New York provided, that "all suits, informations, and indictments for any crime or misdemeanor, *murder excepted*," should be brought within three years after its commission; the word "murder" was held to include as well accessories before the fact as principals. "Writers on criminal law," said Marcy, J., "make some difference between the offence of a principal and that of an accessory, but it is chiefly as to the order and mode of proceeding against them."[7]

§ 675. **How distinguish Accessory.** — In respect of the criminal intent, the rules of which have already been discussed, there is no distinction between the accessory before the fact and the principal.[1] In many instances, the accessory is the one in whose mind the idea of the crime originated, and he excites the doer to it. But the legal consequence is the same though the evil purpose is born in the mind of the latter, and the former encourages him therein.[2] There must be, first, a principal;[3] secondly, the accessory must not be so near him as to be able to render personal assistance; because, if he is so able, he will be himself a principal.[4] Also, the thing counselled must be done,[5] else the counselling will be only an indictable attempt. To illustrate, —

[1] Broom Leg. Max. 2d ed. 643; Co. Lit. 258 *a*. "The principle of common law, *Qui facit per alium, facit per se*, is of universal application, both in criminal and civil cases." Hosmer, C. J., in Barkhamsted *v.* Parsons, 3 Conn. 1, 8.

[2] 2 Hawk. P. C. Curw. ed. p. 440, § 11; Foster, 343, 359; 4 Bl. Com. 39; ante, § 646; Rex *v.* Higgins, 2 East, 5, 18, 19, 21.

[3] See Rex *v.* Morris, 2 Leach, 4th ed. 1096.

[4] Ante, § 355, 359; post, § 678.

[5] Ante, § 648.

[6] See ante, § 275. For some unsatisfactory reasons by Blackstone, see 4 Bl. Com. 39, 40.

[7] People *v.* Mather, 4 Wend. 229, 255. Possibly the relation of the particular words to their context might have influenced the construction.

§ 676. **In Murder of Child.** — If, before the birth of a child, a person advises the mother to murder it when born, and she does so, the adviser is an accessory before the fact in the murder.[6] And, —

Uttering Forgery. — If several plan the uttering of a forged order, where this offence is felony by statute, and one of them utters it in the absence of the rest, he only is a principal, while the others are accessories.[7] Again, —

Larceny in Dwelling-house — Burglary. — A servant, on a Saturday afternoon, let a man into his master's house to rob it; concealed him there till Sunday morning; and then, by arrangement, left. The man, after the servant's departure, stole money; and he was held to be rightly indicted as a principal in the larceny, and the servant as accessory before the fact.[8] If the charge had been for the burglary of breaking into the house, both would have been principals.[9]

§ 677. **Accessory to an Accessory.** — Where one employs another to procure a third to commit a felony, and it is committed, — in other words, becomes an accessory before the fact to another like accessory, — he is an accessory also to the third; that is, to the principal.[10] "And it will be sufficient, even though the accessory

[1] Ante, § 204 et seq., 285 et seq.

[2] Keithler *v.* The State, 10 Sm. & M. 192.

[3] See ante, § 649–651, 663–666.

[4] See ante, § 653, 663.

[5] 1 Hale P. C. 622.

[6] Parker's Case, 2 Dy. 186, pl. 2; 2 Hawk. P. C. Curw. ed. p. 443, § 18.

[7] Rex *v.* Badcock, Russ. & Ry. 249; Rex *v.* Soares, Russ. & Ry. 25, 2 East P. C. 974; Rex *v.* Else, Russ. & Ry. 142. And see Rex *v.* Stewart, Russ. & Ry. 363. These English cases were decided under the misapprehension that the uttering was felony.

[8] Reg. *v.* Tuckwell, Car. & M. 215.

[9] Rex *v.* Jordan, 7 Car. & P. 432; ante, § 648, 649.

[10] Rex *v.* Cooper, 5 Car. & P. 535; McDaniel's Case, Foster, 121, 125; 4 Bl. Com. 37; 2 Hawk. P. C. Curw. ed. p. 436, § 1. And see Reg. *v.* Williams, 1 Den. C. C. 39; post, § 696.

does not name the person to be procured, but merely directs the agent to employ some person."[1]

§ 678. **Nature of the Offence.** — A particular felony may be of a nature rendering it impossible there should be an accessory before the fact in it. Thus, —

Manslaughter. — There cannot be an accessory before the fact in manslaughter; because, when the killing is of previous malice, it is murder.[2] Plainly this is the ordinary doctrine, yet probably a form of manslaughter may appear, admitting of this accessory;[3] as, if one should order a servant to do a thing endangering life, yet not so directly as to make a death from the doing murder, it might be manslaughter, — then, why should not the master be an accessory before the fact in the homicide? And —

Principals of Second Degree. — There may be principals of the second degree in manslaughter.[4] Also, —

In Murder of Second Degree. — Murder of the second degree admits of accessories before the fact.[5] And —

Wife. — A wife may be an accessory before the fact in a crime by the husband.[6]

§ 679. **Petit Larceny.** — In England, when our country was settled, larceny was divided into grand and petit, — the former being committed where the goods stolen were over twelve pence in value; the latter, where they were of the value of twelve pence or under. "And this," observes Lord Coke, "was the ancient law before the Conquest."[7] In the year 1275, the statute of Westm. 1 (3 Edw. 1), c. 15, mentioned the minor offence as "petty larceny that amounteth not above the value of twelve pence."[8] "In these prosecutions," says East, following Lord Coke, "the valuation ought to be reasonable; for, when the statute (of Westm. 1, c. 15)[9] was made, silver was but 20*d.* an ounce,

[1] Parke, J., in Rex *v.* Cooper, supra. See Rex *v.* Giles, 1 Moody, 166; Commonwealth *v.* Glover, 111 Mass. 395.

[2] Bibithe's Case, 4 Co. 43*b*; Goose's Case, Sir F. Moore, 461; 2 Hawk. P. C. Curw. ed. p. 444, § 24. See Reg. *v.* Gaylor, Dears. & B. 288, 7 Cox C. C. 253, 40 Eng. L. & Eq. 556; Stipp *v.* The State, 11 Ind. 62.

[3] Reg. *v.* Taylor, Law Rep. 2 C. C. 147, 13 Cox C. C. 68.

[4] The State *v.* Coleman, 5 Port. 32

[5] Jones *v.* The State, 13 Texas, 168.

[6] Reg. *v.* Manning, 2 Car. & K. 887.

[7] 3 Inst. 109.

[8] And see 2 Russ. Crimes, 3d Eng. ed 1, and note; 11 Law Mag. & Rev. 268.

[9] Mr. East, by misprint, gives the Stat. as Westm. 2, c. 25.

and at the time Lord Coke wrote it was worth 5*s.*, and it is now higher."[1]

How punished — Abolished in England. — The leading distinction between grand and petit larceny was in the punishment; both were felonies; but the latter was never visited by death. The penalty was "only to be whipped, or some such corporal punishment,"[2] understood afterward to be imprisonment,[3] together with the same forfeiture of goods[4] as in grand larceny. Petit larceny was, in England, elevated to the higher degree by Stat. 7 & 8, Geo. 4, c. 29, § 2.[5]

Petit Larceny in our States. — In this country, the distinction has been recognized as having a common-law existence, and in some of the States it seems fully to prevail, though perhaps more or less modified by legislation.[6] There are States in which petit larceny is even reduced to misdemeanor.[7] In North Carolina, a statute makes thefts of all kinds petit larcenies; obliterating the distinction between the two grades, in a manner the opposite of that adopted in England.[8] In various other States, the distinction has ceased to be of importance.

§ 680. **No Accessories.** — Where petit larceny is felony, still, in consequence of the smallness of the offence,[9] it has no accessories. Those who, in grand larceny, would be accessories before the fact, are principals in petit larceny;[10] those who would be accessories after are not, it has been held, deemed criminal at all in petit

[1] 2 East P. C. 736, referring to 2 Inst. 189, where Lord Coke says: "The things stolen are to be reasonably valued, for the ounce of silver, at the making of this act, was at the value of 20*d.*, and now it is at the value of 5*s.* and above." And see 4 Bl. Com. 239.

[2] 1 Hale P. C. 530.

[3] 2 East P. C. 737; 3 Inst. 218.

[4] Ante, § 615.

[5] 2 Russ. Crimes, 3d Eng. ed. 1, 82.

[6] The State *v.* Larumbo, Harper, 183; The State *v.* Wilson, 3 McCord, 187; The State *v.* Spurgin, 1 McCord, 252; The State *v.* Wood, 1 Mill, 29; The State *v.* Bennet, 2 Tread. 693; Ward *v.* The People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144; The State *v.* Goode, 1 Hawks, 463; The State *v.* Barden, 1 Dev. 518; Carpenter *v.* Nixon, 5 Hill, N. Y. 260; The State *v.* Murphy, 8 Blackf. 498; The State *v.* Smith, Brayt. 143; The State *v.* Wheeler, 15 Rich. 362; Montgomery *v.* The State, 7 Ohio State, 107; Jenkins *v.* The State, 50 Ga. 258.

[7] Shay *v.* People, 22 N. Y. 317; People *v.* Adler, 3 Parker C. C. 249, 254; People *v.* Rawson, 61 Barb. 619; The State *v.* Gray, 14 Rich. 174; The State *v.* Hurt, 7 Misso. 321.

[8] The State *v.* Gaston, 73 N. C. 93. And see The State *v.* Minton, Phillips, 196.

[9] See ante, § 212 et seq.; The State *v.* Goode, 1 Hawks, 463; Chancellor Walworth, in Ward *v.* People, 6 Hill, N. Y. 144; Lasington's Case, Cro. Eliz. 750.

[10] The State *v.* Barden, 1 Dev. 518; 2 East P. C. 743; Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill N. Y. 144.

larceny.[1] In North Carolina, these rules apply to all larcenies, even of things of the greatest value; because they are all by statute made petit.[2] How it is of larcenies of small sums under statutes of a different sort in other States, and the late English enactment, we are not informed by adjudication.

III. *In Treason.*

§ 681. **In General.** — In petit treason, never known in this country and abolished in England,[3] there were accessories the same as in felony.[4] But in high treason, now simply termed treason, there are, say the books, no accessories either before or after the fact; those who would be accessories in felony and petit treason being principals.[5] This proposition, however, does not accord with the adjudged law as to the accessory after the fact;[6] and, as to the accessory before, it requires some observation, though the present author accepts it as correct.

§ 682. **No Accessories before.** — To repeat, there are no acessories before the fact in treason, but they who in felony would be such accessories are principals.[7] Let us see what this doctrine implies.

Regarded as Doers — (How the Indictment). — The consequence of this doctrine is, that, at the election of the pleader, the indictment may allege the criminal thing to have been done through the agency of another, or, omitting this, charge it directly as the act of him who procured the doing, the proofs at the trial to proceed on the rule that what one does by an agent is in law his own act,[8] — either method according with the established

[1] The State *v.* Goode, 1 Hawks, 463.

[2] The State *v.* Gaston, 73 N. C. 93.

[3] Ante, § 611.

[4] 4 Bl. Com. 36; 1 East P. C. 338; 1 Hawk. P. C. Curw. ed. p. 105, § 5; Anonymous, Dalison, 16.

[5] 1 Hale P. C. 233, 237, 613; 3 Inst. 16, 138; Foster, 341; 4 Bl. Com. 35, 36; 1 Hawk. P. C. Curw. ed. p. 15, § 39; 2 Ib. p. 437, § 1; 1 Hume Crim. Law, 2d ed. 525, 526, note, where the Scotch law appears to be the same; Charge on Law of Treason, 2 Wal. Jr. 134, 137; United States *v.* Hanway, 2 Wal. Jr. 139, 195; Anonymous, Dalison, 16; Anonymous, J. Kel. 19, Dalison, 14; Throgmorton's Case, 1 Dy. 98 *b*, pl. 56; 1 East P. C. 93, 178, 186; Reg. *v.* Tracy, 6 Mod. 30, 32, 12 Co. 81; Whitaker *v.* English, 1 Bay, 15; Chanet *v.* Parker, 1 Mill, 333; Rex *v.* Bear, 2 Salk. 417; s. c. nom. Rex *v.* Beare, 1 Ld. Raym. 414; Somerville's Case, 1 Anderson, 109.

[6] Post, § 701.

[7] Ante, § 681.

[8] Ante, § 673.

practice in all other pleadings, civil[1] and criminal.[2] That such is the only meaning which this doctrine can have is plain; because the distinction between the accessory before the fact and his principal, in felony, is merely in the form of the allegation, and in the order of the trial; while, as we have seen,[3] the accessory would be a principal but for a technical rule of the old common law, introduced into it by a blunder, against reason, and against all its other teachings in both civil and criminal procedure.

§ 683. **So in Authority.** — The authorities also seem to establish, that the allegation in the indictment against one who has procured a treason may be in form as above stated.[4] But —

Contrary — (Order of Trial). — Lord Hale has transmitted to us his private opinion, not based on adjudication, that, in the order of trial, the procurer should not be convicted except after or with the person who did the act.[5] This expression has been echoed by later writers:[6] and, on the trial of Aaron Burr before Marshall, C. J., for the high treason of levying war against the United States, the counsel for the defendant argued that the English law is so; the counsel for the United States, quite against the interest of the prosecution, conceded the point; and the learned chief-justice, in his opinion, fell into the current; not, however, deciding absolutely the question.[7]

[1] Brucker *v.* Fromont, 6 T. R. 659; Heys *v.* Heseltine, 2 Camp. 604; Collis *v.* Emett, 1 H. Bl. 313, 321; Feltmakers *v.* Davis, 1 B. & P. 98, 102; 2 Chit. Plead. 117, note; Lawes on Assumpsit, 110, 111.

[2] Reg. *v.* Tracy, 6 Mod. 30, 32; United States *v.* Morrow, 4 Wash. C. C. 733; and other cases cited post, § 685, 686; Crim. Proced. I. § 332.

[3] Ante, § 673.

[4] 1 Hale P. C. 214, 238; 1 Gab. Crim. Law, 895; 1 East P. C. 127; Reg. *v.* Tracy, 6 Mod. 30, 32; Rex *v.* Foy, Vern. & S. 540. See United States *v.* Burr, 4 Cranch, 469, 470, 496–498.

[5] 2 Hale P. C. 223.

[6] Foster, 346; 1 East P. C. 100, 101; 1 Gab. Crim. Law, 889. Hawkins, however, lays down the true doctrine; but one of his editors, Leach, following Lord Hale, sets him *wrong*. 2 Hawk. P. C. 6th ed. c. 29, § 2, Curw. ed. p. 437, § 1 and note.

[7] United States *v.* Burr, 4 Cranch, 469, 504; Burr's Trial, *passim*. **Too many Counsel and too Eminent.** — This was a case of immense public interest and notoriety; and, on each side, were employed several very eminent lawyers. The reader, therefore, need not be surprised at finding it within the common fact, that, in proportion as a case attracts the public attention, and the counsel engaged in it are multiplied, it increases in learned fervor, but diminishes in true wisdom and the genuine learning of the law. A principal reason is, that no one of the half-dozen or dozen lawyers on a side feels a particular responsibility for those parts of the performance which, with the honor following, are necessarily shared in common; while each is impelled, by the instincts which go out after fame, to lift his individual light as high as possible, in the presence of a community better able to

§ 684. **Further Explanation.** — Lord Hale, to whom the misapprehension is thus traced, says, in another place, the same thing of the principal in the second degree in felony; namely, that he should not be tried in advance of the principal in the first degree.[1] But this doctrine, we have seen,[2] was long ago exploded. As to treason, the mistake of this eminent person may have arisen from not distinguishing the procurer of the treason from him who afterward receives the traitor.[3] And it is believed, that, in spite of the doubts created by Burr's case, a man may, according to the law of this country, commit treason without being present at the overt act; and may be prosecuted in advance of those who were present.[4] Still the authorities to this proposition are not very distinct.

IV. *In Misdemeanor.*

§ 685. **All are Principals — (How Procurers Indicted).** — The authorities concur, that, in misdemeanor, there are no accessories either in name or in the order of the prosecution. When, therefore, one sustains in misdemeanor a relation which in felony makes an accessory before the fact, if what he does is of sufficient magnitude,[1] he is to be treated as a principal; the indictment charges him as such, and, unless the pleader chooses, it does not mention that the act was through another;[2] and he may be proceeded against either in advance of the doer, or afterward, or jointly with him.[3] Thus, —

judge of eloquence than of law. Besides, a man who is not answerable for the whole of even a subdivision cannot well bring his mind to so minute and exact a study of the entire case as is often indispensable to his seeing any one object, in any one part of it, correctly and clearly. This may be an infirmity of his nature; but it is inherent in the human mind, and no integrity, station, calling, or learning can rise entirely superior to it. Again, if the lawyers employed are men who feel themselves to be very eminent, the care of each, which is necessarily given most to what is most important, is to sustain his position, rather than evolve true legal doctrine and win a just cause. A great case requires more lawyers than one on a side, because it involves more hard work than one can do. But they should not be unduly multiplied. And an eminent lawyer is not so good as a truly able one. Occasionally a lawyer is both able and eminent; then, in a trial, his ability is of service, but his eminence is an impediment. An eminent lawyer without ability is always a damage. Judge and jury resist what they deem the danger of being captured by his wiles; and, when they find nothing proceeding from him worthy of regard, they conclude that the fault is in his cause, and lean against it, and forbear to exercise their own ingenuity in the discovery of merits which otherwise they might see. It would be interesting to draw, as I might, illustrations of these views from several notorious cases, but I forbear.

[1] 1 Hale P. C. 613.

[2] Ante, § 648.

[3] See post, § 692.

[4] Charge on Law of Treason, 2 Wal. Jr. 134, 137; United States *v.* Hanway, 2 Wal. Jr. 139, 195; Ex parte Bollman, 4 Cranch, 75. And see Throgmorton's Case, 1 Dy. 98, pl. 56. Judge Tucker combats this doctrine. See 4 Bl. Com. Tucker ed. Appendix, 49, and at various other places. The following from Lord Coke is as sound in common sense as in law: "All agree, that procurers of such treason to be done, before the fact done, if after the fact be done accordingly, in case of treason, are principals; *for that they are participes criminis in the very act.*" 3 Inst. 138.

§ 686. **Assault and Battery — Betting on Election — Passing Counterfeits — False Imprisonment — Selling Liquor — Obstructing Way — Burning Building — False Pretences — Bawdy-House.** — If one employs another to commit an assault and battery;[4] or to bet for him on an election;[5] or to pass counterfeit money, where this offence is misdemeanor;[6] or to make an arrest, amounting to an indictable false imprisonment;[7] or to sell, contrary to a statute, intoxicating liquor without license;[8] or to throw dirt into the highway, being a common-law nuisance;[9] or to set fire to a building, where the burning is misdemeanor;[10] or to obtain money for him by false pretences;[11] or to keep a bawdy-house;[12] the employer may be indicted, as doing the thing, either before or after or with the person whom he employs.

[1] Ante, § 212 et seq.

[2] See ante, § 682.

[3] 2 Hawk. P. C. Curw. ed. p. 437, § 2; The State *v.* Cheek, 13 Ire. 114; The State *v.* Westfield, 1 Bailey, 132; Williams *v.* The State, 12 Sm. & M. 58; United States *v.* Morrow, 4 Wash. C. C. 733; Floyd *v.* The State, 7 Eng. 43; Curlin *v.* The State, 4 Yerg. 143; Reg. *v.* Clayton, 1 Car. & K. 128; Rex *v.* Dixon, 3 M. & S. 11, 14; Commonwealth *v.* McAtee, 8 Dana, 28; The State *v.* Lymburn, 1 Brev. 397; Reg. *v.* Tracy, 6 Mod. 30, 32; Reg. *v.* Greenwood, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535; Reg. *v.* Moland, 2 Moody, 276; United States *v.* Mills, 7 Pet. 138; Rex *v.* Douglas, 7 Car. & P. 644; Rex *v.* Jackson, 1 Lev. 124; Uhl *v.* Commonwealth, 6 Grat. 706; Commonwealth *v.* Gillespie, 7 S. & R. 469, 478; Sanders *v.* The State, 18 Ark. 198; Stratton *v.* The State, 45 Ind. 468; Lowenstein *v.* People, 54 Barb. 299; Riley *v.* The State, 43 Missis. 397.

[4] The State *v.* Lymburn, 1 Brev. 397; Rex *v.* Jackson, 1 Lev. 124; Bell *v.* Miller, 5 Ohio, 260, a civil case; Greer *v.* Emerson, 1 Tenn. 12, a civil case; Baker *v.* The State, 12 Ohio State, 214.

[5] Williams *v.* The State, 12 Sm. & M. 58.

[6] 2 East P. C. 978; United States *v.* Morrow, 4 Wash. C. C. 733; The State *v.* Cheek, 13 Ire. 114; Reg. *v.* Greenwood, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535.

[7] Floyd *v.* The State, 7 Eng. 43; Reg. *v.* Tracy, 6 Mod. 178.

[8] The State *v.* Dow, 21 Vt. 484; Commonwealth *v.* Nichols, 10 Met. 259; Schmidt *v.* The State, 14 Misso. 137; The State *v.* Anone, 2 Nott & McC. 27; The State *v.* Borgman, 2 Nott & McC. 84, note; Smith *v.* Adrian, 1 Mich. 495. And see The State *v.* Brown, 31 Maine, 520; The State *v.* Stewart, 31 Maine, 515; ante, § 658.

[9] Tuberville *v.* Stampe, 1 Ld. Raym. 264.

[10] Reg. *v.* Clayton, 1 Car. & K. 128.

[11] Reg. *v.* Moland, 2 Moody, 276.

[12] Ross *v.* Commonwealth, 2 B. Monr. 417.

§ 687. **Intent to concur with Act.** — For one to be guilty, his intent must concur sufficiently with his act.[1] And —

§ 688. **Small Offences — (Liquor Selling).** — For reasons already mentioned,[2] the accessorial act must draw closer to the principal one as the misdemeanor is lighter. Yet in a small offence, like the selling of intoxicating liquor without license,[3] if the one who instigates to the act is also to be benefited by it, he is, though absent, criminally responsible.[4] The agent in these cases is likewise, we have seen, responsible.[5] Again, —

Preventing Inquest — (Mistake of Law). — Where the captain of a man of war, mistaking his legal duty,[6] had prevented the coroner from taking an inquest on the body of a man hanged in his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order.[7] Yet an information is in a measure discretionary with the court, and on an indictment it may be the boatswain would have been deemed liable.

§ 689. **Crimes of Peculiar Nature.** — There are crimes which in their nature can be committed only by a personal doing of the forbidden thing.[8] They are probably not so numerous as might seem on the first impression. Thus, —

Rape. — A boy physically incapable or a woman may become a principal offender in rape, by abetting a capable person.[9] Surely, therefore, most other offences can be committed in like manner. And —

Statutory Offences. — The offences of this sort are chiefly such as are created by the special terms of a statute.[10]

[1] Ante, § 628 et seq.; The State *v.* Pollok, 4 Ire. 303; The State *v.* Hunter, 5 Ire. 369.

[2] Ante, § 212 et seq. 657–659.

[3] See ante, § 685, 686, and the authorities there cited.

[4] Stat. Crimes, § 1024. And see ante, § 673.

[5] Ante, § 658; Stat. Crimes, § 1024.

[6] Ante, § 294.

[7] Rex *v.* Soleguard, Andr. 231, 234, 235.

[8] See Stat. Crimes, § 145; ante, § 864, 869; Rex *v.* Douglas, 7 Car. & P. 644; Commonwealth *v.* Dean, 1 Pick. 387; Mount *v.* The State, 7 Sm. & M. 277; O'Blennis *v.* The State, 12 Misso. 311; Vaughn *v.* The State, 4 Misso. 530.

[9] Vol. II. § 1135; The State *v.* Jones, 83 N. C. 605.

[10] See the first note to this section; ante, § 657, 658; Stamper *v.* Commonwealth, 7 Bush, 612.

CHAPTER XLVIII.

THE ACCESSORY AFTER THE FACT, AND THE LIKE.[1]

§ 690. **Scope of this Chapter.** — On the "Diagram of Crime," the subject of this chapter is represented within E F L M. It includes the accessory after the fact proper in felony, and those who sustain the like relation in treason and misdemeanor.

§ 691. **How divided.** — Having, under the first sub-title of the last chapter, considered the general law of the accessory, we shall, in this chapter, examine the special doctrines pertaining to the accessory after the fact, I. As to Felony; II. As to Treason; III. As to Misdemeanor.

I. *As to Felony.*

§ 692. **Accessory after defined.** — An accessory after the fact is a person who, knowing a felony to have been committed, harbors the felon, or renders him any other assistance to elude punishment.[3]

On what Principle punished — (Concurring Act and Intent). — According to general principles, we have seen, one by corruptly consenting to a criminal fact already accomplished by another does not become a partaker in the guilt of the doer; because, only when an act and evil intent concur in point of time, is a crime committed.[4] An accessory after the fact is one who is made answerable for the principal's offence in violation of this

[1] See Crim. Proced. II. § 1 et seq.

[2] Ante, § 602.

[3] Rex *v.* Greenacre, 8 Car. & P. 35; Wren *v.* Commonwealth, 26 Grat. 952; White *v.* People, 81 Ill. 333. Blackstone, following 1 Hale P. C. 618, defines such accessory as a person who, "knowing a felony to have been committed, receives, relieves, comforts, or assists the felon." 4 Bl. Com. 37.

[4] Ante, § 207, 642.

rule. An accessory before is within the rule itself, but an accessory after is different. The ground of his liability seems to be, that the harboring or assisting constitutes a separate crime. And we may presume, as explaining the origin of the doctrine, that anciently the helping of a felon to elude punishment was deemed worthy of the same condemnation as the act of him who was helped;[1] that the judges, who gave shape to our common law, thought it not safe, in a capital case, to convict the one rendering the assistance in advance of the one assisted; and, therefore, this second offence, philosophically independent of the first, was called accessorial, and its perpetrator an accessory. To distinguish him from an accessory before the fact, who is punishable from a different reason,[2] he was termed an accessory after the fact. The law on this subject is not easily vindicated if this view of it is not correct.[3]

§ 693. **Felony completed.** — If, when one assists a felon, the felony is not fully accomplished, he becomes a principal with the other.[4] It is only help given subsequently to the completion of the felony that can make him an accessory after the fact.[5] And, —

Guilt known. — To be an accessory after the fact, a man must be aware of the guilt of his principal.[6] Therefore —

Helping escape. — One cannot become such an accessory by helping a prisoner convicted of felony to escape, unless he has notice of the conviction, or, at least, of the felony committed.[7] So, —

In Homicide. — On this ground, and also, according to some opinions, because of the non-completion of the felony, if a man has of malice aforethought inflicted a blow on another, a third cannot become an accessory after the fact in the murder, by harboring the murderer, until death has rendered the result of the blow certain.[1]

§ 694. **How far Assistance proceed — (Compounding — Misprision).** — Compounding a felony,[2] and a misprision of it,[3] are severally wrongs of the like nature with that of becoming an accessory after the fact in it, but are less helpful to the felon and of milder degrees of turpitude. When, therefore, the thing done amounts to no more than a compounding of the felony, or a misprision of it, the doer will not be an accessory. Thus —

Neglect to prosecute or arrest — Taking back Goods stolen, &c. — A person will not be such, who merely neglects to make known to the authorities that a felony has been committed, or forbears to arrest the felon,[4] or agrees not to prosecute him. *A fortiori*, one does not become an accessory who merely receives back his own stolen goods,[5] or charitably supplies a prisoner with food;[6] for neither of these acts is any offence.

§ 695. **The Test.** — The true test, whether one is an accessory after the fact or not, is, whether what he did was by way of personal help to his principal, to elude punishment, — the kind of help being unimportant.[7] Thus, —

Escape — Money — Victuals — Instruments to break Prison — Bribing Jailer. — He is an accessory who, with the requisite knowledge and intent, furnishes the principal felon "with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes a man an accessory to the felony."[8] But —

Keeping Witness away. — One is not thus chargeable who, by persuasion or intimidation, keeps a witness from appearing against

[1] Ante, § 321, 673.

[2] Ante, § 673.

[3] **Austrian Law of Accessory.** — According to the penal code of Austria, "The immediate criminal is not alone guilty of a crime, but also he who, by command, counsel, instruction, or praise, prepares the offence, or intentionally has rendered assistance towards the execution of the same, or towards removing the obstacles to its commission; lastly, he who has stipulated with the offender beforehand to give him criminal assistance after the deed, or to participate with him in the gain arising therefrom. Whoever *after* the commission of the crime, and without preliminary stipulation, gives assistance to the criminal, or divides the spoils with him, is not equally guilty, but by those acts becomes guilty of another and special crime." Sanford Penal Codes in Europe, 96.

[4] Ante, § 642, 649, 650.

[5] 4 Bl. Com. 38.

[6] Rex *v.* Burridge, 3 P. Wms. 439, 493; Rex *v.* Greenacre, 8 Car. & P. 35; 4 Bl. Com. 37; 1 Hale P. C. 328, 622; Reg. *v.* Butterfield, 1 Cox C. C. 39; ante, § 301–303.

[7] Rex *v.* Burridge, supra.

[1] 2 Hawk. P. C. Curw. ed. p. 448, § 35; Harrel *v.* The State, 89 Missis. 702. As to whether the blow is murder before death, see ante, § 113–115 and note; Reg. *v.* O'Brian, 1 Den. C. C. 9, 3 Car. & K. 115.

[2] Post, § 709 et seq.

[3] Post, § 716 et seq.

[4] 1 Hale P. C. 618, 619; 2 Hawk. P. C. Curw. ed. p. 444, § 23, and p. 447, § 29; Wren *v.* Commonwealth, 25 Grat. 789.

[5] 1 Hale P. C. 619; 2 East P. C. 743.

[6] 1 Hale P. C. 620; 4 Bl. Com. 38.

[7] See 2 Hawk. P. C. Curw. ed. p. 445–447, § 26–31; Rex *v.* Lee, 6 Car. & P. 536; Reg. *v.* Chapple, 9 Car. & P. 355; Loyd *v.* The State, 42 Ga. 221.

[8] 4 Bl. Com. 38; Vol. II. § 1066–1069.

the felon on his trial;[1] though such conduct is punishable as a misdemeanor.[2]

§ 696. **Substantive Felony.** — A substantive felony is one depending on itself alone, and not on another felony to be first established by the conviction of the person who directly committed it.[3] Now, —

Accessories distinguished. — We should not confound the guilt of him who commits a substantive offence with his who becomes an accessory after the fact. Yet, in various circumstances, the prosecuting power may hold an offender for the one or the other, at its election. Thus, —

§ 697. **Prison Breach, Rescue, Escape.** — In discussing prison breach, rescue, and escape, in the second volume, we shall see illustrations of this.[4] One mode of helping a felon is to rescue him from lawful confinement, either before or after his conviction; and the rescuer may be indicted for the substantive offence of rescue, or for being an accessory after the fact in the other's felony, at the election of the prosecutor.[5] The idea on which the prosecution proceeds differs a little in the two forms, but not essentially. If a man is committed on a charge of felony, though only awaiting his trial, the rescuing of him, or helping of him to break prison, is a distinct felony, equally whether he is guilty or not: when the commitment is on a charge of misdemeanor, it is, irrespective of the question of his guilt, a misdemeanor.[6] Still, where the commitment is for felony, the rescuer is also, or may be, an accessory after the fact in it; and, as the crime of the accessory is itself felony,[7] it is immaterial with which form of felony he is charged.

§ 698. **Accessory after to Accessory before.** — Since, also, accessories in felony, whether before or after the fact, are felons,[8] a man may become an accessory after, by helping the accessory

[1] Roberts's Case, 3 Inst. 139; Reg. v. Chapple, 9 Car. & P. 355.

[2] Roberts's Case, supra; ante, § 468.

[3] The State v. Ricker, 29 Maine, 84.

[4] Vol. II. § 1064 et seq.

[5] See, as affording much light on this question, Rex v. Burridge, 3 P. Wms. 439, 488-485, 493; Commonwealth v. Miller, 2 Ashm. 61.

[6] 1 Gab. Crim. Law, 305, 310; Jenk. Cent. 171; ante, § 321; Anonymous, 1 Dy. 99, pl. 60; Kyle v. The State, 10 Ala. 236; The State v. Murray, 15 Maine, 100; Reg. v. Allan, Car. & M. 295; People v. Duell, 3 Johns. 449; Rex v. Stokes, 5 Car. & P. 148; Commonwealth v. Miller, 2 Ashm. 61; Rex v. Haswell, Russ. & Ry. 458.

[7] Ante, § 678; post, § 700 a.

[8] Ante, § 673.

before, the same as by helping the principal felon, to elude justice.[1] And such accessory after is deemed an accessory to the principal felon.[2] He would seem, on principle, to be likewise an accessory to the other accessory.

How in Manslaughter. — We have seen, that, in general, manslaughter admits of no accessories before the fact;[3] it does, however, admit of accessories after the fact.[4]

§ 699. **Receiving Stolen Goods.** — The receiver of stolen goods, knowing them to be stolen, is not, within our definition, an accessory; because he renders no personal help to the thief.[5] At common law he is indictable for the misprision[6] of knowing the felon and neglecting to prosecute him; or, if he had agreed not to prosecute him, or to pursue him but faintly, his offence would be compounding felony.[7] But, in England, by 3 Will. & Mary, c. 9, § 4, the receiver was made an accessory after the fact;[8] the consequence of which was, that he could be punished only as an accessory, agreeably to the rule stated in "Statutory Crimes,"[9] that, when a misdemeanor is by statute made a felony, the offence is no longer indictable as a misdemeanor.[10] Stat. 5 Anne, c. 31, § 5, confirmed that of William & Mary; and § 6, as also 1 Anne, stat. 2, c. 9, § 2, provided, that, where the principal felon could not be taken, the receiver of the stolen goods might be prosecuted separately for the misdemeanor.[11] By the later and present English law, the receiver of stolen goods may be proceeded against for felony, as a substantive offence, without any reference to the principal offender.[12]

§ 700. **How in our States.** — The statutes just mentioned, of

[1] 2 Hawk. P. C. Curw. ed. p. 466, § 1. See as to the law of Tennessee, The State v. Payne, 1 Swan, Tenn. 388.

[2] Rex v. Jarvis, 2 Moody & R. 40; Reg. v. Parr, 2 Moody & R. 346; Cassels v. The State, 4 Yerg. 149; Wright v. The State, 5 Yerg. 154. And see ante, § 677.

[3] Ante, § 678.

[4] Rex v. Greenacre, 8 Car. & P. 35.

[5] Loyd v. The State, 42 Ga. 221; People v. Stakem, 40 Cal. 599.

[6] Post, § 717 et seq.

[7] 2 East P. C. 743, 744; 4 Bl. Com. 38, 133; 1 Hale P. C. 619; 2 Hawk. P. C. Curw. ed. p. 447, § 30; Foster, 373.

[8] The State v. Butler, 3 McCord, 383.

[9] Stat. Crimes, § 174.

[10] 2 East P. C. 744; Foster, 373; 4 Bl. Com. 133.

[11] 2 East P. C. 744, 745; Foster, 373, 374; 4 Bl. Com. 133. And see Rex v. Wilkes, 1 Leach, 4th ed. 108, 2 East P. C. 746; Rex v. Pollard, 8 Mod. 264, 265. See ante, § 668.

[12] Rex v. Solomons, 1 Moody, 292; Rex v. Pulham, 9 Car. & P. 280; Rex v. Wheeler, 7 Car. & P. 170; Rex v. Hartall, 7 Car. & P. 475; Rex v. Austin, 7 Car. & P. 796. And see Rex v. Wyer, 1 Leach, 4th ed. 480. The crime of the receiver, however, is not, like that of the principal, larceny. People v. Maxwell, 24 Cal. 14

William & Mary, and of Anne (A. D. 1691–1706), are subsequent to the settlement of the older colonies which became our original States; therefore, on principle, they are common law in not all of the States.[1] But in most, and perhaps all, the legislative power has made provisions, following the English ones, whereby the receiving of stolen goods is punishable separately from the larceny of them, either as felony or as misdemeanor.[2]

§ 700 *a*. **Offence of Accessory is Felony.** — The offence of an accessory, whether before or after the fact, is, like his principal's, felony.[3]

II. *As to Treason.*

§ 701. **In General.** — The books tell us, that there are no accessories after the fact in treason; but they who in felony would be such, are, in treason, principals. Yet these persons are practically treated, by whatever name called, in every particular as accessories; the charge in the indictment against them must specify the accessorial nature of their offence, and they cannot be convicted in advance of the one by whose direct volition the traitorous act was performed.[4] Evidently, therefore, it is a mere abuse of terms to call them principals; for they are really accessories. The English common law, however, makes them traitors;[5] just as it makes accessories after the fact in felony felons.

[1] Kilty, in his Report of Statutes, says: "The 4th section [of the statute of William & Mary], which made the receiver of stolen goods an accessory to the felony, did extend to the province [of Maryland], as appears by cases of prosecutions under it, as did also those of 1 Anne, c. 9, and 5 Anne, c. 31, by which such receiver was liable to be prosecuted for a misdemeanor before the conviction of the principal offender; but both these cases are provided for by the act of 1809, c. 138." p. 179, 180. And see The State v. Butler, 3 McCord, 383; Loyd v. The State, 42 Ga. 221.

[2] See People v. Wiley, 3 Hill, N. Y. 194; Rohan v. Sawin, 5 Cush. 281; Commonwealth v. Andrews, 2 Mass. 14; The State v. S. L., 2 Tyler, 249; The State v. Counsil, Harper, 53; The State v. Butler, 3 McCord, 383; The State v. Scovel, 1 Mill, 274; The State v. Harkness, 1 Brev. 276; The State v. Sanford, 1 Nott & McC. 512; The State v. Coppenburg, 2 Strob. 273; Commonwealth v. Frye, 1 Va. Cas. 19; The State v. Weston, 9 Conn. 527; Cassels v. The State, 4 Yerg. 149; Wright v. The State, 5 Yerg. 154; Swaggerty v. The State, 9 Yerg. 338; The State v. Ives, 13 Ire. 388; Commonwealth v. Elisha, 3 Gray, 460; Bieber v. The State, 45 Ga. 569.

[3] 4 Bl. Com. 39; 2 Hawk. P. C. c. 20, § 11; Crim. Proced. II. § 7. And see Long v. The State, 1 Swan, Tenn. 287; ante, § 673.

[4] 1 Hale P. C. 233, 237, 238; 2 Hawk. P. C. Curw. ed. p. 437, 441, § 3, 14; 1 East P. C. 101; Foster, 341 et seq.

[5] Bensted's Case, Cro. Car. 588. There was doubt anciently, whether the guilt of the receiver of a traitor rose above misdemeanor. 1 Hale P. C. 233, 234; 2 Hawk. P. C. Curw. ed. p. 437, § 3.

§ 702. **How in Statutory Treasons.** — The English statutes of treason were evidently intended to abolish all common-law treasons;[1] yet they have not been always, in all respects, so interpreted.[2] And if the view, that the accessory after the fact is really guilty, not of his principal's crime, but of a distinct one of his own, suggested several sections back,[3] is correct, it follows, that, where the treason is statutory, he is not a traitor under the statute, but at the common law: just as, when a legislative enactment forbids a thing, yet provides no penalty, the person violating it is indictable at the common law, not under the enactment; or as an unsuccessful attempt to commit a statutory crime is a common-law offence, — doctrines already explained in these pages.[4]

§ 703. **Under United States Constitution — (State Constitutions).** — From this view it follows, that, under the Constitution of the United States, and State constitutions on the same pattern, the accessory after the fact is not a traitor. As against the United States, we have seen, not only there are no common-law crimes,[5] but the Constitution prohibits any thing not mentioned in it from being made treason. Its words are: "Treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort."[6] But —

Misprision. — Doubtless the receiver of a traitor is guilty of a misdemeanor, within the act of Congress concerning misprision of treason.[7]

§ 704. **In States having Common-law Offences.** — Even in States where the common law prevails, — if the question arises under a constitution providing that treason against the State shall consist *only*, &c., — the effect of the negative "only" must be to exclude

[1] See Rex v. Speke, 3 Salk. 358; 1 Hale P. C. 86, 89; 1 Gab. Crim. Law, 882. 4 Bl. Com. 76; 1 East P. C. 55; 1 Hawk. P. C. Curw. ed. p. 7, § 2.

[2] 4 Bl. Com. Tucker ed. App. 16; 1 Hale P. C. 236, 237; 1 Gab. Crim. Law, 885. "You are deceived to conclude all treasons be by the statute of 25 Edw. 3; for that statute is but a declaration of certain treasons, which were treasons before at the common law. Even so there do remain divers other treasons at this day at the common law, which be not expressed by that statute, as the judges can declare." Throckmorton's Case, 1 Harg. St. Tr. 63, 72, 1 Howell St. Tr. 869, 889. And Lord Coke, with this statute before him, said: "High treason is either by the common law or by act of Parliament;" and he went on to mention the receiving, comforting, and aiding of "any man who committeth high treason," as an "example" of treason at the common law. 3 Inst. 138.

[3] Ante, § 692.

[4] Stat. Crimes, § 138; ante, § 287. And see 1 East P. C. 96.

[5] Ante, § 198.

[6] Const. U. S. art. 3, § 3.

[7] Post, § 722.

common-law treasons.[1] But in such States it would seem, from principles already laid down,[2] that the accessory after the fact to the treason is a felon. Yet his felony must remain accessorial to the treason, and retain also the peculiar quality of admitting the procurer to sustain to it the same legal relation as the doer.[3] This question, however, both as concerns the States and the United States, is one on which we have no light of authority; only there has been manifested an undefined repugnance to accepting in this country the entire English doctrine of accessorial treason.[4]

III. *As to Misdemeanors.*

§ 705. **In General.** — Those who would be accessories after the fact in felony and treason are not such in misdemeanor. When their offence is cognizable at all by the criminal law, it is itself a distinct misdemeanor.[5]

§ 706. **Small Offences.** — There are under this head things too small for the law's notice.[6] Therefore —

Receiving Vagrant — One charged with Bastardy. — No indictment lies for entertaining a vagrant knowingly;[7] or for harboring one against whom there is a warrant in a bastardy case, knowing him to be guilty.[8] Indeed, —

§ 707. **Receiver in Other Misdemeanors.** — If we were to look merely for direct adjudications, we might doubt whether the assisting of a person, guilty of any mere misdemeanor, to elude justice, is cognizable by the criminal law. But —

Escapes in Misdemeanor. — A constable has been held to be indictable for suffering a street-walker, delivered to his custody by one of the night watch, to escape.[9] And we have seen,[10] that, generally, escapes and prison breaches are punishable when the offence charged or committed is a misdemeanor, the same as when it is a felony.[11]

[1] Stat. Crimes, § 151, 152.
[2] Ante, § 612.
[3] Ante, § 612, 698.
[4] United States *v.* Burr, 4 Cranch, 469, 470.
[5] 2 Hawk. P. C. Curw. ed. p. 438, § 4; 1 Hale P. C. 684; 2 East P. C. 973; Commonwealth *v.* Macomber, 8 Mass. 254; Commonwealth *v.* Barlow, 4 Mass. 439; Stratton *v.* The State, 45 Ind. 468.
[6] Ante, § 212 et seq.
[7] Rex *v.* Langley, 2 Ld. Raym. 790.
[8] Vaughan's Case, Popham, 184, 2 Rol. Abr. 75.
[9] Rex *v.* Bootie, 2 Bur. 864; s. c. nom. Rex *v.* Booty, 2 Keny. 575.
[10] Ante, § 697.
[11] And see Rex *v.* Stokes, 5 Car. & P. 148; Reg. *v.* Allan, Car. & M. 295.

In Principle. — What is conclusive in principle is, that, as we shall see in the next chapter, the compounding of the higher misdemeanors is indictable; and compounding is precisely of the same nature as harboring, yet one degree further removed from the act of the principal offender.[1] Since, therefore, the agreement not to prosecute a person guilty of a high misdemeanor is indictable, much more must be the assisting of him to elude justice.

§ 708. **Law of this Sub-title little cultivated.** — There is a reason why this branch of the law has been practically neglected in England; namely, that the statutes taking away clergy from specific felonies did not usually extend to accessories after the fact;[2] therefore, if such accessories were convicted, they could not be punished to any effect. So it became common to overlook their offence altogether; and, this being the course in felony, the same thing would naturally follow in misdemeanor, else he who had harbored a small offender would be in a worse condition than he who had harbored a great one.

[1] Ante, § 694.
[2] 4 Bl. Com. 39.

CHAPTER XLIX.

COMPOUNDING.

§ 709. **Scope of this Chapter.** — The subject of this chapter is indicated on the "Diagram of Crime" [1] by F G K L. We there see that compounding is a misdemeanor, and it extends through the entire regions of Treason and Felony, and in part through that of Misdemeanor.

§ 710. **How defined.** — Compounding crime is an agreeing with one who has committed an offence not to prosecute him.[2]

Theft Bote. — A species of compounding was anciently called *theft bote*, "which," says Blackstone, "is where the party robbed, not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute." [3] In very early times, contrary to the later and present law, a person so conducting was held to be an accessory after the fact.[4]

How accessorial. — Still, in the sense discussed in the last chapter, the offence of compounding is accessorial,[5] not after the manner of felony and treason,[6] but of misdemeanor,[7] where the offender may be proceeded against without reference to any prosecution of the principal.[8]

§ 711. **Compounding of Treason, Felony, Misdemeanor.** — The language of the books is general, that the taking of money to forbear or stifle a criminal prosecution of any sort, whether for felony or misdemeanor, or, of course, treason, is an indictable offence.[9] Yet —

[1] Ante, § 602.

[2] The State *v.* Duhammel, 2 Harring. Del. 532; Bothwell *v.* Brown, 51 Ill. 284.

[3] 4 Bl. Com. 133; 2 East P. C. 743, 790; 1 Hawk. P. C. Curw. ed. p. 74, § 5.

[4] Anonymous, Sir F. Moore, 8; 1 Hawk. P. C. Curw. ed. p. 74, § 7.

[5] The State *v.* Duhammel, 2 Harring. Del. 532; The State *v.* Henning, 33 Ind. 189.

[6] Ante, § 692, 701.

[7] Ante, § 705.

[8] People *v.* Buckland, 13 Wend. 592.

[9] Jones *v.* Rice, 18 Pick. 440; Commonwealth *v.* Pease, 16 Mass. 91; Plumer *v.* Smith, 5 N. H. 553; Rex *v.* Stone, 4 Car. & P. 379; Collins *v.* Blantern, 2 Wils. 341, 349; Johnson *v.* Ogilby, 3 P. Wms. 277, commented on, 6 Q. B. 316; Train & Heard Prec. 136. And see Porter *v.* Jones, 6 Coldw. 313; Chandler *v.* Johnson, 39 Ga. 85; Brown *v.* Padgett, 36 Ga. 609; Cannon *v.* Rands, 11 Cox C. C. 631; Golden *v.* The State, 49 Ind. 424.

Small Offences. — Various teachings of the criminal common law, already considered, show, that a misdemeanor may be so small, or so much of the nature of a private injury,[1] as will render the compounding of it not indictable. But we have almost no direct authority on this question.[2]

§ 712. **Compounding Penalties — (18 Eliz.).** — The English statute of 18 Eliz. c. 5, provided, says Blackstone, "that, if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent of commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit £10, shall stand two hours in the pillory, and shall be for ever disabled to sue on any popular or penal statute." [3]

How in our States. — This statute is sufficiently early to be common law in our States, while yet it is of a penal class not generally so regarded. We have no decisions on the direct question of its common-law force,[4] or informing us what was the anterior common law; but we have, from an American judge, a dictum, that "the compounding of penalties is an offence at common law," [5] — which, if in any degree correct, must be accepted with modifications.[6] A penal statute, imposing only a pecuniary penalty, should make it very heavy to cause a compounding under it, especially if the prohibited act is not *malum in se*, indictable, according to just principles of jurisprudence. But, —

§ 713. **Private Settlement under Sanction of Court.** — In the language of Blackstone, "it is not uncommon, when a person is convicted of a misdemeanor which principally and more immediately

[1] Ante, § 212 et seq., 237, 247.

[2] See Fallowes *v.* Taylor, 7 T. R. 475; Keir *v.* Leeman, 6 Q. B. 308; Golden *v.* The State, 49 Ind. 424.

[3] 4 Bl. Com. 136; 1 Russ. Crimes, 3d Eng. ed. 132; 1 Deac. Crim. Law, 269; Rex *v.* Crisp, 1 B. & Ald. 282; Rex *v.* Southerton, 6 East, 126; Rex *v.* Gotley, Russ. & Ry. 84, 1 Russ. Crimes, 3d Eng. ed. 133; Reg. *v.* Best, 2 Moody, 124, 9 Car. & P. 368.

[4] Kilty deems that a part of this statute, not saying what part, was received in Maryland. Kilty Rep. Stats. 235. The Pennsylvania judges do not mention it among the statutes accepted in the latter State. Report of Judges, 3 Binn. 598, 621.

[5] Collamer, J., in Hinesburgh *v.* Sumner, 9 Vt. 23, 26. And see Edgcombe *v.* Rodd, 5 East, 294.

[6] See Rex *v.* Crisp, 1 B. & Ald. 282; Rex *v.* Southerton, 6 East, 126; ante, § 711.

affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor* before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment," — a proceeding, however, which this commentator considers dangerous, except in particular cases, before the higher courts.[1] Yet the proceeding is well established by English authority.[2] And, —

Amends Mitigating Punishment. — Both in England and the United States, the court will take into its consideration, in determining the amount of punishment, that the offender has shown repentance by doing all in his power to repair the wrong.[3] Moreover, —

Statutes authorizing Private Settlement. — In some of our States, legislation has provided for the discharge of the wrong-doer altogether, in a few special offences, on his making full reparation to the injured person.[4]

§ 714. **Reclaiming Stolen Goods — Taking Amends.** — We have seen,[5] that one from whom goods have been stolen may lawfully

[1] 4 Bl. Com. 363.

[2] 1 Russ. Crimes, 3d Eng. ed. 132; Beeley *v.* Wingfield, 11 East, 46; Baker *v.* Townsend, 7 Taunt. 422; Kirk *v.* Strickwood, 4 B. & Ad. 421; Rex *v.* England, Cas. temp. Hardw. 158; Reg. *v.* Roxburgh, 12 Cox C. C. 8, 2 Eng. Rep. 165. Where a part of the penalty was going to the crown, a motion to permit the defendant to compound with the prosecutor was denied after verdict of guilty; "for the king's moiety of the penalty is vested by the conviction, and then it is too late to compound." Brery *v.* Levy, 1 W. Bl. 443.

[3] Beeley *v.* Wingfield, 11 East, 46, 48; Rex *v.* Grey, 2 Keny. 307. See post, § 948-950.

[4] See People *v.* Bishop, 5 Wend. 111; Bradway *v.* Le Worthy, 9 Johns. 251; Price *v.* Van Doren, 2 Southard, 578. In Georgia the statute provides, that "it shall be lawful, in all criminal offences against the person or property of the citizen, not punishable by fine and imprisonment, or by a more severe penalty, for the offender to settle the case with the prosecutor, upon the consent of the injured party being obtained, at any time before verdict." The statutory offence of trading with a slave has been held not to be so exclusively "against the person or property of the citizen" as to come within the provision. Dunn *v.* The State, 15 Ga. 419. And see McDaniel *v.* The State, 27 Ga. 197; Chandler *v.* Johnson, 39 Ga. 85; Statham *v.* The State, 41 Ga. 507. In Louisiana: "In all cases of assault and battery and misdemeanors, when the parties compromise, and the prosecution is withdrawn, no charges shall be brought against the parish; the parties compromising shall pay all costs in such cases; it shall be lawful for the Attorney-General or District Attorney to enter a nolle prosequi." And, **Nolle Prosequi.** — The court has held, that the prosecuting officer is not bound, under this statute, to enter as of course a nolle prosequi whenever a case for assault and battery has been compromised between the parties: he is to consult the public good, and act as in his judgment it demands. The State *v.* Hunter, 14 La. An. 71. See also Bone *v.* The State, 18 Ark. 109.

[5] Ante, § 694. And see ante, § 699.

receive them back, but he must not also agree to forbear prosecuting the offender. And it is believed that the right to take amends applies in all other private injuries from public wrongs.[1] Yet this does not justify a compounding under the guise of amends.

Enforcing Agreements to forbear Prosecution. — Under what circumstances a court will decline to enforce a private undertaking to pay damages for acts done in committing a public offence, as being calculated to obstruct the course of justice,[2] is an inquiry not lying in our present path. If, in a particular case, the plaintiff is not permitted to prevail in his civil suit, he may still not be indictable.

§ 715. **Extortion.** — There are extortions by officers, and other obstructions of public justice by persons in and out of office, analogous to compounding, and punishable on nearly the same grounds, while not usually classed under this title.[3]

[1] Plumer *v.* Smith, 5 N. H. 553; Beeley *v.* Wingfield, 11 East, 46, 48; Baker *v.* Townsend, 7 Taunt. 422, 426.

[2] See Bell *v.* Wood, 1 Bay, 249; Mattocks *v.* Owen, 5 Vt. 42; Plumer *v.* Smith, 5 N. H. 553; Cameron *v.* McFarland, 2 Car. Law Repos. 415; Corley *v.* Williams, 1 Bailey, 588; Hinesburgh *v.* Sumner, 9 Vt. 23, 26; Bailey *v.* Buck, 11 Vt. 252; State Bank *v.* Moore, 2 Southard, 470; Murphy *v.* Bottomer, 40 Misso. 67; Ford *v.* Cratty, 52 Ill. 313; Brown *v.* Padgett, 36 Ga. 609; Porter *v.* Jones, 6 Coldw. 313; Collins *v.* Blantern, 2 Wils. 341, 350; Edgcombe *v.* Rodd, 5 East, 294; Keir *v.* Leeman, 6 Q. B. 308, where there is a general review of the authorities; Fallowes *v.* Taylor, 7 T. R. 475; Kingsbury *v.* Ellis, 4 Cush. 578; Daimouth *v.* Bennett, 15 Barb. 541; Kirk *v.* Strickwood, 4 B. & Ad. 421; Loomis *v.* Cline, 4 Barb. 453. A man accused his cashier of stealing money, but did not set on foot any prosecution; the cashier acknowledged that he had omitted to enter certain sums, begged the employer not to expose him, and gave his note, secured by his father's indorsement and mortgage, for the amount which he said he had taken. The employer made no agreement not to prosecute, neither did he agree that the amount so secured was all which had been taken. And it was held, that the note was not extorted by threats, and was not given to compound a felony. Catlin *v.* Henton, 9 Wis. 476. And see Reg. *v.* Daly, 9 Car. & P. 342.

[3] See Rex *v.* Harrison, 1 East P. C. 382; Rex *v.* Buckle, 1 Russ. Crimes, 3d Eng. ed. 408; Reg. *v.* Loughran, 1 Cr. & Dix C. C. 79.

CHAPTER L.

MISPRISION.

§ 716. **Scope of this Chapter.** — On the "Diagram of Crime,"[1] the subject of this chapter is represented by G H K. It extends through the regions of treason and felony, but not into misdemeanor.

§ 717. **Meaning of "Misprision."** — The word misprision is sometimes employed to denote "all such high offences as are under the degree of capital, but nearly bordering thereon."[2] The term "high misdemeanor," however, better conveys this meaning, while the precision of our language is promoted by restricting "misprision" to neglects; and such, it is believed, is the better modern usage.

How defined. — Misprision of felony, therefore, is a criminal neglect, either to prevent a felony from being committed, or to bring to justice the offender after its commission.[3] Misprision of treason is the same of treason.

Misprision of Misdemeanor — is unknown equally in the facts and the language of the law; because, for reasons already explained,[4] it is too trifling a dereliction from duty to engage the attention of the tribunals.

Is Misdemeanor. — Misprision of treason, on the other hand, being an appendage to the highest crime, was anciently held to be a common-law treason; but now both it and misprision of felony are misdemeanors.[5]

§ 718. **Two Forms.** — The reader perceives, that the neglect which constitutes a misprision may be in either of two forms, — a neglect to prevent a treason or felony, or to bring to justice its

[1] Ante, § 602.

[2] 4 Bl. Com. 119. See further, as to the meaning of the word, ante, § 624.

[3] 1 Hale P. C. 484.

[4] Ante, § 212 et seq. 267. "It may be the duty of a citizen," said Marshall, C. J., "to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man." Marbury *v.* Brooks, 7 Wheat. 556, 575.

[5] 4 Bl. Com. 120; Eden Penal Law, 3d ed. 202. And see 1 Hale P. C. 371. And see ante, § 710

perpetrator. Our law treats the two forms as of equal turpitude, though few would regard them so in morals. By the laws of Egypt, observes a learned historian, "whoever had it in his power to save the life of a citizen, and neglected that duty, was punished as a murderer," — a provision which the same authority deems "remarkably severe."[1] By our law, it is not murder even for one to stand by and see another murdered, without interfering, where his will does not contribute to what is done.[2] It is only misprision of felony. But any law would be regarded as something more than "severe" which should condemn to the gallows a man who was merely too slothful or too humane to procure the execution of another guilty of a capital crime.

§ 719. **Misprision as to Libel.** — Lord Coke says: "It was resolved in the Star-chamber, in Halliwood's Case, that, if one finds a libel (and would keep himself out of danger), if it be composed against a private man, the finder either may burn it, or presently deliver it to a magistrate; but, if it concerns a magistrate or other public person, the finder ought presently to deliver it to a magistrate, to the intent, that, by examination and industry, the author may be found out and punished."[3] This seems to carry the doctrine into cases of aggravated misdemeanor; but there is no ground for believing that any courts of the present day would follow this lead of the old Star-chamber.

§ 720. **Doctrine of Misprision, stated.** — The doctrine of misprision, as now understood, is as follows: A man, to be responsible for a crime directly committed by another, must give to the criminal act some contribution from his own will.[4] But, if it is treason or felony, and he stands by while it is done without using means in his power to prevent it, though his will does not concur in it;[5] or, if he knows of its having been done in his absence, yet neither makes disclosure of it to the authorities, nor does any thing to bring the offender to punishment, — the law holds him to be guilty of a breach of the duty due to the community and the government.[6]

[1] 1 Tytler's History, Boston ed. of 1844, p. 37.

[2] Connaughty *v.* The State, 1 Wis. 159; Burrell *v.* The State, 18 Texas, 713; ante, § 633. 634.

[3] Case de Libellis Famosis, 5 Co. 125.

[4] Ante, § 629; 2 Hawk. P. C. Curw. ed. p. 440, § 10; Foster, 350; The State *v.* Hildreth, 9 Ire. 440.

[5] 1 East P. C. 377; 1 Russ. Crimes, 3d Eng. ed. 45; 2 Hawk. P. C. Curw. ed. p. 440, § 10; Foster, 350.

[6] 1 Russ. Crimes, 3d Eng. ed. 45; 1 East P. C. 139, 140; 2 Hawk. P. C. Curw.

§ 721. **Limit of Duty as to Misprision.** — How much a man, to avoid the guilt of misprision, must do to prevent a crime, or bring the offender to punishment, it is difficult to state; and doubtless the rule will vary with the nature and magnitude of the offence, and the kind and degree of public provision made for searching out and prosecuting offenders.[1] Russell observes, in accordance with the general language of the English books, that "a man is bound to discover the crime to a magistrate with all possible expedition;"[2] and Lord Coke says, that, "if any be present when a man is slain, and omit to apprehend the slayer, it is a misprision."[3] We saw in "Criminal Procedure" what a private person may do to arrest offenders; but one is not always indictable for not doing all that the law permits.[4]

§ 722. **United States Statutes.** — The statutes of the United States make punishable both misprision of felony,[5] and misprision of treason,[6] against the general government.

ed. p. 444, 447, § 28, 29; 1 Hawk. P. C. Curw. ed. p. 73, § 2; 4 Bl. Com. 121, 1 Hale P. C. 371, 374. And see ante, § 267–276.

[1] And see ante, § 271.

[2] 1 Russ. Crimes, 3d Eng. ed. 45. And see 1 East P. C. 139; 1 Hale P. C. 372; The State v. Leigh, 3 Dev. & Bat. 127; Long v. The State, 12 Ga. 293.

[3] 3 Inst. 139.

[4] Crim. Proced. I. § 164–172.

[5] R. S. of U. S. § 5390.

[6] Ib. § 5338.

CHAPTER LI.

ATTEMPT.[1]

§ 723. **Scope of this Chapter.** — The subject of this chapter is indicated on the "Diagram of Crime"[2] by A B P. Attempt, it is seen, is misdemeanor, extending through the Regions of Treason and Felony, and partly through that of Misdemeanor.

§ 724. **Indictable Endeavor short of Attempt.** — In England, the courts speak of indictable endeavors, which are too remote from the accomplished crime intended to be termed attempts.[3] No satisfactory reason appears why they should not be so termed, but there is ample reason why they should be.[4] In no American case, the writer believes, has this English distinction been made. And it is to be hoped that no judge among us will ever undertake to introduce a refinement so absolutely without practical advantage. If it were accepted, the thing thus receiving a new name would be indicated on the "Diagram of Crime" by a line drawn from some point between A and B to some point between P and A. The change would not enlarge the criminal field, but assign to a minuter space in it a new name.

§ 725. **Subject Intricate and Important.** — The subject of this chapter is alike intricate and important. The reports are full of cases upon it, yet it is but imperfectly understood by the courts. As for text-books, there was no one, English or American, until the present author wrote, which contained more than a few para-

[1] For the pleading, evidence, and practice in attempt, see Crim. Proced. II. § 71 et seq.

[2] Ante, § 602.

[3] Ante, § 435, 436.

[4] Crim. Proced. II. § 71.

graphs of loose and inadequate statements of doctrine. The reader, therefore, will not object if in this chapter he is delayed more with discussion than in some others.

§ 726. **Order of the Chapter.** — We shall consider, I. The General Doctrine of Attempt; II. The Kind of Intent; III. The Kind and Extent of Act; IV. The Combination of Act and Intent; V. The Degree of the Offence.

I. *The General Doctrine of Attempt.*

§ 727. **Why indictable.** — If a man undertakes to do a particular wrong of the indictable sort, and does some act toward it but fails to complete what he meant, his evil intent and act together constitute what is shown in the foregoing discussions to be a common-law crime;[1] provided the act is not too trivial and small for the law's notice.[2] For the intent is sufficient, and the adequacy of the act is the only further object of inquiry.[3] Therefore, —

§ 728. **How defined.** — An attempt is an intent to do a particular thing which the law, either common or statutory, has declared to be a crime, coupled with an act toward the doing, sufficient, both in magnitude and in proximity to the fact intended, to be taken cognizance of by the law that does not concern itself with things trivial and small. Or, more briefly, an attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended.[4]

§ 729. **Two Elements.** — An attempt, therefore, is, like any other crime, composed of the two elements of an evil intent and a simultaneous resulting act. As to —

The Act. — We have seen,[5] that an act may be evil in itself, or evil by reason of the intent prompting it,[6] or being in itself evil may be rendered more so by the intent. Now, in attempt, the act may be either evil or indifferent in itself; but, whether the one or the other, its special reprehensible quality, as an element in this form of indictable wrong, is derived from the particular

[1] Ante, § 204–207, 435.
[2] Ante, § 212, 223 et seq.
[3] People *v.* Lawton, 56 Barb. 126; Cunningham *v.* The State, 49 Missis. 685.
[4] See Johnson *v.* The State, 14 Ga. 55; The State *v.* Marshall, 14 Ala. 411; Cunningham *v.* The State, 49 Missis. 685.
[5] Ante, § 434 et seq. and other places.
[6] Rex *v.* Sutton, Cas. temp. Hardw. 370.

intent whence it proceeds. An act which, whether more or less evil in itself, is punishable when done simply from general malevolence, is not classed with attempt, but is a substantive offence. If a man, from this sort of wicked impulse, does less of such an act than the law requires to constitute the substantive offence, he incurs no criminal liability. But, —

Specific Intent. — An attempt is committed only when there is a specific intent to do a particular criminal thing, which intent imparts a special culpability to the act performed toward the doing.[1] It cannot be founded on mere general malevolence. When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it; and proceeded a certain way in the doing. The intent in the mind covers the thing in full;[2] the act covers it only in part. Thus, —

§ 730. **Murder — Attempt to Murder.** — To constitute murder, the guilty person need not intend to take life;[3] but, to constitute an attempt to murder, he must so intend.[4]

Further Course of Discussion. — The object of this introductory sub-title is to give the reader a general view of the subject before entering on its minuter consideration. But what is said here will be in substance repeated in the subsequent discussions of this chapter.

II. *The Kind of Intent.*

§ 731. **To do what, if done, would be Substantive Crime.** — It is but another form of foregoing propositions to say, that, in attempt, the intent must be specific to do some act, which, if it were fully performed, would constitute a substantive crime.[5] Therefore, as just seen, —

General Malevolence — is not sufficient, even though of a sort

[1] Cunningham *v.* The State, 49 Missis. 685.
[2] Post, § 735, 736; Eden Penal Law, 3d ed. 86, 87; Rex *v.* Boyce, 1 Moody, 29; Commonwealth *v.* Martin, 17 Mass. 359; The State *v.* Mitchell, 5 Ire. 350; Reg. *v.* Stanton, 1 Car. & K. 415; Roberts *v.* People, 19 Mich. 401; The State *v.* Jefferson, 3 Harring. Del. 571; Reg. *v.* Cox, 1 Fost. & F. 664. And see Reg. *v.* Adams, Car. & M. 299; Reg. *v.* Fretwell, Leigh & C. 443, 9 Cox C. C. 471; Sullivant *v.* The State, 3 Eng. 400.
[3] Vol. II. § 676.
[4] Vol. II. § 741; post, § 736; Maher *v.* People, 10 Mich. 212; Slatterly *v.* People, 58 N. Y. 354; Reg. *v.* Lallement, 6 Cox C. C. 204; Henderson *v.* The State, 12 Texas, 525; Reg. *v.* Donovan, 4 Cox C. C. 399.
[5] As to what is meant by "substantive crime," see ante, § 696.

which, added to the appropriate act, would constitute an ordinary substantive offence. So —

Civil Wrong. — We saw, under a previous title,[1] that sometimes an act is indictable when the intent is no more than to commit a mere civil wrong. That doctrine applies only to substantive offences, not to attempts. But, —

Entire Crime — (Rape). — The offender's purpose must be to commit an entire substantive crime; as, if the alleged offence is an assault with intent to commit rape, he must, to be guilty, have meant to use force, should it be necessary, to overcome the woman's will.[2]

§ 732. **Change of Purpose.** — A crime, once committed, may be pardoned, but it cannot be obliterated by repentance.[3] In reason, therefore, if a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, though he voluntarily abandons the evil purpose.[4] This doctrine may not be established absolutely beyond controversy by the authorities, but it is reasonably so. Thus, —

§ 733. **In Rape.** — If a man assaults a woman fully intending to ravish her, but this intent subsides before the act is committed, and he desists, he may still be guilty of assault with intent to commit rape.[5] Or if, after he has made the assault with the

[1] Ante, § 208.

[2] Taylor *v.* The State, 50 Ga. 79; Reg. *v.* Wright, 4 Fost. & F. 967.

[3] Vol. II. § 1028, 1122; Commonwealth *v.* Tobin, 108 Mass. 426, 429.

[4] See the cases to the next section; also The State *v.* McDaniel, Winston, No. 1, 249; observations of Gibson, C. J., in Shannon *v.* Commonwealth, 2 Harris, Pa. 226. **Under Foreign Codes.** — The Prussian penal code, following that of France, declares, as stated by Mr. Sanford, that "an attempt is only punishable when the same is manifested by acts which constitute a commencement of execution, and when the consummation is hindered only by circumstances, independent of the will of the author." Sanford Penal Codes in Europe, 61. So, by the penal code of Spain, "Criminal attempt is a direct commencement of execution, by external acts, the realization of which is hindered by causes independent of the will of the author." Ib. 122. And by the Austrian code, "Criminal attempt is punishable when the criminal has committed an action leading to the commission of a crime, which crime, however, was hindered by some circumstances independent of the will of the author. . . . An attempt exists also when a person endeavors to persuade another to a crime which he does not commit." Ib. 96. But these codes cannot control the principles of an unwritten jurisprudence.

[5] Lewis *v.* The State, 35 Ala. 380, 389. In delivering the opinion of the court, Stone, J., said: "If the attempt was in fact made, and had progressed far enough to put Miss Ozlery [the prosecutrix] in terror, and render it necessary for her to save herself from the consummation of the attempted outrage by flight, then the attempt was complete; and an after-abandonment by the defendant of his wicked purpose, if he had proceeded thus far, could not purge the crime." See Taylor *v.* The State, 50 Ga. 79. So, if one endeavoring to ravish a woman is frightened off by persons coming in answer to her cries, he is still liable for attempting to commit rape. The State *v.* Elick, 7 Jones, N. C. 68.

intent to ravish, the woman, who had resisted, yields voluntarily, so that there is no rape, the offence of assault with intent to commit rape, which had been perpetrated, remains.[1] But —

Purpose abandoned before Attempt. — If, in these cases, the criminal purpose is abandoned before enough of the evil act is done to constitute an attempt, guilt, of course, is not incurred.[2]

§ 734. **Intent presumed — Tendency of Act.** — It is a rule of criminal evidence, that a man is presumed to intend the natural, necessary, and even probable consequences of what he intentionally does; and that, in some circumstances, the presumption is conclusive.[3] Upon this principle, —

Substantive Crimes — (Libel — Bawdy-house — Forgery — Perjury — Hindering Witness, &c.). — Some acts are made substantive crimes, not so much on account of their inherent evil, as of their tendency to promote ulterior mischief. Thus, libels are indictable, because they *tend* to break the peace,[4] or to corrupt the public morals, or to stir up sedition against the government;[5] bawdy-houses, because their tendency is to corrupt the public morals; forgeries, as tending to defraud individuals[6] or the public; false oaths and affidavits employed in judicial proceedings,[7] preventing the attendance of witnesses,[8] and the like, because they are calculated to pervert public justice; and illustrations of this sort might be multiplied indefinitely.[9] Here, if a man intentionally does the thing, he cannot be heard to say, in his defence, that he did not intend the ulterior mischief.[10] And thence it is that these wrongs are substantive crimes, instead of attempts.

[1] The State *v.* Cross, 12 Iowa, 66; post, § 766.

[2] Pinkard *v.* The State, 30 Ga. 757.

[3] Crim. Proced. I. § 1060.

[4] Hodges *v.* The State, 5 Humph. 112; Reg. *v.* Nun, 10 Mod. 186.

[5] Rex *v.* Woodfall, Lofft, 776; Reg. *v.* Lovett, 9 Car. & P. 462.

[6] Reg. *v.* Marcus, 2 Car. & K. 356; Rex *v.* Ward, 2 Ld. Raym. 1461, 1469; People *v.* Genung, 11 Wend. 18.

[7] Omealy *v.* Newell, 8 East, 364; Hamper's Case, 3 Leon. 230.

[8] The State *v.* Carpenter, 20 Vt. 9.

[9] See Williams *v.* East India Company, 3 East, 192, 201; Reg. *v.* Chapman, 1 Den. C. C. 432; The State *v.* Taylor, 3 Brev. 243; Smith *v.* The State, 1 Stew. 506; Holmes's Case, Cro. Car. 376; Barefield *v.* The State, 14 Ala. 603; Reg. *v.* Darby, 7 Mod. 100; Rex *v.* Philipps, 6 East, 464; Reg. *v.* Renshaw, 11 Jur. 615; Smith's Case, 1 Broun, 240; Gibson's Case, 2 Broun, 366.

[10] And see Reg. *v.* Gathercole, 2 Lewin, 237; The State *v.* Nixon, 18 Vt. 70; Rex *v.* Farrington, Russ. & Ry. 207.

§ 735. **Tendency of Act as Evidence of Intent.** — On an indictment for a technical attempt, the jury may take into view the nature of an act proved, to determine the intent which prompted it. And the court will instruct them, that the defendant should be presumed to have intended the natural and probable consequences of his act.[1] But —

Intent in Fact — (Intent in Law not adequate). — They cannot go further. The doctrine of an intent in law, differing from the intent in fact, is not applicable to these technical attempts; and, if the prisoner's real purpose were not the same which the indictment specifies, he must, according to views already explained,[2] be acquitted.[3] To hold otherwise would be unjust and absurd. For the charge is, that the defendant put forth an act whose criminal quality or aggravation proceeded from a specially evil intent prompting it;[4] and, in reason, we cannot first draw an evil intent from an act, and then enhance the evil of the act by adding this intent back again to it. There are a few cases[5] which seem to overlook this truth, and even possibly to deny it; but it is sustained by the clear preponderance of judicial authority, English and American.[6] Thus, —

[1] Reg. v. Jones, 9 Car. & P. 258; The State v. Davis, 2 Ire. 153; Cole v. The State, 5 Eng. 318; Rex v. Howlett, 7 Car. & P. 274; Rex v. Holt, 7 Car. & P. 518; Jeff v. The State, 37 Missis. 321; Jeff v. The State, 39 Missis. 593. And see Rex v. Moore, 3 B. & Ad. 184; Rex v. Bailey, Russ. & Ry. 1; Southworth v. The State, 5 Conn. 325; The State v. Jefferson, 3 Harring. Del. 571; Dains v. The State, 2 Humph. 439. Said Campbell, J., in a Michigan case: "The intent to kill must undoubtedly be established as an inference of fact, to the satisfaction of the jury; but they may draw that inference, as they draw all other inferences, from any fact in evidence which, to their minds, fairly proves its existence. Intentions can only be proved by acts, as juries cannot look into the breast of the criminal." People v. Scott, 6 Mich. 287, 296.

[2] Ante, § 728-730.

[3] Reg. v. Ryan, 2 Moody & R. 213, overruling Rex v. Lewis, 6 Car. & P. 161; Rex v. Duffin, Russ. & Ry. 365; Rex v. Thomas, 1 Leach, 4th ed. 330, 1 East P. C. 417; Rex v. Holt, 7 Car. & P. 518; Mooney v. The State, 33 Ala. 419; Ogletree v. The State, 28 Ala. 693; and cases cited ante, § 729.

[4] Ante, § 729.

[5] The State v. Bullock, 13 Ala. 413; McCoy v. The State, 3 Eng. 451; Rex v. Jarvis, 2 Moody & R. 40; The State v. Boyden, 13 Ire. 505.

[6] The State v. Jefferson, 3 Harring. Del. 571; Moore v. The State, 18 Ala. 532; Reg. v. Sullivan, Car. & M. 209; Reg. v. Cruse, 8 Car. & P. 541; Rex v. Holt, 7 Car. & P. 518; Rex v. McIlhone, 1 Crawf. & Dix C. C. 156; Rex v. Kelly, 1 Crawf. & Dix C. C. 186; People v. Shaw, 1 Parker C. C. 327; Davidson v. The State, 9 Humph. 455; and see The State v. Hailstock, 2 Blackf. 257; Dains v. The State, 2 Humph. 439; Cole v. The State, 5 Eng. 318; Rex v. Hunt, 1 Moody, 93; Reg. v. Stringer, 2 Moody, 261; Reg. v. Nicholls, 9 Car. & P. 267; Reg. v. Griffiths, 8 Car. & P. 248; Rex v. Davis, 1 Car. & P. 306; Rex v. Mogg, 4 Car. & P. 364; Roberts v. People, 19 Mich. 401; People v. Woody, 48 Cal. 80

§ 736. **In Homicide.** — There are, as already said, circumstances wherein the unintended taking of human life is murder.[1] Yet there can be no attempt to murder, except where the death of the victim was meant.[2] For example, "if one from a housetop recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be by the common law murder. But if, instead of killing, it inflicts only a slight injury, the party could not be convicted of an assault with intent to commit murder;"[3] since, in fact, murder was not intended. Again, —

In Burglary. — If one, to commit a misdemeanor in another's dwelling-house, breaks and enters it at night, he does not thereby become guilty of burglary, which requires an intent to commit a felony,[4] though unintentionally his act therein amounts to a felony. He may be convicted of the unintended felony done therein, but not of burglary.[5] On the other hand, —

Name of Crime — Thing meant no Crime. — The name of a crime is no part of it.[6] Therefore one, to be guilty of an attempt, is not required to have in mind the name of a wrong meant. He need only contemplate the doing of a thing which the law holds to be an offence. And he is guiltless of the attempt if it is not such, though he supposes it is.[7] Thus, —

Attempts at Murder and Manslaughter, distinguished. — One who assaults another, meaning to take his life, becomes guilty of an

And see the cases in a previous note to this section, and ante, § 729.

[1] Ante, § 314, 730.

[2] Simpson v. The State, 59 Ala. 1; Smith v. The State, 2 Lea, 614, 617; The State v. Seymour, 1 Houst. Crim. 508; Washington v. The State, 53 Ala. 29; The State v. Neal, 37 Maine, 468; Seitz v. The State, 23 Ala. 42; Rapp v. Commonwealth, 14 B. Monr. 614; The State v. Beaver, 5 Harring. Del. 508; Ogletree v. The State, 28 Ala. 693; Jeff v. The State, 37 Missis. 321; Walker v. The State, 8 Ind. 290; Morman v. The State, 24 Missis. 54; The State v. Stewart, 29 Misso. 419; King v. The State, 21 Ga. 220. **Statutory Modifications.** — There are States in which this doctrine is more or less modified by statutes; as, in Texas, "Whenever it appears upon a trial for assault with intent to murder, that the offence would have been murder had death resulted therefrom, the person committing such assault is deemed to have done the same with that intent." Wilson v. The State, 4 Texas Ap. 637, 641; Daniels v. The State, 4 Texas Ap. 429, 430. And see Pugh v. The State, 2 Texas Ap. 539; Stapp v. The State, 3 Texas Ap. 138; Gay v. The State, 3 Texas Ap. 168; King v. The State, 4 Texas Ap. 54; Ewing v. The State, 4 Texas Ap. 417; Johnson v. The State, 4 Texas Ap. 598; Ferguson v. The State, 6 Texas Ap. 504; Walker v. The State, 7 Texas Ap. 627.

[3] Moore v. The State, 18 Ala. 532.

[4] Ante, § 559; Vol. II. § 90.

[5] 2 East P. C. 509; Rex v. Dobbs, 2 East P. C. 513. And see Rex v. Thomas, 1 Leach, 4th ed. 330, 1 East P. C. 417; Rex v. Trusty, 1 East P. C. 418; The State v. Eaton, 3 Harring. Del. 554.

[6] Crim. Proced. I. § 416; ante, § 599.

[7] Post, § 747, 748, 753; The State v. Brooks, 76 N. C. 1. See United States v. Tharp, 5 Cranch C. C. 390.

assault with intent to commit murder, or to commit manslaughter, according as the killing would be the one or the other if effected; and it is neither, if, under the circumstances, the killing would not be an offence.[1] To illustrate: where an officer, having a proper warrant, undertakes to arrest a man, the latter by killing him to prevent being taken, commits murder;[2] or, if the assault which was meant to kill fails, the offence is assault with intent to murder; while yet the offender may not know whether the officer has a warrant or not, and therefore whether he is himself endeavoring to perpetrate murder or manslaughter. But if the officer, where a warrant is required, has none, then the offence of the man who meant to kill him and failed will be assault with intent to commit manslaughter. He cannot be convicted of assault with intent to murder.[3] For a like reason, —

In Rape. — One does not become guilty of assault with intent to commit rape, where, under the circumstances, an actual violation of the woman's person would not be rape.[4] Again, —

Shooting at One to kill Another. — If a man, to murder A, shoots at B, whom he mistakes for him, still, though he intends to take the life of A, he also intends to take the life of the one at whom he shoots, namely, B; and, if the charge from his gun inflicts only a wound, he may be convicted of wounding B with the intent to murder B.[5] And, —

Shooting into Crowd. — If he discharges loaded arms into a group, to inflict grievous bodily harm generally, and wounds one, he becomes guilty of wounding this one with intent to do him grievous bodily harm.[6] The greater includes the less.

[1] And see Vandermark *v.* People, 47 Ill. 122.

[2] Vol. II. § 652.

[3] Commonwealth *v.* McLaughlin, 12 Cush. 615; Mitton's Case, 1 East P. C. 411. And see Rex *v.* Payne, 4 Car. & P. 558; Rex *v.* Curran, 3 Car. & P. 397; Sharp *v.* The State, 19 Ohio, 379; Nancy *v.* The State, 6 Ala. 483. **Intent to Kill.** — There is a difference between an intent to kill and an intent to murder: the former may exist where the party intends only such killing as amounts to manslaughter. People *v.* Shaw, 1 Parker C. C. 327; The State *v.* Nichols, 8 Conn. 496; Nancy *v.* The State, 6 Ala. 483; Bonfanti *v.* The State, 2 Minn. 123. It seems, however, to be the doctrine in Mississippi, that by an intent to kill is meant an intent to murder. Bradley *v.* The State, 10 Sm. & M. 618. See Morman *v.* The State, 24 Missis. 54; post, § 747.

[4] People *v.* Quin, 50 Barb. 128; Rhodes *v.* The State, 1 Coldw. 351; People *v.* Brown, 47 Cal. 447; The State *v.* Brooks, 76 N. C. 1; Johnson *v.* The State, 63 Ga. 355; post, § 746.

[5] Reg. *v.* Smith, Dears. 559, 25 Law J. N. s. M. C. 29, 7 Cox C. C. 51, 1 Jur. N. s. 1116, 33 Eng. L. & Eq. 567; Reg. *v.* Stopford, 11 Cox C. C. 643; The State *v.* Gilman, 69 Maine, 163. But see Lacefield *v.* The State, 34 Ark. 275. See Commonwealth *v.* Morgan, 11 Bush, 601. Reg. *v.* Hewlett, 1 Fost. & F. 91.

[6] Reg. *v.* Fretwell, Leigh & C. 443, 9 Cox C. C. 471. And see The State *v.* Sloanaker, 1 Houst. Crim. 62.

III. *The Kind and Extent of the Act.*

§ 737. **In General.** — Questions of the gravest difficulty, involving some conflicts of judicial opinion, and a few departures from sound doctrine, present themselves under this sub-title. But the general proposition is plain, that any act sufficient in turpitude for the law's notice, and near enough to the offence intended to create an apparent danger of its commission, will, when done in pursuance of the intent described under the last sub-title, complete the criminal attempt. But this proposition can furnish practical help only as it is made definite by a comparison with the adjudications and the other principles governing them.

Offender in Condition to perform. — It is of no consequence that the person accused was not in a condition to do the criminal thing which he meant,[1] if he appeared to be, and thus created the reasonable apprehension required.

§ 738. **Adaptation of Means.** — Some of the cases, particularly some of the English ones, seem to proceed on the idea, that the means employed must be really adapted to the accomplishment of the end, and not merely apparently so.[2] But this, we shall see,[3] is not the true doctrine; for the alarm created by the endeavor is the same whether the means are really adapted or only appear to be. And generally the reason why an attempt is not effectual is because of some occult inefficacy of the means. This doctrine would overturn the law of attempt itself. But, —

§ 739. **Act foreign to Purpose — Too Remote.** — If one, from a wicked purpose, does an act quite foreign to what he intends, he creates no apparent danger that his intent will be executed, and

[1] In the Indiana case of Kunkle *v.* The State, 82 Ind. 220, 230, 231, Elliott, J., after referring to the earlier case of The State *v.* Swails, 8 Ind. 524, observes: "If the case is to be understood as laying down the broad proposition that, to constitute an assault, or an assault and battery, with intent to commit a felony, the intent and the present ability to execute must necessarily be conjoined, it does not command our assent or approval. . . . Suppose an assault and battery is perpetrated on a woman, with intent to ravish, and she proves the stronger of the two, and thereby prevents the accomplishment of the object intended. The failure results alone from the want of the present ability to accomplish the end; and would it be contended that the party could not, in such a case, be convicted of the felonious intent?"

[2] Reg. *v.* Sheppard, 11 Cox C. C. 302; The State *v.* Napper, 6 Nev. 113.

[3] Post, § 749 et seq.

evidently he does not become guilty of an attempt. And it is the same if an act, though adapted, does not proceed far enough for the law's notice.[1]

§ 740. **How, in Principle, determine Indictability.** — The following view will be helpful. An intent to commit a substantive crime having been shown to exist, the prisoner cannot, as we have seen,[2] complain though he is made to suffer the full punishment for the act intended, while yet he has been unable to take even one step toward its performance. And, as said in an old case, "*in foro conscientiæ* the attempt is equal with the execution of it."[3] But, to justify the government in punishing the intent, it must have developed itself in something done, whereby society has received an injury.[4] There are cases, as disclosed in a previous chapter,[5] wherein, while a person is intending to do one wrong, he, failing in it, does another; and then, as a general rule, he is punishable for the wrong done, as a substantive offence. But where the thing done does not amount to such substantive offence, it is a criminal attempt, if the doing has proceeded far enough for the law's notice, and is also of a kind from which the community suffers. And the community suffers from a mere alarm of crime.

§ 741. *Discussions of Cases and Doctrines:* —

Attempted Pocket-picking and Abortion in England. — The cases are not all reconcilable with any uniform principle. Thus, in England, some defendants having been, in 1864, convicted of an attempt to commit larceny from a woman by picking her pocket, the conviction was held to be wrong, because no evidence had been produced, nor was it submitted to the jury to find, that she had in her pocket any thing which was the subject of larceny.[6] But, in 1846, it having been made punishable by 7 Will. 4 & 1 Vict. c. 85, § 6, unlawfully to "use any instrument" "with intent to procure the miscarriage of any woman," one was held to be guilty, though the evidence showed affirmatively that the woman, supposed to be pregnant, was not so in fact.[7] The acut-

[1] Ante, § 112 et seq.
[2] Ante, § 325 et seq.
[3] Rex *v.* Kinnersley, 1 Stra. 193, 196.
[4] Ante, § 204, 334.
[5] Ante, § 323 et seq.
[6] Reg. *v.* Collins, Leigh & C. 471. Contra, in the United States. See post, § 743, 744. The English text-books have since intimated that this would be punishable on the distinction stated ante, § 435, 436, 724. 1 Russ. Crimes, 5th Eng. ed. 192, note; Archb. Crim. Pl. & Ev. 19th ed. 382.
[7] Reg. *v.* Goodhall, 1 Den. C. C. 187; s. c. nom. Reg. *v.* Goodall, 2 Cox C. C. 41; s. c. nom. Reg. *v.* Goodchild, 2 Car. & K. 293. In the earlier case of Rex *v.* Scudder, 1 Moody, 216, the indictment being for administering a drug to a woman with intent to procure an abortion, contrary to 43 Geo. 3, c. 58, § 2, it was held, "that," in the language of the report, "the statute did not apply when it appeared negatively that the woman was not with child." But the terms of the statute were, "with intent, &c., to cause and procure the miscarriage of any woman *then being quick with child*." Obviously this decision was required by the express statutory words. See also Rex *v.* Phillips, 3 Camp. 76; Rex *v.* Phillips, 3 Camp. 78.

[1] 1. In the second edition of Bennett & Heard's "Leading Criminal Cases," vol. ii. p. 482, 483, Mr. Heard has fallen into a singular misapprehension, which, as it occurs in a book of much value, extensively before the profession, it becomes necessary for me to correct. He quotes this section of mine, and adds: "Obviously the decision in Regina *v.* Goodhall [miscarriage] was required by the express language of the statute. [The writer's reference to a statute, at this place, has nothing to do with the case, as perhaps he did not mean to be understood that it had; it having been enacted fifteen years after the decision was pronounced.] And it is equally obvious that the decision in Regina *v.* Collins [pocket-picking] was required by the express language of the indictment. The two cases are thus reconciled. During the argument in Regina *v.* Collins, Crompton, J., said: 'It is important to notice how the indictment is framed. The prisoners are charged with putting their hands into the pocket "with intent the property of the said woman *in the said gown pocket then being* from the person of the said woman to steal."' As the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common-law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case. And the counsel for the prisoner argued, 'if the goods had not been specified as in the said gown pocket then being, an indictment might perhaps have been framed which would have been supported by the evidence.' Cockburn, C. J.: 'This case is governed by Regina *v.* McPherson, Dears. & B. C. C. 197, 7 Cox C. C. 281. That case proceeds on the ground that you must prove the property as laid.' 9 Cox C. C. at p. 499."

2. I shall now show that Mr. Heard is mistaken in both branches of his proposition. The decision in Reg. *v.* Goodhall was not required by the express language of the statute, nor did it proceed on any such ground; and the decision in Reg. *v.* Collins was not required in fact, and was not understood by the judges to be required, by the express language of the indictment.

3. As to the latter case, it contains no two such connected sentences as Mr

est understanding could not reconcile these two cases, — the one, for putting the hand into the pocket, but not finding there any thing to be removed; the other, for penetrating to the womb, yet not discovering an embryo or fœtus to be taken away — and the differing decisions must have sprung from opposite views in the two benches of judges. But he who adopts the line of argument indicated in our last section will readily choose between the two decisions. It being accepted truth, that the defendant deserves punishment by reason of his criminal intent, no one can seriously doubt that the protection of the public requires the punishment to be administered, equally whether, in the unseen depths of the pocket or the womb, what was supposed to exist was really present or not.[1]

§ 742. **Unseen Impediments, in Reason how regarded.** — A further word, as to how an unseen impediment should in legal reason be

Heard puts into the mouth of Cockburn, C. J., or their equivalent in meaning, but the contrary. As Mr. Heard relies on the report in Cox, whose series is not deemed regular, or consequently of the highest authority, whatever be its intrinsic merit, I shall quote from this source the whole of the mature opinion of the court, as delivered by Cockburn, C. J., at the rendering of final judgment. He said: "We are all of opinion that this conviction cannot be sustained; and, in so holding, it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was any thing in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of the court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny? We are far from saying, that, if the question whether there was any thing in the pocket of the prosecutrix had been left to the jury, there was not evidence on which they might have found that there was, and in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. The case is governed by that of Reg. *v.* McPherson, and we think that an attempt to commit a felony can only be made out when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit which the party is charged. In this case, if there is nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the jury in this case, either directly, or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed." And that this learned Chief Justice expressed no such idea as the words interpolated by Mr. Heard import, but quite the contrary, is further apparent from what appears in the same report of the ground taken by the counsel for the defendants. "For the defence, it was contended that to put a hand into an empty pocket was not an attempt to commit felony, and that as it was not proved affirmatively that there was any property in the pocket at the time, it must be taken that there was not, and as larceny was the stealing of some chattel, if there was not any chattel to be stolen, putting the hand in the pocket could not be considered as a step towards the completion of the offence." p. 497.

4. But Mr. Heard professes to tell us what Cockburn, C. J., said *at the argument*. If he said any thing contrary to his deliberate opinion pronounced at the rendering of final judgment, it should be disregarded. But he did not. According to Cox, when the case of Reg. *v.* McPherson was mentioned at the argument, he remarked: "That case proceeds on the ground that you must prove the property as laid." He is not reported to have observed also at this time that the case under consideration must be governed by that one. He said so, indeed, at the rendering of final judgment. But he never said the two things in connection, as Mr. Heard reports him to have done. Now, if the reader will look into Reg. *v.* McPherson (Dears. & B. 197, post, § 757), he will see the explanation. Two points were discussed in it: first, whether the matter as proved constituted in law a criminal attempt; secondly, whether, if it did, there could be a conviction on the indictment as drawn. And the judges intimated opinions in the negative on both these points. When, there

regarded, will be helpful on this most difficult part of the doctrine of attempt. We have seen, that, if what a man contemplates

fore, at the argument of Reg. *v.* Collins, this case of McPherson was alluded to, and the learned Chief Justice used the words reported, he had one point in mind; and, when he referred to it in delivering final judgment, he had in mind the other point. This is an obvious explanation, assuming the report in Cox to be correct, which quite likely it is. But as these words, if employed at the argument, might mislead a reader who did not look into McPherson's case, when this case of Collins came to be reported in the regular series (Leigh & C. 471), the learned Chief Justice seems to have taken care that the words should be struck out. At all events, they are not to be found in the regular report.

5. Again; it is impossible that any legal tribunal could have seriously entertained so untenable a position as is attributed to this court by Mr. Heard. None of the reports of this case give the words of the indictment under marks of quotation; but, I have compared the reports of Cox and of Leigh & Cave, and they agree in saying, that the prisoners were tried, &c., "on an indictment which stated that they unlawfully did attempt to commit a certain felony; that is to say, that they did then put and place one of the hands of each of them into the gown pocket of a certain woman, whose name is to the jurors unknown, with intent the property of the said woman, in the said gown pocket then being, from the person of the said woman to steal, &c." Now, if it is in matter of law an offence to put the hand into a woman's gown pocket, supposed to contain property of hers, but in fact containing nothing, "with *intent* the property of the said woman in the said gown pocket there being" to steal, the person charged being mistaken in supposing there was in it such property, surely these words describe the offence as accurately as any words are capable of doing. They do not say, that, in fact, there was such property; but that the intent with which the hand was thrust into the pocket was to steal such property. If they did say there was such property, and it was not in law necessary there should be any in order to constitute the offence, then this particular allegation would be simply surplusage. Thus, in this very case, the allegation puts one hand of each defendant into the pocket, and the proof was that only one hand of one of the defendants was actually there; yet no one thought that, therefore, the offence was not proved as laid. Consequently it is simply absurd to say that this was a case of variance between the allegation and the proof. To be sure, Crompton, J., dropped, at the argument, a remark which possibly looks a little toward this idea; but it was not followed up by any other judge, it was evidently abandoned by him as untenable, if indeed he entertained the idea, and nothing came of it as nothing could come.

6. Let us now look into the other case, Reg. *v.* Goodhall, the decision in which Mr. Heard says "was required by the express language of the statute." This, the reader remembers, was an indictment for an attempt to commit an abortion; the proof showing that there was no fœtus to be removed, and the court holding that there need be none. The statute on which the indictment was framed (7 Will. 4 & 1 Vict. c. 85, § 6) is, in full, "that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." The reader can see for himself, that here is no "express language," as Mr. Heard says there is, rendering pregnancy in the woman unnecessary. Nor is there in the report any intimation that the case was adjudged on any such ground. To be sure, Mr

doing would not be in law a crime, he cannot be said, in point of law, to intend to commit the crime. If he thinks his act will be a crime, this is a mere mistake of his understanding, where the law holds it not to be such. His real intent being to do a particular thing, if the thing is not a crime he does not intend to commit one, whatever he may erroneously suppose.[1] But, where the thing he intends is a crime, and what he does is of a sort to create alarm, — in other words, excite apprehension that his evil intent will be carried out, — the incipient act which the law of attempt takes cognizance of, is, in reason, committed. Should a man mistake an effigy in female dress for a real woman, and undertake to ravish it,[2] he would not even intend to commit rape, because the law holds the ravishment of an inanimate object not to be rape; but, if a real woman occupied the place of the effigy, and he undertook to ravish her, yet, unknown to him, she carried a revolver, and with it disabled him, so that he could not effect his object, surely, in reason, and, it is believed, in law also, he would commit a criminal attempt. Again, if a man undertakes to rob one who, contrary to appearances, has no money, by reason of which the undertaking miscarries, shall he, after having throttled, stripped, and searched his victim, be permitted to deny his intent to commit robbery? The victim was a real person capable of being robbed, on whom he reasonably expected to find money; and, had it not been for the accident of no money being there, his offence would have been the completed crime of robbery. There is no analogy between this case and one in which an outrage is attempted on a mere inanimate substance.[3] Therefore, —

Heard, in his report, p. 446, says the judges were of opinion the question of pregnancy was immaterial "under this *statute*," and the authoritative report in Denison (1 Den. C. C. 187) says it was deemed immaterial under this "*indictment*," — but I do not consider the particular wording of the report, in this instance, important. Thus the matter stands in fact. But, at the place where Mr. Heard says this decision "was required by the express language of the statute," he has the following note: "The statute 24 & 25 Vict. c. 100, in terms makes it immaterial whether the woman was or was not with child, in accordance with the decision in Regina *v.* Goodhall." A hasty reader might understand this to be the statute which governed the case. I am not clear that Mr. Heard fell into the error; I think he did not. At all events, this statute of Victoria was enacted in 1861, and Reg. *v.* Goodhall was decided in 1846, so that the statute could not have governed the decision.

[1] Ante, § 736.

[2] See, for the principle, ante, § 441.

[3] Post, § 744.

Rule in Reason. — In reason the rule is, that, if there is an intent to do what in law constitutes a substantive crime, and the person intending such crime proceeds in its commission till interrupted by some unforeseen impediment or lack, outside of himself, special to the particular case, and not open to observation, he commits the indictable attempt.

§ 743. **American Doctrine — (Pocket-picking, continued).** — In mere form of words, the foregoing exposition may not be found among the judicial utterances, but it is believed to embody the American — or, at least, the better American — doctrine. Thus, in Pennsylvania, it was held, contrary to the English adjudication, that an indictment for assault with intent to steal from the pocket is good, though it contains no setting out of any thing in the pocket to be stolen. And Duncan, J., in delivering the opinion of the court, said: "The intention of the person was to pick the pocket of whatever he found in it; and, although there might be nothing in the pocket, the intention to steal is the same."[1] Afterward, in Massachusetts, the same question arose on a statute which, in affirmance of the common law, provided a punishment for "every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same."[2] And it was held, that the indictment for an attempted pocket-picking need not allege, and the prosecutor need not prove, that there was in the pocket any thing which could be the subject of larceny. Said Fletcher, J., speaking for the whole court: "To attempt is to make an effort to effect some object, to make a trial or experiment, to endeavor, to use exertion for some purpose. A man may make an attempt, an effort, a trial, to steal, by breaking open a trunk, and be disappointed in not finding the object of pursuit, and so not steal in fact. Still he remains nevertheless chargeable with the attempt, and with the act done toward the commission of the theft. So a man may make an attempt, an experiment, to pick a pocket, by thrusting his hand into it, and not succeed, because there happens to be nothing in the pocket. Still he has clearly made the attempt, and done the act towards the commission of the offence. So, in the present case, it is not

[1] Commonwealth *v.* Rogers, 5 S. & R. 463.

[2] Mass. R. S. c. 133, § 12.

probable that the defendant had in view any particular article, or had any knowledge whether or not there was any thing in the pocket of the unknown person; but he attempted to pick the pocket of whatever he might find in it, if haply he should find any thing; and the attempt, with the act done of thrusting his hand into the pocket, made the offence complete. It was an experiment, and an experiment which, in the language of the statute, failed; and it is as much within the terms and meaning of the statute, if it failed by reason of there being nothing in the pocket, as if it had failed from any other cause."[1]

§ 744. **Continued.** — Afterward, in a pocket-picking case in Connecticut, the same doctrine was affirmed. "It would be a startling proposition," said Butler, J., "that a known pick-pocket might pass around in a crowd, in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present, with intent to steal, and yet not be liable to arrest or punishment, until the policeman had first ascertained that there was in fact money or valuables in some one of the pockets on which the thief had experimented."[2] This observation opens to view what the author has set down in these sections[3] to be the true legal reason for the conclusion; namely, that the defendant, with the criminal intent, has performed an act tending to disturb the public repose. On every principle of law, therefore, the act is indictable. Again, —

Attempted Robbery. — The Indiana court, following the Pennsylvania, Massachusetts, and Connecticut doctrine, has held, that an assault on one with intent to rob him of his money may be committed, though he has no money in possession.[4]

§ 745. **Further of Reasons in Pocket-picking.** — The principle on which the English judges hold the attempt to steal not committed when the pocket contains no money appears to be, that, —

"If successful, Full Offence." — "There must," in the words of Cockburn, C. J., "be an attempt which, if successful, constitutes the full offence."[5] There can be no doubt of the soundness of this doctrine. We have even seen,[6] that, in law, a man does not

[1] Commonwealth *v.* McDonald, 5 Cush. 365; affirmed in Commonwealth *v.* Jacobs, 9 Allen, 274.

[2] The State *v.* Wilson, 30 Conn. 500, 506.

[3] Ante, § 740, 742.

[4] Hamilton *v.* The State, 36 Ind. 280.

[5] Reg. *v.* Collins, Leigh & C. 471, 474; ante, § 741, note.

[6] Ante, § 736, 742.

intend to commit a particular offence, if the act he intends would not, when fully performed, constitute such offence. But if, in these pocket-picking cases, the accused persons had found the money they meant to steal, they would have been guilty of a substantive offence: not finding it, their crime was, by this accident, interrupting their operations, reduced to attempt.

§ 746. **Legal Incapacity of Accused Person.** — One without legal capacity to commit a crime cannot, in law, intend its commission.[1] Nor can he do any act toward it; because, as he cannot accomplish the whole, so neither can he a part. Thus, —

Attempted Rape by Boy. — A boy under fourteen is, as we have seen,[2] incapable in law of committing rape, whatever be his physical abilities in fact; therefore he cannot be guilty of assault with intent to commit rape.[3]

§ 747. **Where All meant is no Crime in Law.** — It is but repeating what is already laid down[4] to say, that, if all which the accused person intended, would, had it been done, constitute no substantive crime, it cannot be a crime under the name attempt, to do, with the same purpose, a part of this thing. One reason is, that the specific intent, which, we have seen,[5] is always necessary in a criminal attempt, is wanting. Another reason relates to the act; namely, if a series of acts together will not constitute an offence, one of the series alone will not. Thus, —

§ 748. **In Robbery.** — A person who by violence compels another to write an order for money or goods, intending to take it away, but is intercepted, does not commit an assault with intent to rob; because, if he had got off with the order, the transaction would not in law be robbery.[6] Again, —

In Forgery. — Forgery, which is a substantive offence, is partly in the nature of attempt.[7] And, though it may be of a fictitious name,[8] yet, if there is in existence no being or corporation to be

[1] Ante, § 736.

[2] Ante, § 373; Vol. II. § 1117.

[3] Reg. *v.* Philips, 8 Car. & P. 736; Rex *v.* Eldershaw, 3 Car. & P. 396; Williams *v.* The State, 14 Ohio, 222; The State *v.* Handy, 4 Harring. Del. 566; People *v.* Randolph, 2 Parker C. C. 213; The State *v.* Sam, Winston, No. 1, 300. Contra, Commonwealth *v.* Green, 2 Pick. 380, Parker, C. J., dissenting. See Smith *v.* The State, 12 Ohio State, 466; Vol. II. § 1136; ante, § 736.

[4] Ante, § 736, 745, 746.

[5] Ante, § 728–730, 735, 736.

[6] Rex *v.* Edwards, 6 Car. & P. 521.

[7] Ante, § 572 and note; Vol. II. § 168, 521.

[8] The State *v.* Givens, 5 Ala. 747; Rex *v.* Taylor, 1 Leach, 4th ed. 214, 2 East P. C. 960; Rex *v.* Bolland, 1 Leach, 4th ed. 83, 2 East P. C. 958; Vol. II. § 543.

injured by the cheat,[1] — or, if the forged writing, were it genuine, would be neither apparently nor really valid in law,[2] — or if, for any other reason, it could not defraud any one,[3] — the transaction is not forgery.

§ 749. **Means adapted.** — We have seen something of the doctrine, that, to constitute attempt, the means employed must have some adaptation to accomplish the intended result;[4] for, without this element, they create no alarm, and the public repose is not threatened.[5] Yet if the means are apparently adapted, that, in reason, and on the better authorities, is sufficient; while there are cases which seem to require, contrary to principle, a real and complete adaptation.[6]

§ 750. **Perfectness of Adaptation.** — Nor can we split hairs here, and say that, even to outward appearance, the adaptation of means to the proposed end must in all circumstances be perfect; for thus we should nearly do away with the doctrine of attempt as a practical element in the law. In most cases, the reason why the means employed proved unsuccessful is, that, as a looker-on might have seen, there was some defect in the arrangement, or in the tools, or in the steps taken in carrying out the plan, by reason of which the enterprise failed. Overlooking these obvious views, —

Defect in Loading of Fire-arms — (Attempted Homicide). — The Indiana court once held, that a man does not commit the offence of shooting at another with intent to murder, if, contrary to his belief, the charge contains no ball, and the person shot at is distant forty feet; because, it was said, where the present ability to commit the act contemplated is wanting, the offence of attempting to commit it is not complete.[7] In a subsequent Indiana case,

[1] Reg. *v.* Tylney, 1 Den. C. C. 319; People *v.* Peabody, 25 Wend. 472; The State *v.* Givens, 5 Ala. 747; Vol. II. § 599.

[2] Rex *v.* Burke, Russ. & Ry. 496; People *v.* Harrison, 8 Barb. 560; Vol. II. § 533 et seq.

[3] Reg. *v.* Marcus, 2 Car. & K. 356, concerning which see Reg. *v.* Nash, 2 Den. C. C. 493, 12 Eng. L. & Eq. 578; Rex *v.* Knight, 1 Salk. 375, 1 Ld. Raym. 527; Barnum *v.* The State, 15 Ohio, 717; Vol. II. § 592-595.

[4] Ante, § 738.

[5] Ante, § 740, 742.

[6] See and compare Kunkle *v.* The State, 32 Ind. 220; Mullen *v.* The State, 45 Ala. 43; The State *v.* Napper, 6 Nev. 113; Reg. *v.* Gamble, 10 Cox C. C. 545; The State *v.* Epperson, 27 Misso. 255; Reg. *v.* Dale, 6 Cox C. C. 14; Sumpter *v.* The State, 11 Fla. 274; People *v.* Blake, 1 Wheeler Crim. Cas. 490; Reg. *v.* Goodman, 22 U. C. C. P. 338.

[7] The State *v.* Swails, 8 Ind. 524, 525. See, as perhaps contra, Johnson *v.* The State, 26 Ga. 611. And see Allen *v.* The State, 28 Ga. 395. In matter of statutory interpretation, perhaps such an act would not be deemed, in England, discharging "loaded arms." Post, § 758.

this court in effect overrule this doctrine, accepting the views of the present and accompanying sections as sound.[1] Again, —

§ 751. **Indiscriminate Shooting — (No Person in Range).** — In a Scotch case, it was held to be a crime wickedly and culpably to discharge loaded fire-arms into an inhabited house, to the apparent danger of lives within. And the lord justice-clerk said: "It was not necessary, under the present libel, to prove real danger to individuals within the house. The mere firing of the gun into the house constituted the crime, the panel having taken his chance of the consequences. It would therefore be no defence that the inmates of the house had accidentally left the room when the shot was fired into it, far less that there happened to be a screen which possibly might shield them from danger. If a person standing upon one side of a wall, and hearing the noise of a crowd collected upon the other, threw over some heavy substance, the act was equally criminal, though the crowd chanced at the moment to have moved back from the wall. In the present case, the act done was one by which lives were endangered, and would in all probability have been lost had it not been for circumstances which the panel could not have foreseen."[2] Again, —

§ 752. **Demanding Thing of one not having it.** — In Ireland, the statute of 9 Geo. 4, c. 55, § 6, having made punishable any person who "shall with menaces or by force demand any such property (being any chattel, money, or valuable security) of any other person, with intent to steal the same;" a defendant was adjudged to be rightly convicted who, with the required intent, demanded a gun, at the house of its owner, of his housekeeper, while neither the owner nor the gun was in fact in the house.[3] And, on the whole, we may deem the true doctrine to be, that, —

Rule for these Cases. — Where the intended criminal result is not accomplished, simply because of obstructions in the way, or because of the want of the thing to be operated upon, when the impediment is of a nature to be unknown to the offender, who used what seemed appropriate means, the criminal attempt is

[1] Kunkle *v.* The State, 32 Ind. 220, 232.

[2] Smith's Case, 1 Broun, 240. See also Rex *v.* Coe, 6 Car. & P. 403; Rex *v.* Crooke, 2 Stra. 901.

[3] Rex *v.* McBennet, Jebb, 148. Compare, with this case, Rex *v.* Jenks, 2 Leach, 4th ed. 774, 2 East P. C. 514; Rex *v.* Lyons, 2 East P. C. 497, 498, 1 Leach, 4th ed. 185.

committed. This doctrine, which was thus educed by the author in the earlier editions of this work, has been adopted by the Massachusetts court; Gray, J., expressing it in the following words: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal, a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."[1] The Indiana court adopted it in the terms of the author.[2]

§ 753. **Impossibility — (of Law — Fact).** — Another form of stating some of the foregoing doctrines is, that, as a man will not in fact attempt, so neither will the law treat him as attempting, what he knows he cannot do.[3] And, all being conclusively presumed to understand the law,[4] no man can legally intend what is legally impossible. An instance of this is, that, as already stated,[5] since a boy under fourteen cannot in law commit rape, he cannot incur the legal guilt of attempting it. This is an impossibility of law. But the doctrines of the foregoing sections disclose, that, in various circumstances, the attempt may be indictable when an impossibility of fact prevented the commission of the substantive offence.

§ 754. **Mistake of Fact.** — Not only may there be an impossibility of fact, but also a mistake of fact. The pocket-picking cases and several others, before mentioned, involve this consideration. On principle, the doctrine is —

Doctrine stated. — The necessary intent existing, the act must

[1] Commonwealth *v.* Jacobs, 9 Allen, 274, 275. **Enticing out of State to enlist.** — In this case the indictment was upon the second clause of the following statute: "It shall not be lawful for any person within this Commonwealth to recruit for or enlist in military service, or, &c.; nor to entice or solicit any person to leave the Commonwealth for the purpose of entering upon or enlisting, or offering themselves as substitutes for drafted persons, in any military service elsewhere." And it was held that a conviction might be maintained, although the person solicited thus to leave the State was not fit to become a soldier "there being no evidence that his unfitness for military service was manifest or known at the time of this unlawful act." p. 276.

[2] Kunkle *v.* The State, 32 Ind. 220, 232. See ante, § 760 and note.

[3] Rex *v.* Edwards, 6 Car. & P. 515. And see Nugent *v.* The State, 18 Ala. 521.

[4] Ante, § 294.

[5] Ante, § 746.

have some adaptation to accomplish the thing intended. But the adaptation need only be apparent; because the evil to be corrected relates to apparent danger, rather than to actual injury sustained. If the thing meant were accomplished, the offence would be a substantive one; but, not being accomplished, the danger as it appears to outside observation is the matter indictable under the name attempt.[1]

Why? — The reasons for this doctrine will sufficiently appear in the foregoing discussions under the present sub-title.

§ 755. *Special Terms of the Statute or Indictment:* —

Statutory and Common-law Attempts similar. — Statutes are construed conformably with the common law, except where their express words otherwise require.[2] Therefore, in cases not within this exception, statutory attempts are subject in all respects to the same rules as those at the common law; and, on the other hand, constructions under the statutes govern also attempts at the common law. But —

Exceptional Statutes. — Occasionally we meet with a statute in special terms, taking it out of the common-law interpretations; for express words cannot be disregarded. Also, —

Form of Indictment. — Sometimes a pleader incautiously draws the indictment in such form as to restrict the proofs, or confine their effects, within narrower limits than the common law would do. And —

Mixed Cases. — There are cases of a mixed nature, proceeding either upon grounds peculiar to themselves, or partly on the common-law rules and partly on special terms in the statute or indictment. These are to be decided, in a measure, on special considerations. The decisions, therefore, are of little weight in other cases.

§ 756. **Special Terms.** — Let us call to mind some special terms already interpreted by the courts. Thus, —

"Attempt to poison." — An "attempt to poison" is not committed by administering a substance not poisonous, yet believed to be; because, if it kills the man, he is not poisoned to death.[3]

[1] This enunciation of doctrine was copied and followed in Kunkle *v.* The State, 32 Ind. 220, 232. And see ante, § 750.

[2] Stat. Crimes, § 88, 114, 119, 141, 144, 155.

[3] The State *v.* Clarissa, 11 Ala. 57. And see, as illustrative, Commonwealth *v.* Manley, 12 Pick. 173; Rex *v.* Coe, 6 Car. & P. 403; Reg. *v.* Williams, 1 Den. C. C. 39; Rex *v.* Hughes, 5 Car. & P. 126; Reg. *v.* Leddington, 9 Car. & P. 79.

This is the English doctrine; but those who have read the foregoing discussions will see, that the question lies very near the debatable ground. For, if the substance administered should resemble poison, and appear to ordinary observation to be such, while yet it could be scientifically ascertained not to be, the requirements of the statute would be filled to ordinary apprehension, in a case where the principles of the common law would demand a conviction.

§ 757. **Attempting to steal Particular Goods — Burglary.** — The English statute of 14 & 15 Vict. c. 100, § 9, having provided, that, "if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same;" a prisoner, indicted for the burglary of breaking and entering a dwelling-house and *stealing therein certain goods specified*, was held to be wrongly convicted of the attempt, where the particular goods were not in the dwelling-house. The reason for this decision is not quite certain: it may be brought into accord with the late English doctrine as to pocket-picking; and, indeed, that doctrine was professedly derived from this case.[1] But, except for the later exposition, we might suppose the judges deemed the allegation, specifying articles as having been stolen, not sustained, even though the facts constituted a criminal attempt; while possibly they did not think the facts indictable as such attempt. In truth, both these points appear in the case.[2] Again, it is held that —

§ 758. "**Shoot at.**" — One does not "shoot at any person"[3] who is not, in fact, in the place toward which the gun is pointed, or within reach of the charge, though believed to be so.[4]

"**Loaded Arms.**" — Neither does one attempt to discharge "loaded arms," if the touch-hole is so plugged that the gun can-

[1] Ante, § 741 and note.

[2] Reg. v. McPherson, Dears. & B. 197.

[3] Stat. 9 Geo. 4, c. 31, § 12.

[4] Rex v. Lovel, 2 Moody & R. 39. And see Rex v. Kitchen, Russ. & Ry. 95; Henry v. The State, 18 Ohio, 32. Yet under this statute it has been ruled, that, if the shot hit the person mentioned in the indictment, it is sufficient, though the defendant aimed his gun at another. Rex v. Jarvis, 2 Moody & R. 40.

not possibly be fired;[1] or if, from not being primed or otherwise, it does not contain a charge capable of doing the mischief intended.[2] In such a case the "arms" are not "loaded." Yet, scarcely in harmony with this interpretation, or, as lying close on the line between this class of cases and another, —

"**Poison**" **in Form not Harmful.** — The English judges have held, under a statute against administering "poison or other destructive thing" with intent to kill, that coculus indicus berries, in their exterior unbroken pod, given to a child nine weeks old, are "poison;" though, by reason of the pod covering the poisonous part, they could not, as they did not, harm the child.[3]

"**Personating.**" — There cannot be a "personating" of a supposed individual who never existed;[4] there can be, of one who has lived and is dead.[5]

§ 759. *Magnitude of the Act and its Nearness to the consummation of the substantive offence intended:* —

Small or Remote. — An attempt may be too small a thing, or proceed too short a way toward its accomplishment, for the law to notice.[6] How great it must be, and how far progress, is matter not reducible to exact rule.[7]

Attempt to commit Misdemeanor — Felony — Treason. — It seems to have been formerly supposed by some, that no attempt to commit a mere misdemeanor is indictable;[8] but, if this was ever law, it has not been in modern times. As generally stated, the doctrine is, that every attempt to commit any crime,[9] whether

[1] Rex v. Harris, 5 Car. & P. 159; Stat. Crimes, § 822.

[2] Rex v. Carr, Russ. & Ry. 377; Whitley's Case, 1 Lewin, 123; Reg. v. Oxford, 9 Car. & P. 525; 1 East P. C. 412; Reg. v. Gamble, 10 Cox C. C. 545; Stat. Crimes, § 322; Vaughan v. The State, 3 Sm. & M. 553. And see Reg. v. Lewis, 9 Car. & P. 523; Shaw v. The State, 18 Ala. 547; Rex v. Mountford, 7 Car. & P. 242, 1 Moody, 441; Henry v. The State, 18 Ohio, 32; Rex v. Kitchen, Russ. & Ry. 95. See as illustrative, in regard to assaults, The State v. Cherry, 11 Ire. 475; The State v. Sims, 3 Strob. 137; Reg. v. St. George, 9 Car. & P. 483; The State v. Smith, 2 Humph. 457.

[3] Reg. v. Cluderay, 1 Den. C. C. 514, Temp. & M. 219, 14 Jur. 71; s. c. nom. Reg. v. Cluderoy, 2 Car. & K. 907. And see The State v. Clarissa, 11 Ala. 57; Rex v. Phillips, 3 Camp. 73. **Form of Indictment.** — An indictment for mixing sponge with milk, with intent to poison, was held bad for not setting out that the sponge was of a deleterious or poisonous nature. Rex v. Powels, 4 Car. & P 571.

[4] Rex v. Tannet, Russ. & Ry. 351.

[5] Rex v. Martin, Russ. & Ry. 324; Rex v. Cramp, Russ. & Ry. 327.

[6] Ante, § 212 et seq.

[7] Ante, § 225.

[8] See observations in Reg. v. Meredith, 8 Car. & P. 589.

[9] Rex v. Scofield, Cald. 397, 403; Rex v. Higgins, 2 East, 5.

treason,[1] felony,[2] or misdemeanor,[3] existing either at the common law or under a statute,[4] is indictable as misdemeanor. Yet evidently, —

§ 760. **Magnitude of United Act and Intent — (Great and Small Offences).** — Though, in attempt, some act must accompany the special intent,[5] still, as the thing noticed by the law is the sum of both, the act may be less, and proceed less far, in proportion as the intent is in enormity greater. Hence, —

§ 761. **Too small for Attempt.** — There are offences which, because of their little magnitude, cannot have the appendage of attempt. This is so both in principle and authority.[6] Thus, —

In Liquor-selling. — A man is not indictable for attempting, or persuading to, the sale of a glass of intoxicating liquor without license;[7] or for making a mere contract to sell spirits, where only the selling is interdicted.[8] But —

Procuring Obscene Print — Writing Libel. — One is indictable who procures an obscene print, with the intent to publish it;[9] and, it seems, who writes any libel with such intent.[10]

§ 762. **As to Act being "Illegal."** — Lord Abinger once suggested, that, in an attempt to commit a misdemeanor, there must be some "illegal act." But, if he meant only that the act must be illegal by reason of the intent prompting it, such a rule would furnish no practical help; if his idea was, that it must be illegal

[1] Rex v. Cowper, 5 Mod. 206, Skin. 637; Rex v. Fursey, 6 Car. & P. 81.

[2] The State v. Danforth, 3 Conn. 112; The State v. Boyden, 13 Ire. 505; Commonwealth v. Barlow, 4 Mass. 439; 1 Hawk. P. C. Curw. ed. p. 72, § 3; Holmes's Case, Cro. Car. 376; Rex v. Hughes, 5 Car. & P. 126; Reg. v. Clayton, 1 Car. & K. 128; Rex v. Higgins, 2 East, 5; The State v. Avery, 7 Conn. 266.

[3] Rex v. Scofield, 2 East P. C. 1028, 1030; Rex v. Burdett, 4 B. & Ald. 95; Reg. v. Martin, 9 Car. & P. 215; Reg. v. Martin, 9 Car. & P. 213, 2 Moody, 123; Commonwealth v. Kingsbury, 5 Mass. 106, 108; Reg. v. Meredith, 8 Car. & P. 589; Dugdale v. Reg., 1 Ellis & B. 435, 16 Eng. L. & Eq. 380; Rex v. Phillips, Cas. temp. Hardw. 241; Ross v. Commonwealth, 2 B. Monr. 417; Reg. v. Chapman, 1 Den. C. C. 432, 439.

[4] Stat. Crimes, § 139, 140; Rex v. Cartwright, Russ. & Ry. 106; Rex v. Roderick, 7 Car. & P. 795; Rex v. Butler, 6 Car. & P. 368; The State v. Maner, 2 Hill, S. C. 453; The State v. Avery, 7 Conn. 266.

[5] Ante, § 204 et seq.

[6] Ante, § 760; Rex v. Upton, 2 Stra. 816; Rex v. Bryan, 2 Stra. 866; Dobkins v. The State, 2 Humph. 424; Commonwealth v. Willard, 22 Pick. 476; Pulse v. The State, 5 Humph. 108; Ross v. Commonwealth, 2 B. Monr. 417. So also in the Scotch law. McColl's Case, 1 Scotch Sess. Cas. 4th ser. Just. 22, 23.

[7] Commonwealth v. Willard, 22 Pick. 476. And see ante, § 658 and note.

[8] Pulse v. The State, 5 Humph. 108.

[9] Dugdale v. Reg., 16 Eng. L. & Eq. 380, 1 Ellis & B. 435; ante, § 206.

[10] Rex v. Burdett, 4 B. & Ald. 95, 159; Vol. II. § 927.

per se, such is not the adjudged law. The foundation principle in attempt is, we have seen,[1] that an act in itself innocent, or not completely criminal, is made "illegal," or its illegality enhanced, by the special evil intent whence it proceeds. The learned judge illustrated his suggestion thus: —

Attempted Carnal Abuse. — If a man, meaning carnally to abuse a girl between ten and twelve, "was to take his horse and ride to the place where the child was, that," said the judge, "would be a step towards the commission of the offence, but would not be indictable."[2] Assuming this not to be an indictable act, as probably no court would hold it to be, still the reason is plainly some other than that it is not illegal. If the man, instead of riding to the place, stole a rope with which to tie the girl, the larceny would be a sufficiently "illegal" act, yet Lord Abinger would doubtless not have deemed it indictable under the name of attempt to commit a carnal abuse. Again, —

Attempt to Charge with Crime. — A conspiracy to charge one falsely with crime is punishable at the common law,[3] and in some circumstances it is so for a single individual to prefer the false accusation.[4] There may, therefore, be an indictable attempt to commit the latter offence; and the act will be sufficient if one puts into a man's pocket "three ducats, with a malicious intent to charge him with felony."[5] Here the act is proximate to the contemplated bringing of the accusation. It derives its criminal quality wholly from the intent; for the deed would be good if the man was poor, and the ducats were put into his pocket as a present.

As to a Rule. — It may be difficult to lay down a rule to determine when the act is in magnitude and proximity to the contemplated full offence adequate; it need not, certainly according to the American idea of attempt,[6] be the act next preceding the one which would complete the substantive crime intended;[7] and, in reason, the act may be less in magnitude and nearness as the crime is heavier.[8] Perhaps the only practicable method is for the judge, in each case, to consider the special facts without

[1] Ante, § 729.

[2] Reg. v. Meredith, 8 Car. & P. 589.

[3] Ante, § 591, note; Vol. II. § 216, 217, 220.

[4] Ante, § 591 and note.

[5] Rex v. Simmons, 1 Wils. 329.

[6] Ante, § 724.

[7] Post, § 764.

[8] Ante, § 760; Rex v. Cowper, 5 Mod 206.

undertaking a complete generalization, and to give directions to the jury largely with reference to them.[1]

§ 763. **Preparation.** — It is probable that, in ordinary circumstances, the making of preparations, at a distance from the place where the substantive offence is to be committed, will not constitute an indictable attempt. Yet it would seem that some preparations of this sort, for the commission of some crimes, may be indictable at the common law;[2] and they would, with us, be called attempt,[3] though not known by this name in England. To illustrate, —

§ 764. **Attempted Battery — (Procuring Switch).** — If a man, not standing *in loco parentis*, should simply procure a switch to whip a child, it is not probable that any court would hold him to be indictable for this; though there may be an indictable attempt to commit a battery.[4] On the other hand, —

"Last Proximate Act." — The act, as already intimated,[5] need "not be the last proximate act prior to the consummation of the felony attempted to be perpetrated."[6] Still, if the offence, instead of being a felony, was the lowest misdemeanor which admits of the indictable attempt, doubtless the act, to be indictable, must be the "last proximate" one.

Attempted Incestuous Marriage — (Preparation, continued). — In a California case, declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a magistrate to perform the ceremony, were held not to

[1] See Uhl *v.* Commonwealth, 6 Grat. 706; Rex *v.* Taylor, Holt, 534; Reg. *v.* St. George, 9 Car. & P. 483; Reg. *v.* Lewis, 9 Car. & P. 523; United States *v.* Twenty-eight Packages, Gilpin, 306; The State *v.* Bruce, 24 Maine, 71; Rex *v.* Parfait, 1 Leach, 4th ed. 19, 1 East P. C. 416, 417; Sinclair's Case, 2 Lewin, 49; Reg. *v.* Renshaw, 20 Eng. L. & Eq. 593, 2 Cox C. C. 285, 11 Jur. 615; Gibson's Case, 2 Broun, 366.

[2] Ante, § 435, 436. Lord Denman, C. J., once stated the doctrine in the very strong terms, that "any step taken with a view to the commission of a misdemeanor is a misdemeanor." Reg. *v.* Chapman, 1 Den. C. C. 432, 439. In Reg. *v.* Eagleton, Dears. 515, 538, Parke, B., said: "The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that *all* acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

[3] Ante, § 724.

[4] United States *v.* Lyles, 4 Cranch C. C. 469; the form of attempt being a solicitation. See Vol. II. § 62. See also, and query whether contra, White *v.* The State, 22 Texas, 608. And see Bob *v.* The State, 29 Ala. 20, 25.

[5] Ante, § 762.

[6] Uhl *v.* Commonwealth, 6 Grat. 706 And see post, § 768.

constitute the indictable attempt. It was even laid down, that, for the attempt to be punishable, it must have proceeded to some act which would end in the substantive offence, but for the intervention of circumstances independent of the will of the parties. In this case, the rule would require them to be standing before the magistrate about to begin the marriage ceremony. Field, C. J., added: "Between preparation for the attempt and the attempt itself there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but, until some movement is made to use the weapon upon the person of his intended victim, there is only preparation, and not an attempt."[1] It is believed that this case lies near the partition line between the indictable and the unindictable, and we cannot safely assume that it will be followed by all courts. Indeed, —

Attempted Larceny. — A Georgia case of attempt to commit a larceny cannot readily be brought into accord with this one, in principle. It was held, that, to take an impression of the key of a warehouse, and have a key made from it for use in committing a larceny therein, is a sufficient attempt, whether the offender means to commit the theft personally, or procure its commission by another. One judge dissented on the ground that, as the plan in that instance was to get another to commit the larceny, the defendant "was not guilty of an attempt to steal from the store," but rather of an attempt to procure another to steal.[2]

§ 765. *Further of the Kind of Act:* —

Any Act. — There is no doctrine limiting the act to any particular species. In general terms, any form of act, apparently adapted to the purpose, is sufficient. Thus, —

Staking Counterfeits. — The staking, at a gaming-table, of counterfeit coin as good, is an attempt to utter it.[3] So —

Burning Own House to burn Neighbor's — Carnal Abuse. — One may attempt to burn his neighbor's house, by burning his own;[4]

[1] People *v.* Murray, 14 Cal. 159, 160.

[2] Griffin *v.* The State, 26 Ga. 493.

[3] The State *v.* Beeler, 1 Brev. 482.

[4] W. Jones, 351; 2 East P. C. 1027. **Arson — Match goes out.** — As to attempt to commit arson where the match goes out, see Reg. *v.* Goodman, 22 U. C. C. P. 338.

or, to carnally abuse a girl between ten and twelve years old, by doing with her consent what otherwise would be an assault,[1] — it being legally in the power of such a girl to consent to the assault but not the carnal act.[2]

§ 766. **Rape attempted where Woman yields.** — If a man, intending to ravish a woman, assaults her, but before penetration she yields, he is guilty of assault with intent to commit rape. Her consent does not undo what is done; for, observes Kellogg, J.: "The rules of the criminal law are not founded upon legal fictions; and the doctrine of relation, however useful it may be as a rule defining or regulating private rights in a civil suit, has no application in criminal proceedings."[3] But this has already been illustrated.[4]

§ 767. **Solicitation.** — A common form of attempt is the soliciting of another to commit a crime; the act, which is a necessary ingredient in every offence,[5] consisting in the solicitation.[6] Thus, —

To Larceny — Sodomy — Adultery — Bribery — Threatening Notice. — To incite a servant to steal his master's goods,[7] or other person to undertake a larceny;[8] to make overtures to one to commit sodomy,[9] or adultery where it is a statutory felony;[10] to offer, merely, a bribe;[11] to request, it seems, one to post up a threatening notice;[12] are severally indictable misdemeanors, though the person approached declines the persuasion.

Conspiracy. — A conspiracy to commit a crime is in some degree in the nature of a solicitation, though it is more; and it is, in part, within the rules which govern attempt.[13]

Solicitation not nearest to Substantive Offence. — A solicitation

[1] Reg. *v.* Martin, 9 Car. & P. 213, 2 Moody, 123.

[2] Stat. Crimes, § 480, 483, 491–493.

[3] The State *v.* Hartigan, 32 Vt. 607, 611; Vol. II. § 1122.

[4] Ante, § 733. See, also, Hull *v.* The State, 22 Wis. 580.

[5] Ante, § 204 et seq., 729.

[6] Rex *v.* Higgins, 2 East, 5; Reg. *v.* Turvy, Holt, 364, 365; People *v.* Bush, 4 Hill, N. Y. 133; The State *v.* Avery, 7 Conn. 266; Commonwealth *v.* Harrington, 3 Pick. 26; Reg. *v.* Gregory, Law Rep. 1 C. C. 77, 10 Cox C. C. 459.

[7] Rex *v.* Higgins, supra; Reg. *v.* Daniell, 6 Mod. 99; s. c. nom. Reg. *v.* Daniel, 6 Mod. 182, 1 Salk. 380; Reg. *v.* Quail, 4 Fost. & F. 1076.

[8] Pennsylvania *v.* McGill, Addison, 21. See Reg. *v.* Collingwood, 6 Mod. 288.

[9] Rex *v.* Hickman, 1 Moody, 34; Reg. *v.* Rowed, 6 Jur. 396; post, § 768 *b*, 768 *d*.

[10] The State *v.* Avery, 7 Conn. 266.

[11] United States *v.* Worrall, 2 Dall. 384; Hefelton *v.* Lister, Cooke, 88; Vol. II. § 88, 89.

[12] Reg. *v.* Darcy, 1 Crawf. & Dix C. C. 33.

[13] See ante, § 432, 762–764; Vol. II. § 169, 173, 191–195.

does not stand so near the substantive offence intended as some other forms of attempt. It appears, properly viewed, to be the first of a series of steps toward the execution, — a "commencement of execution."[1] While not "the last proximate act prior to the consummation,"[2] it need not be. Consequently, —

§ 768. **Solicitation to Lighter Offences.** — Though, to render a solicitation indictable, it is, as in other attempts,[3] immaterial in general whether the thing proposed to be done is technically a felony or a misdemeanor;[4] still, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained,[5] be of a graver nature than if the step lay further in advance. Thus, —

To Adultery. — In Connecticut, where adultery is felony, an unsuccessful enticement to it has been adjudged to be an indictable attempt;[6] but otherwise in Pennsylvania, where it is misdemeanor punishable by fine, and imprisonment not exceeding a year. And this contrariety of conclusion appears to proceed, not so much from differing views of the two courts, as from the differing enormity of the substantive offence in the two States.[7] On the other hand, —

§ 768 *a*. **Solicitations to Higher Offences.** — The illustrations previously given[8] show, that all sufficiently-direct solicitations to commit any of the heavier offences are punishable attempts. And it would be within established principles to hold, that, in proportion to the gravity of the particular crime, the solicitation, to come within the law's cognizance, may be less direct. But of the latter distinction the explanatory instances are not very plentiful.

Assassination. — The English statute of 24 & 25 Vict. c. 100, § 4, goes but little, if at all, beyond a mere affirmance of the unwritten law in declaring, that "whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person, to murder any other person, whether he be a subject of

[1] Ante, § 732, note.

[2] Ib. And see, as illustrative, ante, § 339, 340; Reg. *v.* Eagleton, Dears. 515, 538, 24 Law J. N. s. M. C. 158, 1 Jur. N. s. 940, 33 Eng. L. & Eq. 540.

[3] Ante, § 754.

[4] See the cases cited to the last section.

[5] Ante, § 760, 764.

[6] Ante, § 767. The State *v.* Avery, 7 Conn. 266.

[7] Smith *v.* Commonwealth, 4 Smith, Pa. 209. As to a conspiracy to commit adultery, see Vol. II. § 184; Shannon *v.* Commonwealth, 2 Harris, Pa. 226; Miles *v.* The State, 58 Ala. 390.

[8] Ante, § 767.

her majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor." Thereupon, after the Emperor of Russia had been assassinated, a German paper in London published an article commending the act, and urging the following of the example in all other countries. For this the writer was indicted under the above statute, and the jury were directed to convict him if they thought that, by the publication, he intended to and did encourage or endeavor to persuade any person to murder any other person, whether a subject of her majesty or not, and whether within the queen's dominions or not. They found him guilty, and on a case reserved the direction was adjudged to be correct.[1] Still, if the offence commended had been greatly lighter, there might be ground to say, — the writer does not express any opinion whether or not it would be just, — that this general encouragement to repetitions, without mention of person, place, or time, was too remote for the law's cognizance.[2] Yet, —

§ 768 *b*. **Letter of Solicitation not read — (Sodomy).** — Where one wrote to a school-boy, enticing him to meet the writer for the purpose of committing sodomy, but the boy passed the letter to the school authorities unread, being in no way made aware of its contents, the English court held, on a case reserved, that the offence of attempt by solicitation was complete.[3] On the other hand, —

§ 768 *c*. **Denying that Solicitation is an Attempt.** — In one of the American cases, already stated and explained,[4] the learned judge who delivered the opinion uttered, in the way of argument, not as affecting the adjudication which is quite harmonious with the general doctrine, some propositions altogether in conflict with the other cases English and American. He denied that a solicitation is an attempt, or that the cases hold it to be. "The attempt," he said, "can only be made by an actual, ineffectual *deed*, done in pursuance of, and in furtherance of the design to commit the offence. I would have supposed that the case of Rex *v.* Butler[5] would have fallen within this rule; and yet it was held there that a count was not good, which charged that the

[1] Reg. *v.* Most, 7 Q. B. D. 244.
[2] See Pool *v.* Sacheverel, 1 P. Wms. 675, and Plating Co. *v.* Farquharson, 17 Ch. D. 49, commented on in this case.
[3] Reg. *v.* Ransford, 13 Cox C. C. 9.
[4] Smith *v.* Commonwealth, 4 Smith, Pa. 209.
[5] Rex *v.* Butler, 6 Car. & P. 368.

defendant 'did attempt to assault the said Sarah Vernon, by soliciting and persuading and inducing her to lie down upon a certain bed in the dwelling-house of him the said J. B. there situate, and getting upon the body of her the said S. V.' &c. This was soliciting and persuading with overt acts that clearly manifested the guilty intent; and, if solicitation with such indubitable acts be not indictable, it is quite necessary to conclude that mere solicitation without any overt acts is not indictable. It is easy to say that solicitation is an attempt, but a study of the cases will show that every case of attempt has included something more than mere solicitation."[1] Not often does the author suffer himself to copy *dicta* as loose as we have here, however they abound in the reports. But this exception seems necessary as a means of checking the spread of an error. The law *as adjudged* holds, and has held from the beginning, in all this class of cases, an indictment sufficient which simply charges that the defendant, at a time and place mentioned, "falsely, wickedly, and unlawfully did solicit and incite" a person named to commit the substantive offence, without any further specification of overt acts.[2] It is vain, then, to say, that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offence. In the very case to which the learned judge refers, Patteson, J., stated a case wherein it was held, that soliciting an engraver to engrave a plate for forgery is indictable. "I drew," he said, "the indictment . . . for soliciting the engraver to engrave the plate, and the prisoner was tried and convicted on it."[3] But plainly, in the principal case, the allegation, which in substance was, that the defendant solicited a woman to let him commit an assault upon her, would not be good; because her yielding to the solicitation would render the act no assault. Nor was the solicitation punishable as an attempt to commit adultery; because, in England, adultery is not an offence, so that an attempt to commit it is not. On the strength of the American case thus explained, and another,[4] and following the blunder of a writer, without looking into either case, —

§ 768 *d*. **Novel Distinction — (Incest — Sodomy).** — The Illinois

[1] Smith *v.* Commonwealth, supra, at p. 213.
[2] Crim. Proced. II. § 74.
[3] Anonymous, stated 6 Car. & P. 368.
[4] Commonwealth *v.* Willard, 22 Pick. 476.

court drew a distinction before unknown. It is, that solicitations to offences which are breaches of the peace, or corrupting to the body politic as interfering with public justice, are indictable attempts, but other solicitations to crime are not. According to this distinction, and contrary to the *dicta* copied into the last section, a solicitation may be an attempt. That case,[1] therefore, supposing it to be sound in every respect, is flat against the distinction. The other case cited by the Illinois court[2] simply affirms the doctrine as to the lighter offences[3] and statutory interpretation, that the purchaser of liquors sold by an unlicensed person contrary to a statute is not indictable. But in this very cited case the court expressly approves the doctrine that it is an offence to solicit a servant to steal his master's goods, — an act tending neither to a breach of the public peace nor to the corruption or public justice. The learned Illinois judge well observed, that "there are respectable authorities holding to a different rule" from the one which he was laying down. On the other hand, it is believed that there is no single authority, respectable or otherwise, prior to this Illinois one, even by implication maintaining the distinction. The particular application of the distinction drawn by the Illinois court was, that, a statute having made incest heavily punishable, a solicitation to commit it was still not an indictable attempt.[4] Directly contrary to this is a close analogy from the law of England, the source whence our jurisprudence is derived. A statute made sodomy heavily punishable.[5] Where it is committed between two men, or a man and woman contrary to nature, it is a sexual dereliction in principle not unlike incest.[6] And ever since the statute was passed, the English law has held a solicitation to sodomy to be an indictable common-law attempt.[7] No difference between classes of offences of equal turpitude, as measured by the law's standard the punishment, can in reason be assigned. Where the same legal consequence follows incest, buggery, adultery, and larceny, if a father should urge his son and daughter to commit incest, then go to a neighbor's house and she steal a silver pitcher while he engaged the woman in

[1] Smith *v.* Commonwealth, 4 Smith, Pa. 209.
[2] Commonwealth *v.* Willard, 22 Pick. 476.
[3] Ante, § 657–659, 688, 759–761, 768.
[4] Cox *v.* People, 82 Ill. 191.
[5] Ante, § 503.
[6] See McColl's Case, 1 Scotch Sess Cas. 4th ser. Just. 22, 2 Couper, 538.
[7] Ante, § 767; Reg. *v.* Ransford, 13 Cox C. C. 9.

adultery, and lastly visit the stables, no just principle of law could make punishable the solicitation to one of the wrongs and not to another. "True," says the new doctrine, "nothing of this would be indictable; but let the solicitation be to inflict on a neighbor's boy a merited whipping for stealing the son's apples, or to dissuade the boy from attending court as a witness to the unlicensed sale of a gill of needed gin to the daughter, and the law would have something worthy of its notice! Verily that would be a crime."[1]

§ 769. **Adaptation.** — From the doctrine of adaptation, already considered,[2] further illustrations may be drawn. If there is no aptitude, real or apparent, in the thing done to accomplish the criminal end meant, it does not approach sufficiently near the consummation to create the alarm against which the law of attempt protects us, and it is not indictable. Thus, —

Similitude, &c. — (Forgery). — In affirmance of common-law principles, but resting mainly on statutes, we have in forgery and counterfeiting the rule, that there must be in the false thing a similitude to the supposed original; else it could not probably accomplish any intended cheat.[3] And there are other derelictions within the like principle.[4] But, —

Sort of Thing administered — (Abortion). — Under a statute making it criminal to administer to a woman, with intent to procure an abortion, "any medicine or *other thing*," a learned judge intimated, that it was immaterial what the thing was, if given with the intent, though only "a bit of bread."[5] Yet should the prisoner know it to be incapable of producing the result, plainly he would not commit the crime; because he could not have the required evil intent.[6] And, at least, a little different wording of the statute would produce a contrary result.[7]

[1] And see post, § 772*a*.; Int., long note.
[2] Ante, § 738 et seq.
[3] Rex *v.* Hoost, 2 East P. C. 950; Rex *v.* Elliot, 2 East P. C. 951; s. c. nom. Rex *v.* Elliot, 1 Leach, 4th ed. 175, 179; Rex *v.* Collicott, Russ. & Ry. 212, 2 Leach, 4th ed. 1048, 4 Taunt. 308, 309; Rex *v.* Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364; United States *v.* Morrow, 4 Wash. C. C. 733; Rasnick *v.* Commonwealth, 2 Va. Cas. 356; Rex *v.* Varley, 1 Leach, 4th ed. 76, 1 East P. C. 164.
[4] Reg. *v.* Stringer, 1 Car. & K. 188; Rex *v.* Griffith, 1 Car. & P. 298.
[5] Rex *v.* Coe, 6 Car. & P. 403, Vaughan, B. And see The State *v.* Fitzgerald, 49 Iowa, 260; Commonwealth *v.* Morrison, 16 Gray, 224.
[6] Ante, § 753.
[7] Reg. *v.* Hennah, 13 Cox C. C. 547; People *v.* Van Deleer, 53 Cal. 147.

IV. *The Combination of Act and Intent.*

§ 770. **Both Act and Intent.** — We have seen,[1] that every thing indictable at the common law consists of a criminal intent and an act proceeding from it. But, in attempt, this is specially so; and what would be adequate as an intent in the greater part of the substantive offences is quite insufficient here.[2] Now, —

Specific Intent. — The specific intent, without which there can be no attempt, must, in reason, impel the act in every one of its essential parts. For example, if a man should, as in a case already supposed,[3] ride to a place where there was a girl between ten and twelve years of age, to commit a carnal abuse upon her, then should bind her under the changed purpose to murder her, then should resolve again upon carnal abuse, but, before taking any further steps should be frightened away, he could not be punished for the carnal attempt, whatever his liability might be for the attempt to murder. Therefore, —

§ 771. **Simultaneous.** — Whether or not, in all other cases of crime, the evil intent and act must be simultaneous,[4] plainly they must be in all attempts. And the special intent must combine with every part of the act which is essential to the attempt. Yet if enough is done while this intent prompts, no objection can be taken that something else, not essential, was done when it was not present.[5]

V. *The Degree of the Offence.*

§ 772. **Is Misdemeanor.** — In early times, an attempt to commit a felony was supposed to be felony.[6] But this idea was long ago exploded; and now all attempts to commit either statutory or common-law felony or misdemeanor are misdemeanors.[7] Therefore, —

Counselling to Felony. — If one counsels to a felonious act an-

[1] Ante, § 204–207, 287, 430 et seq.
[2] Ante, § 729, 730.
[3] Ante, § 762.
[4] Ante, § 207.
[5] Ante, § 339–341.
[6] 1 Hawk. P. C. Curw. ed. p. 72, § 3; 1 East P. C. 411; Dwar. Stat. 2d ed. 794.
[7] 1 East P. C. 85, 411, 415; Holmes's Case, Cro. Car. 376; The State v. Boyden, 13 Ire. 565; Commonwealth v. Barlow, 4 Mass. 439; Rex v. Scofield, Cald. 397; Hackett v. Commonwealth, 3 Harris, Pa. 95; Rex v. Kinnersley, 1 Stra. 193; Smith v. Commonwealth, 4 Smith, Pa. 209; Rice v. Commonwealth, 3 Bush, 14; The State v. Jordan, 75 N. C. 27.

other who in his absence undertakes it and fails, both may be indicted together for the attempt;[1] though, had the effort succeeded, the one would have been an accessory before the fact, and the other a principal, in the felony; and the indictment could not have been in the same sense joint.[2]

Attempts at Treason. — Some of the English treasons, as the imagining of the sovereign's death, are so purely attempts as not to admit of technical attempts.[3] But it is believed that both of the forms of treason known with us, though in some sense attempts,[4] admit, in the States, of indictable attempts besides,[5] which are misdemeanors.[6]

Under Statutes — (Punishment). — In a note are cited some cases relating to the grade of attempt under statutes, and the punishment.[7] Among these statutory attempts are some felonies.

§ 772 *a*. **General Summary.** — In conclusion of this chapter, the doctrine, on this embarrassing subject of attempt, may be summed up as follows: An act toward an indictable wrong, if prompted by the intent to do it, partakes of the culpability of the doing. And if its not being done was caused by some intervening obstacle, while the evil purpose remained unchanged, the person attempting it is morally as reprehensible as if he had succeeded in what he meant. But the public has not suffered so much, therefore it will not punish him so heavily. Still, if there was an apparent danger of the thing meant being accomplished, it suffered more or less according to the particular facts. If such danger and suffering were too light for the law's notice, it would

[1] Reg. v. Clayton, 1 Car. & K. 128; ante, § 685, 686.
[2] Ante, § 663, 664; Train & Heard Prec. 15.
[3] Rex v. Jackson, 1 Crawf. & Dix C. C. 149; 1 Hawk. P. C. Curw. ed. p. 12, § 27, 30–33; Rex v. Tooke, 1 East P. C. 60; Reg. v. Harris, Car. & M. 661, note.
[4] Ante, § 437, 440; Rex v. Stone, 6 T. R. 527; Rex v. Gordon, 2 Doug. 590; 3 Inst. 9. And see Respublica v. Roberts, 1 Dall. 39.
[5] See 1 East P. C. 85. "If there be only a conspiracy to levy war, it is not treason." Holt, C. J., in Freind's Case, 13 Howell St. Tr. 1, 61. See ante, § 767; Rex v. Cowper, 5 Mod. 207.
[6] And see ante, § 717.
[7] Ex parte Max, 44 Cal. 579; The State v. Swann, 65 N. C. 330; Mackay v. People, 1 Parker C. C. 459; Pinson v. The State, 23 Texas, 579; Usher v. Commonwealth, 2 Duv. 394; O'Neil v. People, 15 Mich. 275; Reg. v. Woodhall, 12 Cox C. C. 240, 4 Eng. Rep. 529; The State v. Archer, 54 N. H. 465; Hamilton v. The State, 36 Ind. 280; People v. Murat, 45 Cal. 281; Nevills v. The State, 7 Coldw. 78; Jones v. The State, 3 Heisk. 445; The State v. Scott, 72 N. C. 461; The State v. Brown, 60 Misso. 141; Hill v. The State, 53 Ga. 125; Meredith v. The State, 60 Ala. 441; The State v. Doering, 48 Iowa, 650.

not visit the doer with punishment. If they were sufficient in degree, the punishment would be greater or less according to the circumstances; the rule being, that the sum of the evil in the intent and of the evil in the act would furnish the proper measure of the punishment. One whose attempt consists of unsuccessfully soliciting another to commit the proposed crime does not morally differ from him who, in felony, solicits successfully, and is termed an accessory before the fact. And his legal position is the same, except that the public has suffered less, so it punishes him less severely. In both cases, what was done was by operating on the will of another; in the one successfully, in the other not. The principle is identical in both. To turn now to the unindictable: where steps are taken of a sort to end in a substantive crime, and even steps which would so end were they not interrupted, yet he who takes them does not mean this result, the reasons thus stated do not control the case, because of the absence of the intent to do the wrong. An essential element is wanting. Either, therefore, the party is not punishable, or his offence is of some other class.

CHAPTER LII.

THE LAW'S METHODS OF DEFINING CRIME.

§ 773. **Course of Discussion.** — In this and the next following two chapters, we are to consider divisions of the criminal field not admitting of representation on our "Diagram of Crime." Some of the doctrines have already been stated in a general way.[1]

§ 774. **Surplusage of Wrong.** — In looking into any criminal transaction, we shall find more or less of wrongful things committed, of a sort not taken cognizance of by the law, or not entering into the particular crime of which the party may be accused. We have seen, that there may be a surplusage of criminal intents, and that an intent not essential does not vitiate an essential one, if it also exists.[2] And it is the same with the act. As a general rule, it is immaterial what wrongful things, whether made crimes by the law or not, a man may have committed in connection with the one charged against him; if he has committed this one, he should be convicted of it, otherwise not.

§ 775. **Unavoidable.** — It is not possible the law should be otherwise. It could not so completely adapt itself to all the facts of wrong-doing as to take cognizance of every shade of motive, and every minute variation of the act, which might attend upon each separate criminal transaction. The transactions of life are nearly limitless and constantly shifting. Even if the law-making power had prophetic vision, it could not so multiply inhibitions as fully to cover all future combinations of evil. It must draw its lines around particular things, and say: "These I forbid; and it is immaterial whether or not they are accompanied by things around which my lines are not drawn; whatever lies outside of my lines, I disregard."

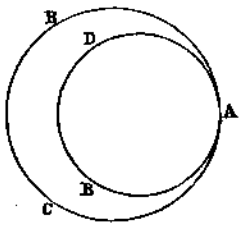
§ 776. **Specific Crime — Name.** — When the law-making power thus draws its lines around a particular combination of act and

[1] Ante, § 599-601.

[2] Ante, § 337-339.

intent, and prohibits the thing under a penalty, it creates a specific crime. It may give to the crime a name, or not. This has already been explained.[1]

§ 777. **Transaction and Crime distinguished.** — There is a difference between a crime and a criminal transaction. A criminal transaction is a series of acts proceeding from a single impulse or connected series of impulses of the will, such that one or more of them will be indictable. A crime consists of whatever of these acts a single line of the law will enclose. To illustrate: If, in the figure here presented, A B C represents a particular criminal transaction, then A D E may represent a crime; A B C E D denoting so much of the transaction as is not indictable, or, if indictable, is not a part of the particular crime.



§ 778. **More Crimes than One in One Transaction.** — In reason, there may be more crimes than one in a single transaction. The law, in advance, draws its lines around a particular combination of act and intent, and makes what is within those lines punishable as a specific crime; then around another, and another, and so on, until it is deemed to have gone far enough, and stops. It is, therefore, found, not only theoretically, but practically, competent for a person to do, in one transaction, what will be within more than one of these circles of the law; and this fact the courts recognize in their adjudications.[2] But, —

Punishing more than One. — Whether a prosecution for one crime carved out of the one transaction should be held to bar an indictment for another, carved out of the same, is a different question; the authorities appear to be, that, in some circumstances, it will be, and in others it will not.[3]

[1] Ante, § 599.

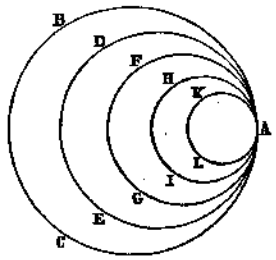
[2] Brown *v.* Commonwealth, 26 Smith, Pa. 319; Womack *v.* The State, 7 Coldw. 508; People *v.* Alibez, 49 Cal. 452; People *v.* Smith, 57 Barb. 46; Bonsall *v.* The State, 35 Ind. 460; Commonwealth *v.* Butterick, 100 Mass. 1.

[3] Stat. Crimes, § 143; The State *v.* Standifer, 5 Port. 523; The State *v.* Damon, 2 Tyler, 387; The State *v.* Fife, 1 Bailey, 1; Hinkle *v.* Commonwealth, 4 Dana, 518; Smith *v.* Commonwealth, 7 Grat. 593; The State *v.* Fayetteville, 2 Murph. 371; Rex *v.* Champneys, 2 Moody & R. 26, 2 Lewin, 52; The State *v.* Johnson, 12 Ala. 840; Holcomb *v.* Cornish, 8 Conn. 375; The State *v.* Squires, 11 N. H. 37; Commonwealth *v.* Tuck, 20 Pick. 356; Josslyn *v.* Commonwealth, 6 Met. 236; The State *v.* Thurston, 2 McMullan, 382; Reg. *v.* Brettel, Car. & M. 609; Rex *v.* Jones, 4 Car. & P. 217; Rex *v.* Britton, 1 Moody & R. 297; Lorton *v.* The State, 7 Misso. 55.

§ 779. **Parting off Criminal Transaction into Specific Crimes.** — Often a criminal transaction presents combinations which leave a wide election in methods of dealing with the offender. In other transactions, the alternatives are but few, or even the prosecuting power may be without any choice. Let us look at some of the forms: —

Law punishing Part only. — If a son knows that his father, prompted by a special affection, has made a will providing for him more largely than for the other children, yet he meditates a series of frauds on the discovery of which he fears the will may be cancelled; and, to prevent this and gain immediate possession of the property, takes the father's life; the law cannot punish his meditated fraud, his ingratitude, or his want of filial duty. It can proceed against him only for simple murder, as it would against a stranger. If the son were also a servant, the English law, as it stood when this country was settled, not as it stands now in either country,[1] would hold him to be guilty of petit treason, which is murder aggravated by the single circumstance of the person whose life is taken being the master or husband of the offender;[2] but the other aggravating matter supposed could not be included in the charge against him in such a way as to enhance his legal guilt. Something like this was illustrated by the figure produced at a previous section.[3]

§ 780. **Crime enclosed within Crime.** — A common sort of combination occurs where one crime is, in a sense, enclosed within another, as represented in the figure hereto attached. Thus, A K L may represent a simple assault; A H I a battery, which includes an assault; A F G a manslaughter, produced by the assault and battery; A D E a murder of the second degree, where what constitutes manslaughter is aggravated by its being done of "malice aforethought;" and A B C murder of the first degree, where the "malice aforethought" is aggravated by being "deliberately premeditated."



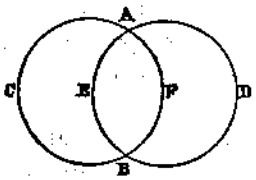
§ 781. **Other Forms.** — But this doctrine is not limited to what

[1] 1 Hawk P. C. 6th ed. c. 32, § 1, 2.

[2] Ante, § 611.

[3] Ante, § 777.

may be termed crimes within crimes. Here, therefore, is a figure more complicated than the preceding ones, and of a somewhat different nature. Suppose A C B D to comprehend the whole of what was done. The law may, or may not, have a way of dealing with the whole. If it has, then, perhaps, the prosecuting officer may elect to indict for the whole, or to indict for A C B E, or for A E B F, or A F B D, or A C B F, or A E B D. For there may be, in one transaction, different offences which will be partly, not wholly, included within one another; or there may be different offences neither one of which will embrace any thing lying within any other. To illustrate the former sort, a man may be guilty of arson in burning a dwelling-house wherein a human being is consumed, and thus be guilty also, by the same act, of murder.[1] The murder and the arson are two offences, each one of which, in the particular instance, includes some element belonging to the other.[2]



§ 782. **Continued.** — There is really no limit to the variety of combinations. Thus, a man may be a common seller of intoxicating liquor without license, contrary to a statute making this punishable; and, in carrying on the business of common seller, he may be guilty of specific sales against another statute, which makes each particular sale an offence.[3] Or we may suppose, that the law has its lines so drawn as not to include, as constituting any one crime, the whole of a particular criminal transaction; but, instead, it cuts the transaction up into, it may be, three parts, while no one of them includes any thing which is also within another.[4]

§ 783. **Continued.** — No solid instruction can be drawn from further elucidations, in this connection, of particular forms. At the same time it should be borne in mind, that no limit can be set down to what is actual, or especially to what is possible, in these

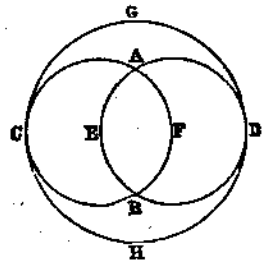
[1] The State v. Cooper, 1 Green, N. J. 361.

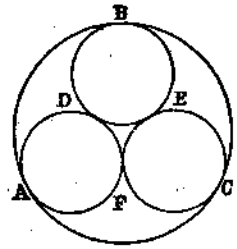
[2] See post, § 815.

[3] The State v. Maher, 35 Maine, 225; The State v. Coombs, 32 Maine, 529. And see The State v. Bugbee, 22 Vt. 82; Commonwealth v. Perley, 2 Cush. 559; Rex v. Champneys, 2 Moody & R. 26, 2 Lewin, 52; Hinkle v. Commonwealth, 4 Dana, 518.

[4] See Torey v. The State, 13 Misso. 455; Wilson v. Commonwealth, 12 B. Monr. 2; Smith v. Commonwealth, 7 Grat. 593; The State v. Fayetteville, 2 Murph. 371; The State v. Fife, 1 Bailey 1; The State v. Standifer, 5 Port. 523.

combinations. Two further figures are here attached by way of suggestion. In them, the reader sees what may be; and, to some





extent, what is. Suppose, for example, in the first of these figures, D G C H represents the whole criminal transaction, the law may make all indictable as one crime; or it may make indictable G C A D, or A C B E, or A C B F, or A E B F, and so on. But these combinations require no further explanation.

§ 784. **Further of the Reason, &c.** — Let it be still borne in mind, that this appearance of the law cannot be avoided by any skill of scientific arrangement, or by legislation. The reason is, as already intimated, that, because of the diversity of human actions, no two acts, of the past or the present, viewed in reference to all their surroundings, and the inner motives prompting to them, are precisely alike. And no single future act, viewed with reference to all these things, can be foreseen. We can merely foresee, that, in its own minuter qualities, and in its relations to its surroundings, each future act will differ from every preceding one, and thus the course of events will continue for ever. The consequence is, that the law, statutory and common, must forbid things in terms broad enough to comprehend an infinite variety of shades and particular qualities of wrong-doing. The inhibition must also be specific, descending somewhat to the minute. When it thus descends, it, of course, can include only a part of the wrong things possible to be done. Then must follow another somewhat minute direction, then another, then another; until the lawgiver thinks he has gone far enough. Each new defining or drawing of lines around a thing thus newly made indictable is just as likely to embrace within it some acts which were indictable before, by reason of lying within different lines, as to embrace what was not before indictable. The new and the old stand together, and a particular element of wrong

may thus be found to be within any number of the law's enclosing circles. And what is thus said applies, as mentioned already, to the common law as well as to the statutes. The common law would be the perfection of folly, instead of meriting the praise bestowed in days past upon it as the perfection of wisdom, if it attempted to divide the indictable into such classes of things that no one transaction would fall into more than a single class.

§ 785. **Committed in Different Ways.** — Some single offences may be committed in different ways. For example, a statute provided a punishment for "every person who shall buy, receive, or aid in the concealment of, any stolen goods, knowing the same to be stolen;" and the construction was, that it described only one offence, the guilt of which might be incurred by either buying, or receiving, or aiding in the concealment of, the goods; and, if an indictment alleged all three of these together, no objection could be taken to it as multifarious, though it might equally well have charged but one.[1] On a principle somewhat similar, frequently a man may be indicted for the same thing, either under a statute, or at the common law, at the election of the prosecuting power.[2]

[1] Crim. Proced. I. § 434–436; Stevens v. Commonwealth, 6 Met. 241; The State v. Slocum, 8 Blackf. 315. And see Reg. v. Bird, 2 Eng. L. & Eq. 448, 2 Den. C. C. 94; Commonwealth v. Tuck, 20 Pick. 356; The State v. Woodward, 25 Vt. 616. But see Miller v. The State, 5 How Missis. 250.

[2] Stat. Crimes, § 164, 178.

CHAPTER LIII.

MERGER OF OFFENCES.

§ 786. **To what applicable.** — The doctrine of merger is applicable to two classes of cases, — the one, where a criminal act falls within the definitions of two or more separate offences; the other, where offences are so graded that the less culpable are included in those involving a larger guilt, as shown at § 780 in our last chapter. The general rule is, as there explained,[1] that the prosecuting power may select for conviction any one of these offences, and the defendant cannot object though his guilt covers also a larger or different one. But —

Merger. — Merger, to be discussed in this chapter, creates a sort of exception to that doctrine.

§ 787. **Merger defined.** — Merger, in the criminal law, occurs where the same act of crime is within the definition of a misdemeanor and likewise of a felony, or of a felony and likewise of treason; and the rule is, that the lower grade of offence merges in the higher, so that the act can be punished only as felony in the one instance or treason in the other. Or, —

More fully. — There is, at the common law, a wide distinction between felony and misdemeanor.[2] It affects alike the punishment, the procedure, and several rules governing the crime itself. Out of this distinction grows the doctrine that the same precise act, viewed with reference to the same consequences, cannot be both a felony and a misdemeanor,[3] — a doctrine which applies only where the identical act constitutes both offences.[4] Hence, as seen in another connection,[5] if a statute creates a felony of what was before a misdemeanor, or a misdemeanor of what was

[1] And see post, § 791, 804.

[2] Ante, § 609, 616.

[3] Reg. v. Button, 11 Q. B. 929; Rex v. Harmwood, 1 East P. C. 411; Commonwealth v. Roby, 12 Pick. 496; Commonwealth v. Parr, 5 Watts & S. 345; Johnson v. The State, 5 Dutcher, 453.

[4] Johnson v. The State, supra.

[5] Stat. Crimes, § 174.

before a felony, there can be no subsequent prosecution of the act for what it was before the statute. In like manner, if a statute elevates a felony to high treason, it is, as Sir Michael Foster observes, "absorbed in the treason."[1] For illustration, —

§ 788. **In Rape — Murder.** — An act which amounts to the common-law felony of a rape[2] or a murder[3] cannot, at the same time, be such an assault as is a misdemeanor. Yet, —

Application of Doctrine. — There is much obscurity in the books as to the application of this doctrine. We shall look again at this question in our next chapter.[4] The Connecticut court has held, that proof of a rape will sustain an indictment for an assault with intent to commit a rape.[5] But Hawkins says: "It seems that, if a man be indicted for a felony generally, and upon the evidence it plainly appear that the fact amounts to no more than a bare trespass [misdemeanor[6]], he cannot be found guilty of the trespass, but ought to be indicted anew.[7] Yet if the special circumstances of the case be set forth in an indictment for an offence laid as felony, and the defendant be found guilty generally, and afterwards the court be of opinion that the fact doth not amount to felony, but only to an enormous trespass, it seems agreed, that judgment may be given as for a trespass only.[8] Also, if the jury find a special verdict on a general indictment for felony, and the crime be adjudged upon such verdict to be but a trespass, judgment may be given upon it as for a trespass only. Also, if on an indictment of trespass the fact appear to have been felonious, it hath been adjudged, that the defendant may be found guilty of the indictment as it is laid, because the king may proceed against the offender as he thinks fit, either as a trespasser or a felon.[9] But the contrary is said to have been holden by the late Chief Justice Holt."[10]

§ 789. **Statutes changing Common Law.** — The rule, that an act cannot be both felony and misdemeanor, may, of course, be altered by an express statute; and we have seen,[11] that it has

[1] Foster, 373.
[2] Rex v. Harmwood, 1 East P. C. 411; The State v. Durham, 72 N. C. 447. See, however, Reg. v. Allen, 2 Moody, 179.
[3] Commonwealth v. Roby, 12 Pick. 496.
[4] Post, § 804–815.
[5] The State v. Shepard, 7 Conn. 54. But see post, § 804–809.
[6] Ante, § 625.
[7] As to which see post, § 804 et seq.
[8] See post, § 810.
[9] See post, § 812–815.
[10] 2 Hawk. P. C. c. 47, § 6.
[11] Ante, § 699, 700.

been so altered as to prosecutions, under some circumstances, for knowingly receiving stolen goods.[1] And there are, in some of our States, statutes abrogating or modifying the rule in other cases.[2]

§ 790. **Course of Discussion — Conclusion.** — This subject will be continued in the next chapter, to which the present one is introductory.

[1] See also Noland v. The State, 19 Ohio, 131
[2] Commonwealth v. Dean, 109 Mass. 349; Stephen v. The State, 11 Ga. 225; Hardy v. Commonwealth, 17 Grat. 592; Foster v. People, 1 Col. Ter. 293; Canada v. Commonwealth, 22 Grat. 899; Wolf v. The State, 41 Ala. 412; Hanna v. People, 19 Mich. 316; People v. Bristol, 23 Mich. 118; post, § 808.

CHAPTER LIV.[1]

THE RELATIONS OF THE SPECIFIC OFFENCES TO ONE ANOTHER AND TO THE CRIMINAL TRANSACTION.

§ 791. **Election of Offences.** — Subject to whatever exception may be found in the doctrine of merger, discussed in the last chapter, a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of his act. He is not to elect, but the prosecuting power is.[2] If the evidence shows him to be guilty of a higher offence than he stands indicted for, or of a lower, or of one differing in nature, whether under a statute or at the common law, he cannot be heard to complain, — the question being, whether it shows him to be guilty of the one charged.[3] Thus, —

§ 792. **In Conspiracy — Manslaughter — Larceny — Robbery — Malicious Mischief — Battery — Non-repair of Way — Accessory.** — Where the indictment is for a conspiracy to commit an offence, and the proofs establish that the conspirators actually committed it;[4] or for manslaughter, and murder is shown;[5] or for larceny,

[1] In connection with this chapter, consult Crim. Proced. I. § 415 et seq.

[2] Cole *v.* The State, 5 Eng. 318, 322; Reg. *v.* White, 9 Car. & P. 282; Reg. *v.* Franklin, 6 Mod. 220; Reg. *v.* Brightside Bierlow, 4 New Sess. Cas. 47, 14 Jur. 174; The State *v.* Jesse, 3 Dev. & Bat. 98; Simpson *v.* The State, 10 Yerg. 525; Hickey *v.* The State, 23 Ind. 21; United States *v.* Grundy, 3 Cranch, 337, and the cases cited in the remaining notes to this section and the next.

[3] Reg. *v.* Neale, 1 Car. & K. 591, 1 Den. C. C. 36; Reg. *v.* Howell, 9 Car. & P. 437, 464; Lohman *v.* People, 1 Comst. 379; The State *v.* Sonnerkalb, 2 Nott & McC. 280; Thayer *v.* Boyle, 30 Maine, 475; Reg. *v.* White, 20 Eng. L. & Eq. 585; The State *v.* Keen, 34 Maine, 500; Rex *v.* Davis, 1 Car. & P. 306; The State *v.* Coppenburg, 2 Strob. 273; Rex *v.* Wilkes, 1 Leach, 4th ed. 103, 2 East P. C. 746; Rex *v.* Cramp, Russ. & Ry. 327; Reg. *v.* Pringle, 9 Car. & P. 408, 2 Moody, 127; The State *v.* Parmelee, 9 Conn. 259; The State *v.* Munco, 12 La. An. 625; Johnson *v.* The State, 14 Ga. 55; The State *v.* Archer, 54 N. H. 465; Commonwealth *v.* Burke, 14 Gray, 100; Hardy *v.* Commonwealth, 17 Grat. 592.

[4] The State *v.* Murphy, 6 Ala. 765; People *v.* Mather, 4 Wend. 229, 265; The State *v.* Murray, 15 Maine, 100; Commonwealth *v.* Delany, 1 Grant, Pa. 224; post, § 814.

[5] Commonwealth *v.* McPike, 3 Cush. 181; Barnett *v.* People, 54 Ill. 325.

and it was perpetrated in the course of a burglary[1] or a robbery;[2] or for malicious mischief, and the facts appearing would equally sustain a charge of larceny;[3] or for inflicting a battery on one man, when in truth the blow took effect on two;[4] or for the non-repair of one street, when the neglect covered several streets;[5] or for being accessory to one person, while more persons also were guilty of the principal offence,[6] — in these and the like cases, the prisoner may be convicted of what is charged against him, if, like what is not charged, it is sustained by the evidence.

§ 793. **Separating Transaction into Specific Offences.** — It is sometimes a nice question into what parts a criminal transaction is separable, and where the lines must run. We shall see something of this in the second volume, and in "Criminal Procedure" and "Statutory Crimes," where the several offences are discussed. In all cases in which there is no merger of misdemeanor in felony or felony in treason, as shown in our last chapter, the transaction is divisible at whatever place it can be so cut that the part will fill the law's definition of any crime. Again, when the division has been made, and the wrong-doer has been prosecuted for one offence, he may or may not be punishable for a second, properly carved out of his act, — a question for a future chapter.[7] Moreover, as a practical suggestion, the prosecuting power ought to be cautious how it carves; because, not only may a miscalculation in the exercise of the discretion result in a failure to convict, but in some circumstances it will enable the prisoner, after trial, to plead the prior proceedings in bar of any subsequent ones. These propositions need not be drawn out into their details in this connection; but a reference to some cases illustrating them will be convenient.[8]

[1] Wyatt *v.* The State, 1 Blackf. 257; People *v.* Smith, 57 Barb. 46.

[2] Hickey *v.* The State, 23 Ind. 21; Bonsall *v.* The State, 35 Ind. 460.

[3] The State *v.* Leavitt, 32 Maine, 183.

[4] The State *v.* Damon, 2 Tyler, 387.

[5] The State *v.* Fayetteville, 2 Murph. 371.

[6] Stoops *v.* Commonwealth, 7 S. & R. 491. And see ante, § 666.

[7] Post, § 978 et seq.

[8] The State *v.* Moultrieville, Rice, 158; The State *v.* Benham, 7 Conn. 414; The State *v.* Fife, 1 Bailey, 1; The State *v.* Fayetteville, 2 Murph. 371; The State *v.* Johnson, 12 Ala. 840; Rex *v.* Champneys, 2 Moody & R. 26, 2 Lewin, 52; Hinkle *v.* Commonwealth, 4 Dana, 518; The State *v.* Damon, 2 Tyler, 387; Holcomb *v.* Cornish, 8 Conn. 375; Frasier *v.* The State, 6 Misso. 195; People *v.* Ward, 15 Wend. 231; The State *v.* Cooper, 1 Green, N. J. 361; The State *v.* Plunkett, 3 Harrison, 5; The State *v.* Coombs, 32

§ 794. **Offences within One Another — (The Indictment).** — Where offences are included one within another, as before explained,[1] a person indicted for a higher one may be convicted of any below it not merged in that for which he is indicted,[2] unless the allegation should happen to be in a form not charging the lower;[3] for, should this occur, contrary to the ordinary course of practice, the want of averment will be fatal to any verdict for the lower.[4] Thus, assuming the allegation for the heavier offence to be in such form as to include the lighter, —

§ 795. **In Homicide — Robbery — Assault with Intent — Mayhem — Carnal Ravishment — Adultery — Fornication — Rape — Incest — Riot — Second Offence — First Offence.** — One indicted for murder may be found guilty of manslaughter;[5] for robbery, may be convicted of larceny;[6] for an assault with an intent to commit

Maine, 529; The State *v.* Maher, 35 Maine, 225; Smith *v.* Commonwealth, 7 Grat. 593; Rex *v.* O'Brian, 7 Mod. 378; Rex *v.* Reynell, 6 East, 315; The State *v.* Spurgin, 1 McCord, 252; Shaw *v.* The State, 18 Ala. 547. **In Larceny.** — As to larcenies, see Reg. *v.* Brettel, Car. & M. 609; Rex *v.* Jones, 4 Car. & P. 217; The State *v.* Williams, 10 Humph. 101; Lorton *v.* The State, 7 Misso. 55; Reg. *v.* Bleasdale, 2 Car. & K. 765; The State *v.* Nelson, 29 Maine, 329; The State *v.* Thurston, 2 McMullan, 382; Rex *v.* Birdseye, 4 Car. & P. 386. **In Burglary.** — As to burglary, and the like, see Commonwealth *v.* Hope, 22 Pick. 1; Josslyn *v.* Commonwealth, 6 Met. 236; The State *v.* Squires, 11 N. H. 37; Commonwealth *v.* Brown, 3 Rawle, 207; The State *v.* Brady, 14 Vt. 353; Jones *v.* The State, 11 N. H. 269; Stoops *v.* Commonwealth, 7 S. & R. 491; Rex *v.* Comer, 1 Leach, 4th ed. 36; Rex *v.* Vandercom, 2 East P. C. 519; s. c. nom. Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; Commonwealth *v.* Tuck, 20 Pick. 356; The State *v.* Moore, 12 N. H. 42; Commonwealth *v.* Dove, 2 Va. Cas. 26.

[1] Ante, § 780.

[2] Ante, § 787–789; post, § 804 et seq.

[3] Post, § 803.

[4] Swinney *v.* The State, 8 Sm. & M. 576; Reg. *v.* Reid, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181; The State *v.* Nichols, 8 Conn. 496; Durham *v.* The State, 1 Blackf. 33; Wilson *v.* Commonwealth, 12 B. Monr. 2; Reg. *v.* Wynn, 1 Den. C. C. 365, 2 Car. & K. 859; Rex *v.* Compton, 3 Car. & P. 418; Commonwealth *v.* Harney, 10 Met. 422; Wills *v.* The State, 4 Blackf. 457; Reg. *v.* Yeadon, Leigh & C. 81, 9 Cox C. C. 91; Reg. *v.* Smith, 34 U. C. Q. B. 552; Heller *v.* The State, 23 Ohio State, 582; Hanna *v.* People, 19 Mich. 316; Wood *v.* The State, 48 Ga. 192; Reg. *v.* Canwell, 11 Cox C. C. 263; Reg. *v.* Taylor, Law Rep. 1 C. C. 194, 11 Cox C. C. 261; Reg. *v.* Dingman, 22 U. C. Q. B. 283; and the other cases cited to sections next following. And see Smitherman *v.* The State, 27 Ala. 23; post, § 803; Crim. Proced. I. § 418, 419.

[5] Lisle's Case, J. Kel. 89–108; The State *v.* Fleming, 2 Strob. 464; Reynolds *v.* The State, 1 Kelly, 222; King *v.* The State, 5 How. Missis. 730; Watson *v.* The State, 5 Misso. 497; Plummer *v.* The State, 6 Misso. 231; The State *v.* Gaffney, Rice, 431; Commonwealth *v.* Gable, 7 S. & R. 423; The State *v.* Arden, 1 Bay, 487; The State *v.* Flannigan, 6 Md. 167; Gordon *v.* The State, 3 Iowa, 410; Wroe *v.* The State, 20 Ohio State, 460; The State *v.* Huber, 8 Kan. 447; Davis *v.* The State, 39 Md. 355; The State *v.* Sloan, 47 Misso. 604, 614.

[6] Hickey *v.* The State, 23 Ind. 21. And see The State *v.* Taylor, 3 Oregon, 10; Hamilton *v.* The State, 36 Ind. 280.

murder, or manslaughter,[1] or mayhem,[2] or a carnal ravishment,[3] may be convicted of either a simple assault or a compound assault of a less degree than that alleged;[4] indicted for adultery, may receive judgment for fornication;[5] indicted for rape on the person of his daughter, convicted of incest;[6] indicted for riot and assault, convicted of assault only;[7] indicted for larceny as a second offence, convicted of the larceny as a first offence.[8] Likewise, —

§ 796. **Burglary and Larceny, &c.** — In burglary and statutory breakings into shops and dwelling-houses, if the indictment sets forth a larceny within the building, as a part of the larger offence,[9] the conviction may be for the larceny alone.[10] But if the charge of burglary is simply that the defendant broke and entered the place with intent to steal, the want of allegation precludes his conviction for larceny.[11] Again, —

§ 797. **Murder of First and Second Degrees.** — Where, as in some of our States, murder is by statute divided into two degrees, one may be convicted of it in either degree if the indictment is in

[1] Gardenheir *v.* The State, 6 Texas, 348; The State *v.* Stedman, 7 Port. 495; The State *v.* Coy, 2 Aikens, 181; Stewart *v.* The State, 5 Ohio, 241; Clark *v.* The State, 12 Ga. 350.

[2] McBride *v.* The State, 2 Eng. 374.

[3] Commonwealth *v.* Fischblatt, 4 Met. 354; Rex *v.* Dawson, 3 Stark. 62; People *v.* McDonald, 9 Mich. 150.

[4] And see Smith *v.* The State, 35 Texas, 500; The State *v.* Shepard, 10 Iowa, 126; White *v.* The State, 13 Ohio State, 569.

[5] Respublica *v.* Roberts, 2 Dall. 124, 1 Yeates, 6; The State *v.* Cowell, 4 Ire. 231. And see The State *v.* Pearce, 2 Blackf. 318; The State *v.* Cox, N. C. Term R. 165.

[6] Commonwealth *v.* Goodhue, 2 Met. 193. And see Crim. Proced. I. § 419.

[7] Rex *v.* Hemings, 2 Show. 93; The State *v.* Townsend, 2 Harring. Del. 543; Rex *v.* Heaps, 2 Salk. 593. It would appear, however, that an indictment for riot may be so framed as, on the principle stated post, § 803, not to include an assault. Reg. *v.* Ellis, Holt, 636. And see The State *v.* Allen, 4 Hawks, 356; Commonwealth *v.* Perdue, 2 Va. Cas. 227; Childs *v.* The State, 15 Ark. 204.

[8] Palmer *v.* People, 5 Hill, N. Y. 427.

[9] Stoops *v.* Commonwealth, 7 S. & R. 491; The State *v.* Squires, 11 N. H. 37; Crowley *v.* Commonwealth, 11 Met. 575; Kite *v.* Commonwealth, 11 Met. 581; Jones *v.* The State, 11 N. H. 269; Commonwealth *v.* Hope, 22 Pick. 1; Josslyn *v.* Commonwealth, 6 Met. 236; Commonwealth *v.* Tuck, 20 Pick. 356; Berry *v.* The State, 10 Ga. 511; The State *v.* Moore, 12 N. H. 42; Rex *v.* Comer, 1 Leach, 4th ed. 36; Rex *v.* Vandercom, 2 East P. C. 519; s. c. nom. Rex *v.* Vandercomb, 2 Leach, 4th ed. 708; Commonwealth *v.* Brown, 3 Rawle, 207; Clarke *v.* Commonwealth, 25 Grat. 908; The State *v.* Alexander, 56 Misso. 131.

[10] The State *v.* Brady, 14 Vt. 353; Anonymous, 31 Maine, 592; The State *v.* Grisham, 1 Hayw. 12; Rex *v.* Withal, 1 Leach, 4th ed. 88, 2 East P. C. 515, 517; Commonwealth *v.* Hope, 22 Pick. 1; The State *v.* Cocker, 3 Harring. Del. 554; Reg. *v.* Reid, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181. See Reg. *v.* Clarke, 1 Car. & K. 421.

[11] Fisher *v.* The State, 46 Ala. 717; Bell *v.* The State, 48 Ala. 684; People *v.* Garnett, 29 Cal. 622.

terms to charge the higher; the statutes prescribing that the degree shall be specified in the verdict.[1] Or the conviction may be for any lower grade of killing.[2] And some of the courts have indulged in the strange absurdity of holding, in violation alike of the fundamental principles of pleading, of guarantees in the constitutions of most of our States, and of common sense, that, if an indictment does not contain any allegation of the aggravated facts which constitute murder in the first degree, still, in some mystic manner which no judge ever undertook to explain or himself saw, it is an indictment for murder of the first degree as well as the second; and, upon it, a conviction for the murder in this higher degree may be maintained. It happened in this way: the first court that considered this sort of statute made a blunder. Judges of other courts shut their eyes and followed the lead. Some other judges have latterly opened their eyes to look; and every one who has looked has refused to follow the old lead. It would be interesting to see any man, on the bench or off, after looking into the question so as to understand it, undertake to answer the argument which explodes the old error. No one ever did undertake it; no gift of prophecy is required to enable a writer to say, with absolute certainty, that no one ever will.[3]

§ 798. **General Result.** — The conclusion is, that, whatever the offence alleged, there may be a conviction for any other, if within the words of the allegation.[4] Exceptions to this rule will appear in subsequent sections.

§ 799. **Offences not within One Another.** — The rule is not confined to these cases of a crime within a crime, but it is general, that the defendant may receive judgment on so much of the allegation proved as constitutes an offence, whether what is thus

[1] McGee *v.* The State, 8 Misso. 495; The State *v.* Dowd, 19 Conn. 388; People *v.* Doe, 1 Mich. 451; McPherson *v.* The State, 9 Yerg. 279; Thomas *v.* The State, 5 How. Missis. 20, 32; Johnson *v.* The State, 17 Ala. 618. And see People *v.* White, 22 Wend. 167; The State *v.* Town, Wright, 75; The State *v.* Williams, 3 Fost. N. H. 321.

[2] Wroe *v.* The State, 20 Ohio State, 460; The State *v.* Huber, 8 Kan. 447; Davis *v.* The State, 39 Md. 355; The State *v.* Sloan, 47 Misso. 604, 614.

[3] See, for a full view of this question, Crim. Proced. II. § 560–596. See, also, Bishop First Book, § 401 and note, 455; Stat. Crimes, § 371, 372, 471. And see The State *v.* McCormick, 27 Iowa, 402, where, in an able opinion, the court unanimously affirm the doctrine which I had laid down in Crim. Proced.

[4] Crim. Proced. I. § 415–420; Benham *v.* The State, 1 Iowa, 542; Prindeville *v.* People, 42 Ill. 217; The State *v.* Butman, 42 N. H. 490; The State *v.* Dumphey, 4 Minn. 438.

proved is the same in degree as the entire matter charged, or different in degree, or in nature.[1] For example, —

In Libel — Larceny (Grand and Petit) — Possessing Counterfeits. — One indicted for printing and publishing a libel may be acquitted of the printing, and convicted of the publishing;[2] one charged with a larceny of property of more than one hundred dollars in value may be found guilty of the larceny in a less value; charged with having in possession, with intent to utter, more than ten pieces of counterfeit coin, may be found guilty of having less than ten.[3] So, on an indictment for grand larceny, — that is, a larceny in which the property stolen is alleged to be worth more than twelve pence,[4] — the conviction may be for petit larceny.[5] And —

Alternative Clauses of Statute. — We have seen,[6] that, when a statute makes punishable several things in the alternative, the indictment may be in one count for the whole, while the proof need cover only so much as constitutes a crime.[7]

§ 800. **Joint Indictment against Two or More.** — In like manner, where two or more persons are indicted together for one offence,[8] a part may be convicted and the rest acquitted;[9] or some may be found guilty of the offence in a higher degree, others in a lower.[10] But if the acquittal of one shows the others to be necessarily innocent, they will not be adjudged by the court to be guilty, though the jury find them so.[11] Therefore, —

§ 801. **In Conspiracy.** — Though one of two conspirators may be proceeded against after the other one is dead,[12] or they may

[1] Rex *v.* Newton, 2 Lev. 111, and the other cases cited to this section; also Stat. Crimes, § 491–498.

[2] Rex *v.* Williams, 2 Camp. 646.

[3] Commonwealth *v.* Griffin, 21 Pick. 523.

[4] See ante, § 679.

[5] The State *v.* Bennet, 3 Brev. 515, 2 Tread. 693; The State *v.* Wood, 1 Mill, 29; The State *v.* Murphy, 8 Blackf. 498; 2 Hawk. P. C. Curw. ed. p. 620, § 6. And see The State *v.* Arlin, 7 Fost. N. H. 116; Wills *v.* The State, 4 Blackf. 457.

[6] Stat. Crimes, § 383; ante, § 785.

[7] Stevens *v.* Commonwealth, 6 Met. 241.

[8] Crim. Proced. I. § 463.

[9] Reg. *v.* Dovey, 2 Den. C. C. 86, 2 Eng. L. & Eq. 532; The State *v.* Allen, 4 Hawks, 356; Bloomhuff *v.* The State, 8 Blackf. 205; Ward *v.* The State, 22 Ala. 16. And see Commonwealth *v.* Perdue, 2 Va. Cas. 227; The State *v.* Allison, 3 Yerg. 428.

[10] Rex *v.* Butterworth, Russ. & Ry. 520; Shouse *v.* Commonwealth, 5 Barr, 83; The State *v.* Arden, 1 Bay, 487. Query as to Rex *v.* Quail, 1 Crawf. & Dix C. C. 191.

[11] Reg. *v.* Ellis, Holt, 636; The State *v.* Mainor, 6 Ire. 340. As to the limitations of the rule, see The State *v.* Allison, 3 Yerg. 428. And see Rex *v.* Hughes, 4 Car. & P. 373.

[12] Rex *v.* Nicolls, 2 Stra. 1227; People *v.* Olcott, 2 Johns. Cas. 301.

have separate trials;[1] yet, if one is acquitted, where two only are charged in the allegation, this is in effect an acquittal of the other, it being legally impossible for a man to *conspire* alone.[2] And,—

In Grand and Petit Larceny. — If two are jointly indicted for stealing the same goods, one cannot receive judgment for grand larceny and the other for petit larceny, because the fact could not be so;[3] yet, when the proof shows a grand larceny, if, nevertheless, the jury return a verdict against both for petit larceny, they may have sentence accordingly, because the evidence is for the jury, and there is no impossibility of record against this finding.[4]

§ 802. **Charge Joint or Several.** — When two are on trial for an offence laid in a single count as committed jointly,[5] and each is shown to have done the whole while acting separate from the other, in disconnected transactions, a verdict should not be taken against both; because the conviction of one exhausts the indictment, and no charge remains for the other.[6] But when the allegation is of an offence committed severally, the word "severally" separates the defendants, so that all may be convicted on the one indictment; unless the court interferes with this form of proceeding in the earlier stages of the cause.[7]

§ 803. **Allegation to be Sufficient.** — The law never condemns without accusation. So that, as already mentioned,[8] the foregoing doctrines do not apply where the thing proved is not adequately set down in allegation.[9] Therefore, for example,—

Principal and Accessory — Assaults — Battery. — One indicted as principal in a felony cannot be convicted of being an accessory

[1] Crim. Proced. I. § 1022.

[2] The State *v.* Tom, 2 Dev. 569; Rex *v.* Hilbers, 2 Chit. 163; Commonwealth *v.* Manson, 2 Ashm. 31. And see Reg. *v.* Gompertz, 9 Q. B. 824; The State *v.* Covington, 4 Ala. 603.

[3] Wilson *v.* Davis, 3 McCord, 187.

[4] The State *v.* Bennet, 2 Tread. 693, 3 Brev. 515; Crim. Proced. II. § 988; ante, § 799.

[5] Crim. Proced. I. § 471.

[6] Stephens *v.* The State, 14 Ohio, 386; Reg. *v.* Dovey, 2 Den. C. C. 86, 2 Eng. L. & Eq. 532. See also Elliott *v.* The State, 26 Ala. 78.

[7] 1 Stark. Crim. Plead. 2d ed. 43, 44; Crim. Proced. I. § 473–475.

[8] Ante, § 794, 798.

[9] The State *v.* Shoemaker, 7 Misso. 177; Rex *v.* Hughes, 4 Car. & P. 373; Rex *v.* Furnival, Russ. & Ry. 445; Reg. *v.* Paice, 1 Car. & K. 73; Vanvalkenburg *v.* The State, 11 Ohio, 404; The State *v.* Jesse, 3 Dev. & Bat. 98; Reg. *v.* Reid, 2 Den. C. C. 88, 1 Eng. L. & Eq. 595; Reg. *v.* Holcroft, 2 Car. & K. 341; Carpenter *v.* People, 4 Scam. 197; Commonwealth *v.* Fischblatt, 4 Met. 354; The State *v.* Raines, 3 McCord, 533; Child *v.* The State, 15 Ark. 204.

before the fact;[1] or, indicted as such accessory, cannot be found guilty as a principal felon;[2] or, indicted for an *assault* with intent to murder, cannot be convicted, not only of a simple assault, but also of a *battery*.[3]

§ 804. *Exceptions and Limitations.* —

Merger — Rights of Defendants in Felony and Misdemeanor. — Let us now go back to the doctrine of merger, discussed in the last chapter. It appeared there to be very uncertain in its limits and nature. The proposition,[4] that the same act cannot be both felony and misdemeanor, is only a particular deduction from a principle familiar in the interpretation of criminal statutes, whereby two statutes punishing a thing differently cannot stand together, but one must be adjudged repealed or void.[5] Another proposition brought to view under the head of merger is, that, on an indictment for felony, there can be no conviction for a misdemeanor included within it; though, we saw, the contrary has sometimes been held with us.[6] This proposition, we are about to see, is derivable from certain distinctions of the old common law as to the differing rights of defendants in trials for felony and misdemeanor. So that, if there is in merger any thing beyond these deductions from familiar principles, it is very little. Indeed, such appears to be the whole of the doctrine of merger, with its reasons. But this presentation of the doctrine does not deny its existence; on the other hand, it explains and confirms it.

Misdemeanor on Indictment for Felony. — The common law is distinct, that there can be no conviction for a misdemeanor on an indictment for a felony.[7] If the allegation includes a misdemeanor, and the proofs sustain this part, but not the felony, there must be a general acquittal, which will be no bar to a subsequent prosecution for the misdemeanor.[8] The reason usually assigned is, that,—

[1] Rex *v.* Plant, 7 Car. & P. 575.

[2] Rex *v.* Gordon, 1 Leach, 4th ed. 515, 1 East P. C. 352.

[3] Sweeden *v.* The State, 19 Ark. 205.

[4] Ante, § 787.

[5] Stat. Crimes, § 156, 168, 174.

[6] Ante, § 788, 789.

[7] Ante, § 788; The State *v.* Durham, 72 N. C. 447; Johnson *v.* The State, 2 Dutcher, 313, 334, and the authorities cited in the next note.

[8] 2 Hawk. P. C. Curw. ed. p. 621; Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12; Commonwealth *v.* Gable, 7 S. & R. 423; Reg. *v.* Eaton, 8 Car. & P. 417; Reg. *v.* Gisson, 2 Car. & K. 781; Reg. *v.* Goadby, 2 Car. & K. 782, note; Commonwealth *v.* Roby, 12 Pick. 496, 505, 506; Wright *v.* The State, 5 Ind. 527; Reg. *v.* Dungey, 4 Fost. & F. 99; Reg. *v.* Woodhall, 12 Cox C. C. 240, 4 Eng. Rep. 529; Reg. *v.* Nicholls, 2 Cox

Doctrine derivable from Procedure. — When this rule was established,[1] persons indicted for misdemeanor had certain advantages at the trial, such as to make a full defence by counsel, and to have a copy of the indictment and a special jury, not permitted in felony. And it was deemed that they could not be deprived of these rights through the device of a too heavy allegation in the indictment. This plain dictate of justice was disregarded in a few of the early English cases,[2] wherein, as it was said afterward, "the judges appear to be transported with zeal too far."[3] But, —

§ 805. **Changed Procedure — How with us.** — It is inequitable to deny one charged with felony any privilege which he ought to have in misdemeanor. Therefore the old practice has been gradually done away with in England, and it was never received in this country. If, with us, there is any discrimination, it is usually in *favor* of those indicted for the higher crimes; while, in prosecutions for the lower, any peculiar rights of defendants are merely incidental. Hence, —

Whether Conviction for Misdemeanor. — The courts of some of the States have permitted convictions for misdemeanor on indictments for felony;[4] discarding the old rule, in obedience to the maxim, *Cessante ratione legis, cessat ipsa lex;*[5] while in other States it has been followed.[6]

§ 806. **What, with us, the True Rule.** — It is a nice question whether or not our changed procedure should, as thus indicated, be held to abrogate the old rule on this subject. For, besides the difficulty of casting off a rule solely because of the removal of

C. C. 182. See Gillespie *v.* The State, 9 Ind. 380.

[1] See ante, § 275.

[2] Rex *v.* Joyner, J. Kel. 29, and cases cited in Rex *v.* Westbeer, supra.

[3] Rex *v.* Westbeer, as reported 2 Stra. 1133.

[4] Stewart *v.* The State, 5 Ohio, 241; The State *v.* Kennedy, 7 Blackf. 233; People *v.* White, 22 Wend. 167; People *v.* Jackson, 3 Hill, N. Y. 92; Burk *v.* The State, 2 Har. & J. 426; The State *v.* Sutton, 4 Gill, 494; Cameron *v.* The State, 13 Ark. 712; The State *v.* Johnson, 1 Vroom, 185; Hanna *v.* People, 19 Mich. 316; Foster *v.* People, 1 Col. Ter. 293; Canada *v.* Commonwealth, 22 Grat. 899; Hunter *v.* Commonwealth, 3 Cent. Law Jour. 129; ante, § 788. See The State *v.* Bridges, 1 Murph. 134; Sweeden *v.* The State, 19 Ark. 205; People *v.* Tyler, 35 Cal. 553.

[5] Ante, § 273, 275.

[6] Black *v.* The State, 2 Md. 376; Commonwealth *v.* Gable, 7 S. & R. 423; Hackett *v.* Commonwealth, 3 Harris, Pa. 95; Braddee *v.* Commonwealth, 6 Watts, 530; Commonwealth *v.* Roby, 12 Pick. 496; Commonwealth *v.* Newell, 7 Mass. 245; The State *v.* Valentine, 6 Yerg. 533; Johnson *v.* The State, 2 Dutcher, 313, 324. And see United States *v.* Sharp, Pet. C. C. 131. As to Vermont, see the notes to the next section.

its original reason,[1] other reasons for adhering to it may exist in addition to the oftener-mentioned ones.[2] So thought the Vermont court, which, having in some earlier cases put aside the English practice, took it back, saying: "On an indictment for a felony, the prisoner must appear in person, and on trial must here be taken and retained in custody in discharge of his recognizance; whereas, on an indictment for a misdemeanor, he is allowed to remain on bail, and may in general appear and plead by attorney. These are privileges of which the party ought not to be deprived by changing the mode of proceeding against him, and they appear to be of sufficient importance to require an adherence to the common-law rule."[3] Yet this court, at a later period, turned again and embraced its former doctrine, apparently without being aware of the intermediate decision.[4]

§ 807. **Continued.** — And there are reasons of a different nature, entitled to weight: as, for example, one indicted for felony cannot be convicted on evidence showing him to have advised the act as an accessory before the fact, while one indicted for misdemeanor can; and the judge must be embarrassed as to the admission of the testimony, if in doubt whether the verdict, should it convict the defendant, will find him guilty of felony or misdemeanor. In England, at the present time, the before-mentioned reasons for the rule have practically ceased, defendants there having substantially the same privileges on indictments for felonies as for misdemeanors; yet the rule itself remains.[5] And the court of Massachusetts, sustaining the rule, rejected altogether those more common reasons, deeming it to rest on "the broader consideration, that the offences are, in legal contemplation, essentially distinct in their character, and that this is manifest from an examination of the authorities."[6] We may doubt, however, whether the Massachusetts reason is broad enough alone to support the rule in all circumstances where it is found in the English law.

§ 808. **Statutory Alterations of the Rule.** — Yet this rule, that on indictments for felony there can be no conviction for misde-

[1] Ante, § 275.

[2] Ante, § 274.

[3] The State *v.* Wheeler, 3 Vt. 344, 347, overruling The State *v.* McLeran, 1 Aikens, 311, and The State *v.* Coy, 2 Aikens, 181.

[4] The State *v.* Scott, 24 Vt. 127.

[5] Greaves Lord Campbell's Acts, 14; Reg. *v.* Thomas, Law Rep. 2 C. C. 141, 13 Cox C. C. 52. The statutes, in some special cases, provide otherwise. Ib.; Reg. *v.* Rudge, 13 Cox C. C. 17.

[6] Commonwealth *v.* Roby, 12 Pick 496, 506.

meanor, has been partly or fully overturned by statutes in some of the States into which it was received from the common law.[1] Therefore, —

Homicide — Rape, &c. — Under the later law in Massachusetts, one tried on an allegation of manslaughter or of rape, which are felonies, may be found guilty of the misdemeanor of an assault and battery.[2] And, by force of statutes, a like practice prevails in some of the other States.[3]

§ 809. **Conviction of Attempt on Indictment for Full Offence.** — It is perceived, therefore, that, by the rules of the common law, though an attempt consists of the full offence partly executed,[4] yet, if, on an indictment for felony, the proof shows only enough of the act to constitute the misdemeanor of an attempt, there can be no conviction even though the allegation charges an attempt in form. Where the attempt and substantive offence are of one grade, — being either both felonies or both misdemeanors, — it is plain that, if the allegation sets out the attempt as well as the completed offence, the common-law rules will permit a conviction for the attempt. It is believed, however, that, in most instances, our forms of indictment for substantive offences do not charge the attempt; though, in other instances, doubtless they do. In England, the common-law doctrine is changed by 14 & 15 Vict. c. 100, § 9, already cited,[5] now in force, and 7 Will. 4 & 1 Vict. c. 85, § 11, repealed,[6] which provides, "that, on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against a person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding."[7] There are some American statutes following more or

[1] Ante, § 789.

[2] Commonwealth v. Drum, 19 Pick. 479; Commonwealth v. Dean, 109 Mass. 349, 352.

[3] Prindeville v. People, 42 Ill. 217; The State v. Johnson, 1 Vroom, 185; Carden v. The State, 8 Head, 267. As to other American statutes and the decisions upon them, see The State v. Flanigin, 5 Ala. 477, 482; Brittain v. The State, 7 Humph. 159; The State v. Valentine, 6 Yerg. 533; The State v. Bowling, 10 Humph. 52; Commonwealth v. Newell, 7 Mass. 245; Commonwealth v. Roby, 12 Pick. 496, 506; Commonwealth v. Cooper, 15 Mass. 187; ante, § 789.

[4] Ante, § 746.

[5] Ante, § 757.

[6] Known as Lord Denman's Act, Reg. v. Dungey, 4 Fost. & F. 99.

[7] Greaves Lord Campbell's Acts, 14. For the construction put upon these statutes by the English courts, see Reg. v. Bird, 2 Den. C. C. 94, 2 Eng. L. & Eq. 448; Reg. v. Watkins, 2 Moody, 217, Car. & M. 264; Reg. v. Eaton, 8 Car. & P. 417;

less closely these English ones.[1] This subject has not been much examined by our courts. The English Parliament is omnipotent. But, while our legislatures may break down all barriers founded on the distinction between felony and misdemeanor, it is not clear that, by our constitutions, they can authorize a conviction for the attempt on an indictment for the full offence, should the allegation not include a charge of the less offence.[2]

§ 810. **Misdemeanor alleged "feloniously."** — We have seen that, according to Hawkins, if an indictment sets out the facts of an offence and lays it as felony, yet in matter of law it is found to be misdemeanor only, a judgment for the misdemeanor may be sustained upon it,[3] notwithstanding there can be no conviction of misdemeanor on an indictment for felony. But, in this instance, the indictment is, in law, for misdemeanor, not felony; the word "feloniously," in the allegation, being rejected as surplusage. For it is a principle in all legal pleadings, that mere surplusage does not vitiate.[4] If, however, the judge at the trial should, contrary to the claim of the defendant, treat the indictment as for felony, and deny him privileges due to persons indicted for misdemeanor, this would be error like any other erroneous ruling. Or, if the defendant admitted, at the trial, that the charge set out was felony, and did not ask for any ruling on the ground of its being misdemeanor, the case would be the same as any other

Reg. v. Brimilow, 9 Car. & P. 366, 2 Moody, 122; Reg. v. Williams, 8 Car. & P. 286; Reg. v. Saunders, 8 Car. & P. 265; Reg. v. Cruse, 8 Car. & P. 541, 2 Moody, 53; Reg. v. Folkes, 2 Moody & R. 460; Reg. v. Crumpton, Car. & M. 597; Reg. v. Nicholls, 9 Car. & P. 267; Reg. v. Ellis, 8 Car. & P. 654; Reg. v. Pool, 9 Car. & P. 728; Reg. v. Guttridges, 9 Car. & P. 471; Reg. v. Barnett, 2 Car. & K. 594; Reg. v. Greenwood, 2 Car. & K. 339; Reg. v. Holcroft, 2 Car. & K. 341; Reg. v. Barratt, 9 Car. & P. 387; Reg. v. Lewis, 1 Car. & K. 419; Reg. v. Reid, 2 Den. C. C. 88, 1 Eng. L. & Eq. 595; Reg. v. Birch, 2 Car. & K. 193; Reg. v. St. George, 9 Car. & P. 483; Reg. v. Phelps, 2 Moody, 240; Reg. v. Birch, 1 Den. C. C. 185; Reg. v. Gisson, 2 Car. & K. 781; 2 Taschereau Canada Crim. Law Acts, 254–263.

[1] And see, on this subject, Wolf v. The State, 41 Ala. 412; Hanna v. People, 19 Mich. 316; The State v. Jarvis, 21 Iowa, 44; The State v. Wilson, 30 Conn. 500; Clifford v. The State, 10 Ga. 422; Stephen v. The State, 11 Ga. 225; The State v. Shepard, 7 Conn. 54, citing Commonwealth v. Cooper, 15 Mass. 187; which last case was subsequently disapproved of by the Massachusetts court, though for a reason not distinctly affecting the doctrine of the text. Commonwealth v. Roby, 12 Pick. 496, 507.

[2] See Crim. Proced. I. § 89–112.

[3] Ante, § 788. And see Crim. Proced I. § 537.

[4] Stephen Plead. 378, 424; Larned v Commonwealth, 12 Met. 240; Rex v Redman, 1 Leach, 4th ed. 477; Rex v Hall, 1 T. R. 320, 322; People v. Lohman, 2 Barb. 216, 220; Lohman v. People, 1 Comst. 379; Crim. Proced. I. § 478.

in which erroneous directions not objected to had been given; the general doctrine being, that the party cannot take advantage of such an error. These propositions, too clear to need further elucidation,[1] have often lain but indistinctly in the minds of judges; yet they are sufficiently deducible from the decisions.[2] Some cases, therefore, in Massachusetts,[3] Vermont,[4] and Maryland,[5] which seem to hold such an indictment not adequate to sustain a conviction for misdemeanor, are not elsewhere good law; and, in the first-mentioned State, partly by the operation of statutes which do not change the principle, the early determination has been overruled.[6]

§ 811. **Jurisdiction.** — Want of jurisdiction in the tribunal may prevent a conviction for the less offence on an indictment for the greater. Thus, in Tennessee, during slavery, the circuit court had cognizance of murder, but not of manslaughter, committed by a slave, the latter being triable in another tribunal only; and the consequence was, that, when a slave was charged in the circuit court with murder, the verdict could not be for manslaughter.[7] But in New Hampshire, a statute having given to justices of the peace exclusive jurisdiction over larcenies to the value of ten dollars and under, directing them to commit the defendants for indictment and trial in the Common Pleas Court when the value was greater; it was held that the latter might render judgment on a verdict of guilty, valuing the property at less than ten dollars. The reason was, that the committing magistrate had conclusively settled the question of jurisdiction; while the jury had determined the degree of the defendant's guilt.[8] In Vermont, it

[1] See ante, § 140, note.

[2] Holmes's Case, Cro. Car. 376; Rex Scofield, Cald. 397, 2 East P. C. 1028, 1029; Rex v. Caradice, Russ. & Ry. 205; Rex v. Turner, 1 Moody, 47; The State v. Upchurch, 9 Ire. 454; Lohman v. People, 1 Comst. 379; People v. Lohman, 2 Barb. 216; The State v. Wimberly, 3 McCord, 190; Hackett v. Commonwealth, 8 Harris, Pa. 95; Commonwealth v. Squire, 1 Met. 258; 2 Hawk. P. C. Curw. ed. p. 621; The State v. Knouse, 29 Iowa, 118; The State v. Boyle, 28 Iowa, 522; The State v. McNally, 32 Iowa, 580. See The State v. Bridges, 1 Murph. 134. And see ante, § 274, 330, note, 361, note.

[3] Commonwealth v. Newell, 7 Mass. 245; Commonwealth v. Macomber, 8 Mass. 254.

[4] The State v. Wheeler, 3 Vt. 344, 347.

[5] Black v. The State, 2 Md. 376. Followed in Delaware, The State v. Darrah, 1 Houst. Crim. 112.

[6] Commonwealth v. Squire, 1 Met. 258.

[7] Nelson v. The State, 10 Humph. 518. The like doctrine is also held in New York, People v. Abbot, 19 Wend. 192.

[8] The State v. Arlin, 7 Fost. N. H. 116. Overruled in The State v. Dolby, 49 N. H. 483. See The State v. Brown, 24 Conn. 316.

was adjudged, that, if an information in one count charges the larceny of divers articles, some valued above seven dollars and others below, and the verdict finds the respondent guilty as to one article only, of a value less than seven dollars, the court will, on motion, dismiss the case. Said the judge: "Where the property is of less value than seven dollars, the offence is within the jurisdiction of the justice of the peace; who may sentence the prisoner, on conviction, to imprisonment in the county jail. The county court have no jurisdiction over criminal offences which are cognizable before a justice."[1]

§ 812. **Felony proved on Indictment for Misdemeanor.** — It has already been explained that the same criminal thing which is a felony cannot also be a misdemeanor;[2] for the differing consequences of felony and misdemeanor cannot exist together, — as, a man cannot be hung and imprisoned at the same time. But, if to what constitutes a misdemeanor some circumstance is added, the aggregate may well be a felony. In such a case, according to Hawkins,[3] should the indictment be for the misdemeanor, and the aggravation which makes the act felony appear at the trial, opinions are divided on the question whether or not there can be a conviction for the misdemeanor. There is great weight in the reason which he gives for the affirmative of this proposition; namely, "because the king may proceed against the offender as he sees fit, either as a trespasser or a felon." And this is the better doctrine. In England, it appears, if on a trial for misdemeanor the wrongful act is shown to have been carried to an extent which makes it felony, the court will, in its discretion, not as of course,[4] order the proceedings to be suspended, until an indictment can be brought forward for the felony.[5] It is not believed that this practice would be proper with us, or that it is ever resorted to; it would lead to embarrassing complications under our constitutional guaranties against a second jeopardy. If the judge declines to give this direction, the prisoner cannot complain; because it is for his advantage to be prosecuted for the

[1] The State v. Nutting, 16 Vt. 261.

[2] Ante, § 787, 804; Rex v. Cross, 1 Ld. Raym. 711.

[3] Ante, § 788.

[4] Bank Prosecutions, Russ. & Ry. 378.

[5] See, for a full discussion of this point and of the matter generally of this section and the next two, with citations of authorities, Reg. v. Button, 11 Q. B. 929, 12 Jur. 1017, 18 Law J. n. s. M. C. 19, 3 Cox C. C. 229. And see 1 Chit. Crim. Law, 639; 2 Hawk. P. C. Curw. ed. p. 621; Reg. v. Boulton, 12 Cox C.C. 87, 93; Reg. v. Selsby, 5 Cox C. C. 495, 497, notes.

lighter matter, rather than for the heavier.[1] There are some decisions in Massachusetts,[2] founded partly on statutes since repealed,[3] apparently holding, contrary to this better doctrine, that the prisoner should be found not guilty of the misdemeanor, and then indicted for the felony; but no satisfactory legal reason for this method appears; moreover, if the same evidence were not produced on the second trial, the party would altogether escape. As observed by Lord Denman, C. J.: "The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretence; and entire impunity has sometimes been obtained by varying the description of the offence according to the prisoner's interest; he has been liberated on both charges, solely because he was guilty upon both."[4] In confirmation of the liability to conviction for the misdemeanor, the books tell us that, —

§ 813. **Misprision of Felony or Treason.** — Every treason includes a misprision of treason,[5] and every felony a misprision of felony,[6] for which misprision, though only a misdemeanor,[7] the person guilty of the higher crime may nevertheless be proceeded against, "if the king please."

§ 814. **Merger in Conspiracy.** — A conspiracy to commit a felony is a step toward the consummation, but it is only misdemeanor. There are American cases which seem to hold, that, if parties are on trial for such a conspiracy, and they are shown to have proceeded in it to the actual commission of the felony, the misdemeanor is merged, and they cannot be convicted,[8] — a rule, the authorities agree, not applicable where the object of the conspiracy is a misdemeanor.[9] This doctrine, the reader perceives,

[1] Reg. v. Button, supra; Reg. v. Neale, 1 Den. C. C. 36; The State v. Leavitt, 32 Maine, 183; Bank Prosecutions, Russ. & Ry. 378; Lohman v. People, 1 Comst. 379, 383; People v. Lohman, 2 Barb. 216, 220; The State v. Vadnais, 21 Minn. 382.

[2] Commonwealth v. Roby, 12 Pick. 496, 508; Commonwealth v. Kingsbury, 5 Mass. 106. The like under the Georgia statute. Kelsey v. The State, 62 Ga. 558.

[3] Commonwealth v. Squire, 1 Met. 258, 261, 262.

[4] Reg. v. Button, supra, 11 Q. B. 948.

[5] 1 East P. C. 140.

[6] 4 Bl. Com. 119.

[7] Ante, § 717.

[8] Commonwealth v. Kingsbury, 5 Mass. 106. And see the cases cited in the next note, which, on this point, contain mere dicta. Also, Commonwealth v. Delany, 1 Grant, Pa. 224; Johnson v. The State, 5 Dutcher, 453; Elkin v. People, 28 N. Y. 177. In Kentucky, it has been laid down that a conspiracy to commit a felony, consummated by committing treason, merges. Commonwealth v. Blackburn, 1 Duvall, 4.

[9] The State v. Murray, 15 Maine, 100; People v. Mather, 4 Wend. 229, 265; People v. Richards, 1 Mich. 216; Commonwealth v. McGowan, 2 Parsons, 341; The State v. Noyes, 25 Vt. 415; The State v. Mayberry, 48 Maine, 218; Commonwealth v. O'Brien, 12 Cush. 84; ante, § 804.

is contrary to just principle: it has been rejected in England;[1] and, though there may be States in which it is binding on the courts, it is not to be deemed general American law.[2]

§ 815. **Misdemeanor committed by Means of Felony.** — There is authority for saying, that, when a man undertakes to commit a misdemeanor by means of an act which is felony, the law stops with the felony, being the culminating point in the transaction, and punishes him for it, to the disregard of the minor consequence beyond. This doctrine is not so completely established by adjudication as to preclude future inquiry into it. Still it seems not unjust in principle. Therefore —

False Pretences. — It has been held, that, if one obtains goods by false pretences, where such obtaining is a misdemeanor, through the instrumentality of a forgery, which is a felony, he can be convicted only of the forgery.[3]

[1] Reg. v. Button, 11 Q. B. 929, 12 Jur. 1017, 18 Law J. N. s. M. C. 19, 3 Cox C. C. 229; Reg. v. Boulton, 12 Cox C. C. 87, 93.

[2] Johnson v. The State, 5 Dutcher, 453; ante, § 791.

[3] Rex v. Evans, 5 Car. & P. 553; Reg. v. Anderson, 2 Moody & R. 469. As to this, however, Lord Denman has observed, "that the misdemeanor of obtaining goods on false pretences consists of a series of acts, the false pretence, and the obtaining of the goods, and the first step in the series may also be a felony. Where that is the case, there appears no reason why the prisoner should be allowed to defeat the charge of the lesser offence by alleging his own guilt in respect of the greater offence. The same act may be part of several offences; the same blow may be the subject of inquiry in consecutive charges of murder and robbery; the acquittal on the first charge is no bar to a second inquiry where both are charges of felony; neither ought it to be where the one charge is of felony and the other of misdemeanor." Reg. v. Button, supra, 11 Q. B. 946, 947; 3 Cox C. C. 229, 240. And see United States v. Rindskopf, 6 Bis. 259.