CHAPTER XXIII.

NECESSITY AND COMPULSION.

§ 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." 1 If, therefore, one seizes the hair of another in which is a weapon, and, in spite of resistance, kills a third person with it, the first only is guilty. 2 And always an act done from compulsion or necessity is not a crime. 3 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 details becomes important. The law of self-defence and the defence of one's property will be explained further on; 6 but —

Save one's Life — Property — (Treason). — Whatever it is necessary for a man to do in order to save his life, is, in general, to be considered as compelled. 8 If one, therefore, joins with rebels from fear of present death, he is not a traitor while the constraint remains. 7

1 To connection with this chapter, consult Crim. Procd. I § 402 et seq. 2 Rutherforth, Inst. c. 18; § 9; Reg. v. Dunnett, 1 Crim. & K. 428; The Generous, 2 Trials, 322, 323. 3 1 East P. C. 325. 4 1 Flow. 19; Tate v. The State, 5 Blackf. 78; Reg. v. Bamber, 5 Q. B. 279, Dav. & M. 307. 5 Post, §§ 335 et seq. 6 1 Brown, Crim. Law, 3d Ed. 460. 7 Oliver v. The State, 17 Ala. 497. 8 1 East P. C. 70; Sex v. Gordon, 1 East P. C. 71; Reepubl. v. McCarty, 2 Dall. 85. 9 An see 1 Brown, Crimes, 3d Ed. 604, 605. 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 to him, 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. 60; 1 Alison Crim. Law, 627. "Nay," says the latter writer, "the same will hold without any reasonable 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 Allan Crim. Law, 678; 1 Hume Crim. Law, 2d ed. 51. 10 Spain v. McGrother, 1 East P. C. 71; Reepubl. v. McCarty, 2 Dall. 85. 11 Bl. Cro. 188; People v. Doe, 1 Mich. 463. 12 1 Russ. Crimes, 3d Ed. 604. 13 1 Hale P. C. 51, 484. And see 4 Bl. Comm. 30; 1 Broom Leg. Max. 2d ed. 9. 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 Wilt. Jr. 1. 14 1 East P. C. 294. 15 1 Russ. Crimes, 3d Ed. 604. 16 Reg. v. Tyler, & Car. & P. 816. 17 4 Bl. Comm. 81; 1 Hale P. C. 64, 655; Dall. Just. c. 161; § 5; 2 East P. C. 693, 695. 18 And see Broom Leg. Max. 2d ed. 8; Barrow v. Page, 6 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 Text).—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. 3, 7-9; Whewell's Translation; i. 328-310; Bosanquet, 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. 269; Vol. II. § 959.

2 The William Gray, 1 Palm. 16. And see United States v. Brig James Wills, 8 Day, 296; 7 Cranch, 22; Anderson v. The Solon, Crabbe, 17.

3 Stratton v. Hugue, 4 Call, 564.

4 The Gertrude, 3 Story, 68. And see Ripley v. Gelston, 9 Johns. 201; Peaslee v. Water, 4 Cranch, 347; Trusman v. Casks of Gunpowder, Thacher Crim. 237.


6 The Generous, 2 Dods. 292, 293.

7 The Joseph, 8 Cranch, 243.

8 Ev. 379; The Joseph, 8 Cranch, 461.


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§ 352. Necessity urgent and without Fault.—The necessity, to excuse, must be real and urgent, and not created by the fault or careless of him who pleads it. 5 "Where the law," observes Story, "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 prudence might resist or overcome, or any innocent course which ordinary skill might adopt and pursue, the party cannot be held guiltyless, who, under such circumstances, shelters himself behind the plea of necessity." — "I do not mean," said

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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 Enumerity 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 — (Oversiding Statute). — It was held in Pennsylvania, that, though the law authorized a prisoner to demand his trial at a 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. 4

§ 355. Command — (Military Officer — Parent — Master — Principal). — The command of a superior to an inferior, as of a military officer to a subordinate, 6 or of a parent to a child, 7 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; 8

1 The Generous, 2 Dods. 422, 424. 2 Dred James Wells v. United States, 7 Cranch, 22; The Generous, 2 Dods. 422, 424; The Joseph Segunda, 5 Wheat. 396.
3 Broom Leg. Max. 2d ed. 9.
4 Aste, § 350.
8 Broom Leg. Max. 2d ed. 11; post, § 267 et seq.
9 Hayes v. The State, 18 Miss. 240; The State v. Bryant, 14 Miss. 910; Commonwealth v. Drew, 3 Cash. 270; Kilfield v. The State, 6 How. Miss. 324; Schmidt v. The State, 14 Miss. 107; The State v. Bell, 5 Port. 308; The State v. Bagbee, 22 Vt. 32; Curtis v. Knox, 2 Denio, 341; Brown v. Howard, 14 Johns. 119; Commonwealth v. Hadley, 11 Met. 56.

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. 9

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. 9

1 Naish v. East India Co., 2 Comyns, 402, 409. 2 Broom Leg. Max. 2d ed. 60.
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 femme 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 — (Trespass — Murder — Robbery). — From this proposition the offences of trespass and murder, and some add robbery,4 would appear from observations of judges and text-

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." 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; 8

1 Hawk. P. C. Curv. ed. p. 4, § 11; Commonwealth v. Neal, 10 Mass. 162; Rex v. Knight, 1 Car. & P. 116, note; Rex v. Stapleton, 64 Id. 49; and the references in the next note.
2 See the two notes of this able English editor in 1 Russ. Crimes, 3d Ed. ed. p. 18, 25. In the second note he says: "Before Somerville’s Case, 26 Eliz. and Somerset’s Case, a.d. 1616, I find no exception to the general rule, that the coercion of the husband excuses the act of the wife. See 27 Ass. 40; Stack. P. C. 26, 27, 142; Foulton de Pace Regis, 158; Rex. Ab. Gor. 308; Fitz. Ahe. Gor. 138, 160, 169. But after those cases I find the following exceptions in the books: Bac. Max. 67, excepts treason only; Dalton, p. 147, treason and murder, citing for the better Mx. Law 18 (though I cannot find, perhaps some reader of some fan of Court); Hale P. C. p. 45, 47, treason, murder, homicide; and p. 431, treason, murder, and manslaughter. Selden, 51, an older dictum; murder only. Hawk. b. 1, ch. 1, §11, treason, murder, and robbery. Bl. Com. Vol. I. p. 444, treason and murder; Vol. IV. p. 29, treason, and manslaughter 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. Cruise, 8 Car. & P. 641, a case is cited, where Burroughs, J., held that the rule extended to robbery. [For an intimation that it does not extend to robbery, see Rex v. Bancombe. 1 Cox C. C. 158.] It seems long to have been considered that the mere presence of the husband was a coercion (see 6 H. 493. Com. 28), and it was so contended in Reg. v. Cruise; and Bac. Max. 59, ex. vol. I. 16

pressly states that a wife can neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will, and in the next page he says: "If husband and wife join in committing treason, the necessity of obedience does not excuse the wife’s offence, as it does in felony. Now, it this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somerville’s Case, which shows that a wife may be guilty of treason in company with her husband, and which would be an exception to the general rule as stated in Bacon. So if a wife 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 states that the other cases follow Hale, and it is unless by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville’s, and Someret’s Case, probably exceptions to the rule as stated by Bacon, have been continued by writers without adhering 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.”

1 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 Gm. 706; Reg. v. Cruise, 8 Car. & P. 641, 2 Moody, 63; Reg. v. Laughers, 2 Car. & K. 225; Commonwealth v. Trimner, 1 Mass. 475; Commonwealth v. Neal, 10 Mass. 152; Martin v. Commonwealth, 1 Mass. 347; Com
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while not even a command from him will excite her, unless she does the act in his presence:—

What is the Presence. — For a married woman to be in the presence of her husband within this rule, it is not necessary that 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."

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. 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. 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, 163 Mass. 71; The State v. Williams, 65 N. C. 498; 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 ad- judged, that his made not the wife accessary." 3 Inst. 108. See also McKeown v. Johnson, 1 McCall. 678.

1 Ante, § 368.
2 Reg. v. Dixon, 10 Mod. 355; Reg. v. Williams, 10 Mod. 384; The State v. Bents, 11 Mass. 27; 1 Hawk. P. C. Curw. ed. p. 5, § 12, and the authorities there cited. Now 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. — See also Commonwealth v. Trimmer, 1 Mass. 476; 4 Russ. Crim. 8d Eng. ed. 27; Reg. v. Price, 8 Car. & P. 10; Reg. v. Stapleton, 1 Croll. & F. 216; The State v. Parkinson, 1 Strob. 199; Bosco Crim. Ry. 345; Reg v. Hughes, 2 Lewin. 329; Wagenor v. Bill, 10 Bar. 329; Uhl v. Commonwealth, 8 Gratt. 706; Reg. v. Tippett, 12 Cox C. C. 48; 2 Eng. Rep. 189; Commonwealth v. Eagan, 163 Mass. 71; The State v. Williams, 65 N. C. 498
one, is to be acquitted. But if he was a cripple, confined to his bed, therefore incapable of coercing her; or, if in fact she was not only the active one, but acting from her own free and uncontrolled will,—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. Of course, also, she may be indicted without her husband. 5

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. 6

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. 7

§ 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 Rex v. Price, 8 Car. & P. 19; Rex v. Knight, 1 Car. & P. 116; Commonwealth v. Trimmer, 1 Mass. 470; Anonymous, 2 East, 559; Rex v. Tolleson, 1 Moody, 243; Rex v. Matthews, 1 Den. C. C. 596; Temp. & M. 337; Rex v. Archer, 1 Moody, 489.


4 The State v. Nelson, 29 Maine, 329; Rex v. Stimpson, 1 CRAWF. & DIX C. C. 163; Rex v. Thomas, CAW. temp. HARDW. 272; Rex v. Chelwrick, 1 Kohlr. 555; pl. 50; The State v. Beniz, 11 Mass. 27.

5 Commonwealth v. Murphy, 2 Gray, 410; Rex v. Morris, 2 Leach, 4th ed. 1006; The State v. Montgomery, CHEVES, 129; The State v. Potter, 43 Vt. 405; Rex v. Bosher, 4 Cox C. C. 372; Commonwealth v. Tryon, 89 Mass. 442.


7 Commonwealth v. Lewis, 1 Met. 153; Rex v. Hannon, 88, 299; Rex v. Crofts, 7 Mod. 397.

8 Williamson v. The State, 16 Ala. 451, 460; Malvey v. The State, 45 Ala. 316; Commonwealth v. Barry, 115 Mass. 146.


12 Ante, § 217; Vol. II. § 634, 652.


§ 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." Yet,

Wife alone — (Purely Criminal — Liquor Selling). — A femme 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


3 Ante, § 217; Vol. II. § 634, 652.


5 1 Russ. Crimes. 3d Eng. ed. 24; Reg.

6 Manning, 2 Car. & K. 887, 903.

7 1 Alison Crim. Law, 602.

8 Ante, § 367.

9 1 Russ. Crimes, 3d Eng. ed. 24; Reg.

10 Smith v. Commonwealth, 1 Mass. 446.

11 Sauford, J., in Rather v. The State, 277. And see Vol. II. § 681.


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§ 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, § 356; People v. Richmond, 29 Cal. 411. See The State v. Learmonth, 41 Vt. 556.
2 Broom Leg. Max. 2d ed. 282; 4 Bl. Com. 20; 1 Russ. Crim. 2d ed. 2; Marsh v. Leander, 14 C. B. 455. Such a child cannot commit a nuisance even on its own land, People v. Townsend, 8 Hill, N. Y. 479; nor be a vagrant, Rex v. Inhabitants of King's Langley, 1 Str. 631.
3 The State v. Gale, 9 Humph. 175; Rex v. Owen, 4 Car. & P. 292; Rex v. Greenbridge, 7 Car. & P. 502; The State v. Pugh, 7 Jones, N. C. 61; The State v. Guild, 5 Halst. 163; Godfrey v. The State, 31 Ala. 223; The State v. Doeherty, 2 Tenn. 20; Commonwealth v. Mead, 10 Allen, 398; The State v. Learmonth, 41 Vt. 556; Reg. v. Vamplew, 3 Port. & P. 550; People v. Davis, 1 Wheeler Crim. Cas. 290. 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 Iowa. 154.
4 Rex v. Owen, 4 Car. & P. 292; 4 Bl. Com. 20; Broom Leg. Max. 2d ed. 282; The State v. Learmonth, supra; The State v. Fowler, 52 Iowa, 103. And see post, § 369.
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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 convicted 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; Ithb v. The State, 55 Ga. 498. In Texas the respective ages are by statute nine and thirteen. Wm. v. The State, 3d Tex. 561; McDaniel v. The State, 5 Tex. 475. And the death penalty cannot be inflicted on an infant below seventeen. Ake v. The State, 6 Texas Ap. 398, 411.

2 In Illinois, the ages are ten and fourteen. Angelo v. People, 95 Ill. 209.

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3 Ante, § 294.

4 People v. Kendall, 25 Wend. 399.

5 Boyd v. Banta, Oxen, 208.

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

7 4 Bl. Com. 24. And see ante, § 298.

8 1 Hale P. C. 27.


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 sparring 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. 325.

3 See, for a case in which a girl under fourteen seems to have been wrongly acquitted, Crim. Proseil. II. § 487 a. note.

4 1 Bishop Mar. & Div. § 145, 147.

5 § 385, note.

6 1 Bishop Mar. & Div. § 146.

7 1 Hale P. C. 27.


9 See ante, § 294, note.

10 1 Bishop Mar. & Div. § 146.

11 Reg. v. Jordan, 9 Car. & P. 118;

12 1 Bishop Mar. & Div. § 146.

13 Reg. v. Brimlow, 9 Car. & P. 368; Murphy, 9 Buse, 522; Chicago, &c., Moody 123; Reg. v. Phillips, 9 Car. & P. 238.
rime is rejected; the court permitting the presumption of incapacity, in cases of rape, to be overcome by evidence. And some of the New York judges have adopted the Ohio rule.

And see O'Meara v. The State, 17 Ohio, 576; Moore v. The State, 17 Ohio, 521; Commonwealth v. Green, 2 Pick. 390. And see The State v. Handy, 4 Haring. 174. And see Vol. II. § 1117.

Williams v. The State, 14 Ohio, 222.

86. Rex v. Elderhouse, 3 Car. & P. 506; 7 Car. & P. 582; Commonwealth v. Green, 2 Pick. 390.

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

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.

1 Crim. Proc. II. § 604-607.
2 Ante, § 565, 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." Binney, C. J., in Commonwealth v. Rogers, 7 Met. 500, 501. And see Thomas v. The State, 40 Texas, 69, 83; People v. Klein, Edin. Rec. Cas. 18.

4 Lord Coke says: "There are four manners of non corpus mensis: 1. Idiot, or fool natural; 2. He who was of good and sound memory, and by the violation of God has lost it; 3. Lunaticus, qui gaudet lucidae intervalis, and sometimes is of good and sound memory, and sometimes non corpus mensis; 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 corpus mensis nam est: 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 corpus mensis may commit high treason; as, if he kills or offers to kill the king, it is

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§ 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, the mind may be weak, ill formed, or diseased — in other words, insane — in a degree not relieving from criminal responsibility.

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 willful wrong-doing.

high treason, for the king est caput et collection, et a corporeLines notes marci tenuit in omnibus; and, for this reason, their persons are so sacred that none can offer any violence. In the case of Commonwealth v. Mosler, cited above, the law, on the other hand, relied 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. 298. 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 his subject, and to have taken from him the freedom of moral action." p. 297.

1 Hale P. C. 30.
2 Ray M. J. Ins. 8d ed. § 8.
3 1 Freeman's Cae, 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 would have found irresistible the prospect of the old test, 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.

The prisoner was of mixed negro and Indian blood, the former predominating. In early life he had been practically uneducated; and, growing up neglected in education, had been sent by the court in 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 — issuing by his counsel on 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.

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 in prison; he called upon the owner of the horse alleged to have been stolen by him, and indiscriminately 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 would 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, 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 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, being confronted with the dead bodies and the living witnesses, he acknowledged all. From this time until he died, he was open and truthful; as so
§ 877. Nature of the Adjudged Cases—How viewed. — In this
dpartment of the law, as in every other, we arrive at the legal doc-
ging the facts, as far as he was able, to
everybody who talked with him. And
we are no presence, that he undertook
to give in insanity. The arrest was made
less than twenty-four hours after the
murder was committed.
6. On one point, the testimony con-
nvinced me, namely, that the intellect of the
defendant was very weak. Though
the mental witnesses were in conflict on
the main question, the most hostile agreed
that his own that his intellect was but
the above that of the brute; and one
of these hostile witnesses, a leading and
outstanding one, answered to the
defendant's counsel, on cross-examination,
following:
"Q. You say he is ignorant; what is
his degree of his intelligence?
A. He appears to have but little.
Q. What is the degree of his intel-
cight?
A. It is difficult to tell by any
examinations that were made there in the
distress. He was there to be tried for
with pressed with the weight of his crimes;
acquittal, and dead, to be sure, but with
very strong is and very desirable. If
his intellect is of a low grade, but
how much he has, precisely, cannot well be
determined under the disadvantages of
situation.
Q. From what you discover, can
you compare his intellect to that of any
other being?
A. I should not think he has as
much intellect as an ordinary child of
three 
years of age. In some respects,
A. With a child two or three years old."
Hale's Trial of Freeman, p. 248.
To illustrate this great imbecility and
guaranty, it may be mentioned, that,
such the prisoner knew, and could call
y name the letters of the alphabet; and
ought, notwithstanding this, he could not
read a word; yet he really believed
that he could, would take a book in his
hand and, say over words and sounds
which were not words, just like an infant
of two years old. He could with difficulty
remember thousand of the words, and
when he reached the end of his knowledge,
he would count right on wrong; not imaginign
he was not right. He thought he once saw Jesus Christ in the
Sabbath school and this idle flat of
ignorance and stupidity was shewn by
no green mound of intelligence and
wisdom. He seldom or never asked a
question, related nothing without poin
ing, 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 bread which should separate
him from the cold stone floor of his cell,
whereas 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
seemingly ill-timed smile upon his face, and
of a peculiar way in which he stood and
spoke to his visitors, as much as I could
classify, 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
taken 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
defense of insanity; and the bench of judges
concurred, and passed sentence of death.
9. Before this sentence was executed,
a writ of habeas corpus was issued, before
the Supreme Court, and in the 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 disposed
and we may here see how the discharge
of a duty did not interfere with the ob-
ligations of a citizen. In a notice
in the prefatory part of the second vol-
ume 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 defense
of insanity in behalf of a prisoner whom,
as I am very much, he deemed 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
nearly 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 defenses made for him;
and the lawyer who refuses through fear
of public obloquy violates his oath and
a high behest of duty. And see Crim.
Proc. 1. § 800, 910.
2. 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
epileptics, 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 wit-nesses an idea of the existence of an
indescribable something which should hold
the gooses responsible when acting under a
particular temptation. To this point of law, we must add.
that the mind of the prisoner in jail
in his own mind was clear that the man was insane;
and he dared to do his duty. Soon after-
ward, 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 the lawyer who refuses through fear
of public obloquy violates his oath and
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Proc. 1. § 800, 910.
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. 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, 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, 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 delusion, like the insanity known hereafter in New England as the Salem Witchcraft,—an insanity in which the delusion is even more in the accused 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 conjectured up—or, if it had been, would have been speedily closed—by 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.

§ 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. No reason indeed appears why they may not be even more numerous, certainly more difficult to be understood, than the qualities and phenomena of sound minds; and our assurance may well be humbled when we reflect, that what is called the learned world, much more the mass of human-kind, still gropes darkly on the borders of intellectual and moral science. Hence,—

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

1 Arnold’s Case, 10 Howell St. Tr. 606, 764, 765. I have copied the above observations from Shefford on Lunacy, 460, 460, where the words of the judge are slightly altered.
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:

| IDIOCY | [1. Resulting from congenital defect. 2. Resulting from an obstacle to the development of the faculties, supervening in infancy.]
| --- | --- |
| IMPERITY | [1. Resulting from congenital defect. 2. Resulting from an obstacle to the development of the faculties, supervening in infancy.]
| MANIA | [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.]

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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, are important in the examination of all judicial decisions; and they are particularly 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. 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. 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.

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.

§ 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. § 83.
3 Ante, § 212 et seq.
4 Freeman v. People, 4 Denio, 9; Martin's Case, Selden L. 406; Haddock's Case, 27 Howst. St. Tr. 1281, 1814.
5 "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. Mosier, 4 Barr. 364. The law is the same in Scotland. 1 Alison Crim. Law, 647. Such also is practically the doctrine of medical men. Ray Med. Jurispr. Uman. 3d ed. § 186, 195, 227.

CHAP. XXVI.] WANT OF MENTAL CAPACITY. § 388.

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 in law when illuminated 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 monomania, and whether the act in question was the product of this disease or of a sound mind. It is not in this form in which 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 juries should extend to various explanations differing with the particular cases.

§ 883. THE EVIL INTENT REQUIRED. [BOOK IV.

§ 884. 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

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. 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. 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, 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,

§ 885. 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 Flanagan v. People, 52 N. Y. 467; The State v. Shippey, 10 Minn. 233; Anderson v. The State, 42 Ga. 9; Brickley v. The State, 56 Ga. 296; The State v. Pratt, 1 Houst. Crim. 249; cases cited post, § 884; and some of the cases cited post, § 887; and see Cunningham v. The State, 59 Missis. 299.
3 Ante, § 386, et seq.
§ 384. THE EVIL INTENT REQUIRED

[BOOK IV.]

know, the law of the land; 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; 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. 566. 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 is likely to be questioned by 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 under 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, it 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 against the law. In this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." D. p. 362. Lord Lyndhurst in one case, in the words, "offence against the laws of God and nature." Rex v. Offord, 5 Car. & P. 168; v. Mannfield, C. J., in Baulding's Case, 1 Collinson L. 656, Shelford L. 490; 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. Biggin, 1 Car. & K. 129, 130; also 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. 580, 673; Commonwealth v. Mealer, 4 Barr. 254; Reg. v. Renshaw, 11 N. Y. 115, 816; Reg. v. Higgison, 1 Car. & K. 129; Parker's Case, 1 Collinson L. 477, Shelford L. 490; Bowler's Case, 1 Collinson L. 673, note; Shelford L. 491; Martin's Case, Shelford L. 465; McAllister v. The State, 17 Ala. 434; The State v. Hurting, 21 Miss. 463; United States v. Shults, 8 McCorn. 121; People v. Spague, 3 Parker C. C. 43; United States v. McGee, 1 Curt. C. C. 1; Loeffler v. The State, 10 Ohio State, 588; Fisher v. People, 23 Ill. 385; People v. Hurley, 8 Cal. 390; Gold v. The State, 30 Miss. 600; People v. Collins, 24 Cal. 299; Willis v. People, 32 N. Y. 176; The State v. Windsor, 5 Harring. Del. 512; People v. Mon- donell, 47 Cal. 134; Dove v. The State, 3 Dall. 35; People v. Griffin, 2 Edin. Sel. Cas. 192; People v. Klein, 1 Edin. Sel. Cas. 13; People v. Coffman, 24 Cal. 230; The State v. Haywood, Phillips, 378; The State v. Brandon, 8 Jones, N. C. 403; Reg. v. Davies, 1 Post & F. 69; Farnan v. People, 32 N. Y. 467; People v. Montgomery, 13 Abb. 3d n. 297; 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. 468; Lam. 469; Willis v. People, 32 N. Y. 176; Reg. v. Townley, 3 Post & F. 889; Reg. v. Burton, 3 Post & F. 772; The State v. Lawrence, 51 Maine, 574; Humphreys v. The State, 45 Ga. 193; Spaner v. The State, 47 Ga. 553; People v. Reed, 29 Cal. 620; Loyd v. The State, 45 Ga. 57; Reg. v. Vaughan, 1 Cox C. C. 50; The State v. Thomas, 1 Houst. Crim. 651, 652. In the Illinois case of Hoppla v. People, 81 Ill. 625, 650, observed "the easily and safely a judgment 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 affinity 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, overruling 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." 1 Some of the foregoing cases, also The State v. Brown, 1 Houst. Crim. 589; The State v. Pratt, 1 Houst. Crim. 589; The State v. Dabney, 1 Houst. Crim. 193; The State v. McHewer, 49 Iowa, 88.

2 Ante, § 380, 382.

3 Freeman v. The State, 4 Kelly, 810; Freeman v. People, 4 Denio, 9; Kimme v. King, 1 Conn. 109, 106.

3 Of the 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, a man may be responsible for some things, while not for others. 2 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 arise from 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, 1 — in relation to a particular subject, its condition as to other subjects.

§ 388. 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: 1 It may be asserted, as the result of observation and experience, that, in all lunatics, even in the most degraded idiots, whenever manifestations of

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any mental action can be excused, 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 Buckman on Criminal Lunacy, 60. 2 See on this point, the article before referred to. 3 Rev. Mod. Jurispr. Insan. 3d ed. § 17. 4 Ante, § 386 a. 5 Ante, § 383 a. 6 Ante, § 388 and the cases there cited.
\section*{THE EVIL INTENT REQUIRED.} 

\section*{CHAP. XXVI. WANT OF MENTAL CAPACITY.} 

\section*{§ 387. Passion — Drunkenness.} — If one allows his passions to be excited to a frenzy, or voluntarily puts his mind out of temporary balance by intoxicating drinks, 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." 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. Descending more to detail, —

1. Willig v. People, 6 Parker C.C. 281; The State v. Gravitt, 25 La. An. 457; Cole v. Case, 7 Ab. Jr. 51, 52; The State v. Sturley, 41 Iowa. 295; Goud v. The State, 65 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. State v. People, 500 et seq.; Bradley v. The State, 31 Ind. 492; The State v. Hurley, 40 Miss. 411; People v. Bell, 40 Cal. 455; Colbath v. The State, 2 Texas Ap. 301; The State v. Coleman, 27 La. An. 698; The State v. Thompson, 12 Nov. 140; Fisher v. The State, 64 Ind. 455; The State v. Hurley, 1 Houst. Crim. 28; The State v. Thomas, 1 Houst. Crim. 511. And see Reg. v. Leigh, 4 Hurt. & F. 915; The State v. Soh, 386; The State v. Johnson, 40 Conn. 182; Roberts v. People, 19 Mich. 402. 3. Reg. v. Oxford, 9 Car. & P. 225, 510. And see The State v. Coleman, 27 La. An. 698. 4. Commonwealth v. Rogers, 7 Met. 600, 602; 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. 237; see Smith v. Commonwealth, 1 Domin. 224; Anderson v. The State, 65 Conn. 161. And see some sensible views, and a collection of cases, in Taylor Med. Jurispr. In a Michigan case, Campbell, C. J., said: "The court in regard to insanity charged that the respondent would be irresponsible in law, 1, if by reason of insanity he was not capable of knowing he was doing wrong or, 2, if he had 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 in control of his mind, or a free agent, and every one irresponsible who is not a free agent, or not having control of his mind." This, it is perceived, quite accords with the Scotch view, as stated ante, § 385, 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. 471; The State v. Brown, 1 Houst. Crim. 480, 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 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 law and its 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. Jr. 381, 387, 1 Beck Med. Jurispr. 10th ed. 705, note. 1. Commonwealth v. Mosher, 4 Barr., 294, 297, 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 insanity, Sanchez v. People, 4 Parker C.C. 555. And see the last note. 2. Dr. Ray has well observed: "No cases subjected to legal inquiry are more
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§ 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 fear, 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 that is tangible to their outward senses; all love the friends who sincerely do them good; all manifest affection, under ordinary circumstances, for their offspring; all control themselves under the pressure of motives calculated to puzzle the understandings of courts and juries, to mock the wisdom of the learned, and baffle the sentences of the shrewd, than those connected with notions of imbecility; and, he might have added, insanity generally. See Ray Med. Jurispr. Insan. 34 ed. § 104.

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§ 392. INSANE DELUSION. — Delusion is, with many, a favorite test of insanity; it was established as a test in the famous case of Hadfield.1 There are even judges who will not admit that there is any other test.2 It excuses on the ground of a mistake of fact, already discussed.3 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 what he believes were real, in this instance kills the man to save his own life, he commits no crime.4 Evidently the doctrine thus laid down is safe in almost any state of the proofs. But,

1 Ante, § 373, 380.
3 § 391 et seq.
4 Hadfield's Case, 27 Howell St. Tr. 1281.
5 Willie v. People, 6 Park. C. 691; In re Forman, 54 Barb. 274; Reg. v. Townley, 8 East & F. 836. And see Reg. v. Davies, 1 East & F. 69; Reg. v. Law, 2 East & F. 866.

1 Ante, § 381 et seq.
2 Ante, § 391 et seq.
3 McKnight's Case, 10 Ch. & F. 200; Opinion on Insane Criminals, 8 Scott N. R. 565; Commonwealth v. Rogert, 7 Met. 500; Cunningham v. The State, 65 Missis. 389. 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
§ 394. 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 insanity believed something which, was 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. 603.

¹ Opinion on Insane Criminals, 8 Scott N. B. 566, 663; McNab's Case, 10 Cl. & F. 394; Boyard v. The State, 90 Mass. 600; The State v. Newberner, 40 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 Robert's v. The State, 3 Kelly, 319, 380.

§ 394. Want of Mental Capacity. —§ 394. Want of Mental Capacity. — 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.³

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. 3 Macklin's Case, 3 Couper, 257, 290, 1251. And see, on this subject, Martin's Case, 466.
ence to something wholly unconnected with the crime, it does not excuse.¹

§ 396. 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 particularly 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. Cutt, 13 Minn. 341, 363.
3 The State v. Draper, 1 Houst. Crim. 201, 302.
CHAPTER XXVII.

DRUNKENNESS AS EXCUSING THE CRIMINAL ACT.

§ 397. The Doctrine stated. — We have seen, that, if a man in	intent to do one wrong accidentally accomplishes another, he is pun-

ishable for what is done, though not intended; except in cases where a specific intent, in distinction from mere general malevo-

lence or carelessness, is an essential element in the particular crime. That doctrine, explained in a previous chapter, is the
document 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 intoxica-
ting 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 coalsces with the wrongful act done while drunk, and makes the offence complete. This is the prin-
ciple; 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; conse-

quently 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 intoxica-
tion, with no act beyond, is not indictable at the common law. There are various old English statutes, early enough
§ 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.  

Again, —

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

§ 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. So likewise does Paley, in his "Moral and Political Philosophy." In legal principle, the question turns upon another; namely, whether drunkenness is to be esteemed

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1 Reniger v. Foggo, 1 Plow, 1, 19; Beverley's Case, 2 Co. 1, 15; United States v. Cornish, 2 Mason, 91, 121; Hale v. The State, 11 Humph, 154; Pirtle v. The State, 9 Humph, 463; Pennsylvania v. McFall, Addison, 235, 267; Rex v. Carroll, 7 Car. & P. 146; Rex v. Ayes, Rush, & Wy. 106; The State v. Bolloock, 16 Ala. 419; The State v. John, 8 Iowa 303; Rex v. Mackin, 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. 49; Carter v. The State, 12 Texas, 500; Commonwealth v. Hawkins, 3 Gray, 463; People v. Robinson, 2 Parker C. C. 235; People v. Haunmull, 2 Parker C. C. 223; The State v. Harlow, 21 Miss. 446; The State v. Mullan, 14 La. An. 650; McIntyre v. People, 38 Ill. 514; Fales v. People, 64 Barb. 319, 2 Keyes, 324; The State v. Johnson, 41 Conn. 394. There are, in the books, a few cases which seem to lead 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; Smahill v. Commonwealth, 8 Bush, 468 (overruling Smith v. Commonwealth, 1 Drumm, 224, and Blum v. Commonwealth, 7 Bush, 890); Kriel v. Commonwealth, 5 Bush, 362; Curry v. Commonwealth, 2 Bush, 67. It is believed, however, that the doctrine of the text is not sound in legal principle, while it is sustained by the usage 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 Minnemore, 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. xiii, p. 290.

4 Paley Phil. b. 4, ch. 2.

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

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." 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 too 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. But, if the habit of drinking has created a fixed frenzy or insanity, whether permanent or intermittent, as, for instance, delirium tremens, — it is the same as if produced by any other cause, excusing the act. For whenever a man loses his understanding,
§ 407. Drunkenness. — Writers on medical jurisprudence inform
us, that drunkenness, and indeed other causes, sometimes betog
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 in-
sanity, 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 offenses, a specific intent in distinction
from mere general malevolence to render a person guilty,
the intent to drink, and drunkenness following, cannot supply
the place of this specific intent. 5 Thus, —

§ 409. Murder of First Degree. — Drunkenness, we have seen, 2
does not incapacitate one to commit either murder or man-
slaughter at the common law; because, to constitute either, the
specific intent to take life need not exist, but general malevo-
lence 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, 6 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 incapa-
bale of intending to do it; and then, in this condition, kills a man.

1 Halle v. The State, 9 Humph. 663;
Halle v. The State, 11 Humph. 154;
Kiefer v. The State, 14 Ohio, 555; Cornwell v. The State, 5
Mart. & Vog. 147; People v. Ham-
mill, 2 Parker C. C. 223; People v.
Robinson, 2 Parker C. C. 256; people v.
The State, 69 Ill. 519; People v.
Begley, 21 Cal. 544; Keenan v.
Commonwealth, 8 Wight, Pa. 55, 67;
People v. Williams, 43 Cal. 844; Kelly
v. Commonwealth, 1 Grant, Pa. 483;

2 Ante, § 383; The State v. Pike, 49
N. H. 599; The State v. Johnson, 40
Conn. 138.

3 Ante, § 383; The State v. Pike, 49
N. H. 599; The State v. Johnson, 40
Conn. 138.

4 Ante, § 281, 286, 320, 325, 326.

5 Reg. v. Monmouth, 4 Cox C. C. 86;
Robert v. People, 19 Mich. 401. See
post, § 412.

6 Ante, § 385.

§ 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.
Drunkenness short of the extreme point, therefore, will not re-
duce the murder to the second degree. 3

§ 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 relinqu-
ishes them before the intent could come upon him, or returns
them the instant his restored mind has cognizance of the posses-
sion 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

3 Ante, 281. 282. 283. 284.
§ 414 THE EVIL INTENT REQUIRED. [BOOK IV.

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

§ 418. 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, 565; United States v. Roundhouse, 1 Bald. 554.
2 Swan v. The State, 4 Humph. 126, 141; s. r. Kelly v. The State, 3 Sm. & M. 615; Reg. v. Cress, 8 Car. & P. 541, 546; Halle v. The State, 11 Humph. 264; Hildreth v. The State, 9 Humph. 63; Reg. v. Moore, 8 Car. & C. 310. In United States v. Roundhouse, supra (at p. 617), Baldwin, J., observed to the jury: "Intoxication is no excuse for crime when the offense consists merely in doing a criminal act, without regard to 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 act 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, beside proof of his passing them as true, proof of his knowledge that they were false." And see ante, § 408.
3 Post, § 729-730.
4 Reg. v. Doody, 6 Cox C. C. 465; Reg. v. Stopford, 11 Cox C. C. 468; Mooney v. The State, 56 Ala. 419; The State v. Harvey, 11 Miss. 184. And see The State v. Bullock, 13 Ala. 413; Reg. v. Cress, 8 Car. & P. 541, 546. Some courts, indeed, have held, contrary to the general and better doctrine, that, for instance, there may be an indicable 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 ground of acquittal. See also Nichols v. The State, 6 Ohio State, 435.

1 Ante, § 401.
2 See Commonwealth v. Hawkins, 3 Gray, 468; and other cases cited ante, § 401.
3 The State v. McCants, 1 Speers, 394; Rox v. Thomas, 7 Car. & P. 817; Rox v. Moskin, 7 Car. & P. 597; Halle v. The State, 11 Humph. 164; Kelly v. The State, 3 Sm. & M. 615; Pearson's Case, 2 Lewin, 144; Smith v. Commonwealth, 1 Durling, 224; Golliver v. Commonwealth, 2 Durling, 163; 2 Green Ed. § 5. But see Rox v. Carroll, 7 Car. & P. 145, overruling Rox v. Grindley, 1 Russ. Crim., 31 Eng. ed. 8. And see The State v. John, 8 Iowa, 220; First Case, 5 Humph. 663; People v. Robinson, 2 Parker C. C. 236; People v. Hamill, 2 Parker C. C. 223. In Halle 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 certain to ascertain 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 premeditated 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 struck. 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. This evidence, moreover, assists in determining whether a defendant acted under the belief that his property or person was about to be attacked.

§ 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.

§ 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 10 Law Reporter, 562. And see Rogers v. People, 3 Parker C. C. 522; Jones v. The State, 39 Ga. 594.

1 Rex v. Thomas, 7 Car. & L. 817; People v. Eastwood, 4 Kernan, 562.
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, 288; People v. Albany, 11 Wend. 558; Lyon v. Beck, 3 B. & Ad. 77, 92, 98; Angell & Ames Corp. § 384. And see Reg. v. Birmingham and Gloucester Railway, 4 Gale & D. 457, 6 May 40.


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

4 Commonwealth v. Swift Run Gap Turnpike, supra.

5 See 15 B. & Ad. 77, 92, 98; Angell & Ames Corp. § 384. 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, 9 Exch. 114, 16 May 12; 20 Law J. 209, Exch. 110.


7 Commonwealth v. New Bedford Bridge, 2 Gray, 338.


9 Louisville and Nashville Railroad v. The State, 3 Hand. 228.

10 See also, as lending support to this doctrine, Wartman v. Philadelphia, 9 Cases, 252; Whitfield v. Southeastern Railroad, 1 Ellis, B. & R. 116; Bessey v. Manufacturing Co., 9 Met. 562. And see Commonwealth v. Ohio and Pennsylvania Railroad, 1 Grant, 229; The State v. Cincinnati Fertilizer Co., 24 Ohio State, 611; Two Sicilias v. Wilcox, 1 Sim. 854.

§ 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." 11

§ 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. 12 Therefore,—

Treason — Felony — Perjury — Assault — Riot, &c. — In a case cited a little way back, 13 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.'" 14 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. 15

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

1 The State v. Vermont Central Railroad, 20 Vt. 108.

2 See ante, § 417.


4 But see ante, § 420, note.

5 Reg. v. Birmingham and Gloucester Railway, 2 Gale & D. 289, 9 Car. & P. 496, 6 May 804, 2 Q. B. 223; Orr v. Bank of United States, 1 Ohio, 36. "A corporation aggregate of many is inviolable, immoral, and rests only in intention and consideration of the law. . . . They cannot commit treason, nor be excommunicated, for they have no souls; neither can they appear in person, but by attorney." Case of Sutton's Hospital, 10 Co. 28, 335. 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. But they are not so liable in all cases in which the corporation is. 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, 8 Wend. 393; Edge v. Commonwealth, 7 Barr. 375; Kimbrough v. The State, 10 Humph. 97; Rex v. Gaul, Holt, 303; The State v. Conlee, 25 Iowa, 227. See 270 also Shaw v. The State, 8 Blackf. 361; Kane v. People, 8 Wend. 393; Edge v. Commonwealth, 7 Barr. 375; Kimbrough v. The State, 10 Humph. 97; Rex v. Gaul, Holt, 303; The State v. Conlee, 25 Iowa, 227. See 270

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 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. 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. 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. 1 Stat. Crimes, § 289. 2 Crim. Proced. I. § 600, 683-687.
§ 429. WILFUL — Malicious. — The appropriate place for these words is in criminal pleading, where they are established too firmly to be uprooted. 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.

§ 429. Wilful. — “Wilfully” sometimes means little more than plain intentionally, or designedly. 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. 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;” and in other words, it means corruptly.

§ 430. Malice — Malice Aforethought. — “Malice,” “malicious,” “maliciously,” are words more purely technical in their legal use than “wilfully.” 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. In opinions of courts and other legal writings we frequently meet with language from which it might be inferred that the word “malice” alone signifies the same thing as “malice aforethought;” 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. Malice, in legal phrase, is 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. 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. And the words “wilful and malicious” cover together a broader meaning than the word “wilful” alone. Sometimes malice is a mere inference of law from facts proved. Hence the distinction between expressed and implied malice.

Mason, 69, 91; The State v. Will, 1 Dev. & Bat. 121, 123; Beauchoy v. The State, 6 Blackf. 230; The State v. Simmons, 8 Ala. 497; Vol. II. § 673 et seq. 1


§ 430. Act and Intent Combining.—In a previous chapter\(^1\) it 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.\(^7\)

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\(^1\) Ante, § 204 et seq.


\(^3\) Commonwealth v. Manson, 2 Ashm. 51; The State v. Tonn, 2 Dev. 599.


\(^5\) Ante, § 204, 406.

\(^6\) Ante, § 230-235.

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\(^7\) Ante, § 204 et seq.

\(^8\) See ante, § 310 et seq.

\(^9\) Indiana v. Blythe, 2 Ind. 76.

\(^10\) "The intent may make an act, innocent in itself, criminal." Rex v. Schofield, Cald. 297, 304, by Lord Mansfield and by Buller, J. And see the cases cited ante, § 294, 399; also the chapter beginning at § 323.

\(^11\) People v. Classen, 15 Barb. 495, 496; Vol. II. § 192. And see People v.
§ 435. THE ACT REQUIRED. [BOOK V.

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

Endeavor short of Attempt (Procurer 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 procuring dyes 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 dyes was not an act sufficiently proximate to this offense 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 substantive offense, as was the case in Regina v. Williams. 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 offense; but in this case no one can doubt, that the procuring of the dyes and machinery was necessarily connected with the offense, and was for the express purpose of the offense, 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 dyes 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 offense, with the intent of committing it. Now, I do not see for what lawful purpose the dyes and apparatus could have been made. The case of statutory attempts to commit felonies is very different; there, to support 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. 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 offenses, while truly they are, in whole or in part, attempts only; and they fall within the principle of attempts. For example, —

Uttering Forger y (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 offense; because the law leaves it unimportant whether or not a fraud is effected, provided it is attempted, and the putting off is complete. 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. 2 Likewise, —

Perjury. — Perjury appears to be regarded as an attempt (to subvert justice in a judicial proceeding); for a man commits this offense who testifies to what he believes to be false, or what he knows nothing about, 3 though it turns out to be true. So —

1 Reg. v. Roberts, 20 Eng. L. & Eq. 553; Dears, 590, 25 Law J. w. 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 Dears.


3 Rex v. Holden, 1 Tant. 334, Mass. & Ry. 164, 2 Leach, 4th ed. 1019; Vol. II. § 555. And see, as illustrative, Casolls v. The State, 4 Yerg. 149; Wright v. The State, 6 Yerg. 164.


5 People v. Kirkbride, 9 Parker C. C. 640.

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Treason. — It is not essential, in treason, that the reasonable 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 publick injurious nature. 2 Thus, —

Robbery (Piracy, 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 Grawe & Dic. C. C. 149. And see Rex v. Gordon, 2 Doug. 500; 1 East P. C. 68.
2 And see ante, § 394, 330.
5 Norden's Case, Foster, 129; 1 Russ. Crimes, 3d Eng. ed. 890, 891, 892.
6 People v. Thomas, 3 Ell, N. Y. 109; Rex v. Williams, 7 Car. & P. 345; Vol. II. § 460.
7 Commonwealth v. Davidson, 1 Cush. 23; Rex v. Dale, 7 Car. & P. 512; The State v. Little, 1 N. H. 257, 258; Vol. II. § 459-460, 461-464.

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§ 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 not the case, but the constable did not know it, therefore the judges held him to be guilty of the statutory crime. 2 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 Annu, § 437.
2 Respubblica v. Malin, 1 Dall. 325 seq. 230; 325 et seq.
3 Rex v. Rainborne, 2 Conn. 242; Rex v. Gardner, 1 Conn. 692.
4 See Foster, 311 et seq.; 1 East P. C. 511.
5 Reg. v. Dadeon, 2 Den. C. C. 35.
7 Ass'ta, § 459, note, par. 6.
§ 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, 6 Rob. Adm. 251, 264, 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."
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wealth and to population; 7. Its protection to the public convenience and safety; 8. Its protection to the public order and tranquility; 9. Its protection to individuals; 10. Its protection to the lower animals.

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

§ 448. Uses of these Chapters on the Act.—The question first presenting itself to a practitioner asked for advice in a criminal cause, on whichever side, is, whether or not the thing assumed to have been done is a crime. To enable him to answer this question is the purpose of this series of chapters. Their usefulness, in localities where there are common-law crimes, as there are in most of our States, is obvious. But they are almost as important in those States in which all crimes are statutory. This arises from the fact, that the statutes are to be construed by the rules of the common law, and so are never truly understood by one ignorant of it.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, § 8, 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 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

² Anti, § 212 et seq.
THE ACT REQUIRED. [BOOK V.

§ 454. 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 irresolute 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 lillies, 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.”

§ 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-

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 Discourse, at sup. Part 2, p. 38-41.
2 See Vol. II. § 1206-1207.
3 And see ante, § 42.
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." And in, most of the States, the offence against the State has been restricted within nearly or quite as narrow limits.  

§ 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 it to its 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, 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 slander of it, riots to its disturbance, and the like.

1 Const. U.S. art. 3, § 8, cl. 1. And see Vol. II. §§ 121-122; Charge on Law of Treason. 1 Story, 614; United States v. Heath, 1 Pet. 443; Ex parte Bollman, 4 Cranch, 75; Raspublia v. McCarty, 2 Dall. 85; Raspublia v. Mallin, 1 Dall. 35; Raspublia v. Carlisle, 1 Dall. 25; United States v. Vigil, 2 Dall. 456; United States v. Burr, 4 Cranch. 469; United States v. Hanway, 3 W. J. 349; 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. § 257.  

3 Ante, § 212 et seq.  

4 1 Halst. C. 77; 1 East. C. 48. 49; Streui's Case, 3 Howell St. Tr. 256; Rex v. Epstein, 25 Howell St. Tr. 471; In re Crowe, 3 Cox C. C. 294. In Archbold it is said: "A man may lawfully discuss and criticize 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. 438. ... If a man curse the queen, wish her ill, give out scandalous stories concerning her (see Reg. v. Harvey, 2 B. & C. 267, 3 D. & R. 464), or do any thing that may lessen his esteem of her subjects, may weaken her government, or raise jealousies between her and her people, ... all are sedition. In Rex v. Tatham, 5 Harg. St. Tr. 417; 472; Holt, 424, Lord Holt said, that, if man 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. Cobett, Holt on Libel, 114, Stark. on Libel, 522, said, that, if a publication be calculated to alienate the affection of the people, by bringing the government into disesteem, whether the expeditious resort 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 sedition libel. Rex v. Burnett, 4 B. & Ald. 95; Rex v. Harvey, supra.  

5 Archib. Crim. Pl. & Enr. 18th ed. 323, 324. For sedition under the "notch law," see Sinclair's Case, 23 Howell St. Tr. 773; McLaren's Case, 33 Howell St. Tr. 1.  

6 Ante, § 199.  


8 Attorney-General v. Read, 2 Mod. 296; Rex v. Grosvenor, 1 Wils. 15, 2 Stra. 1181; Rex v. Denison, 2 Kent. 269; Rex v. Prigg, Aley. 78; The State v. McNelly, 8 Ira. 171.  

9 As to the form of the procedure, see Crim. Proc. II. §§ 820-822.  


11 The State v. McNelly, 3 Ira. 171, 174; Reg. v. Neale, 9 Car. & P. 441; Raspublia v. Montgomery, 1 Yeats, 140; Reg. v. James, 1 Eng. L. & Eq. 552; 2 Den. C. C. 3, Temp. & M. 300, 14 Jur. 940; Rex v. Howard, 7 Mod. 307; Rex v. Angell, 10 Cow. temp. Haro. 124; Anonymous, 8 Mod. 96; Crotcher's Case, 3 Eas. 654; Smith v. Langham, 50, 61; W. & J. Case, 283; Allen v. Torkington, Holt, 137; The State v. Leech, 3 Dev. & B. 127; Rex v. Coningsby, 9 Mod. 177; Rex v. Henningtons, 9 Sask. 187; Smith's Case, Syne, 188; Wilkes v. Dinman, 7 How. U. S. 80; Rex v. Harrison, 1 East. P. C. 329; Reg. v. Buck, 6 Mod. 308; Mann v. Owen, 9 B. & C. 655, 4 Man. & B. 449; Rex v. Beadle, 6 Hor. 384; s. c. nom. Rex v. Beatty, 2 Kent. 676; Rex v. Ferr, 1 Salt. 975, 9 Ed. Raym. 249; Reg. v. Tracey, 6 Mod. 39; The State v. Buxton, 2 Swam, Tom 67.  

§ 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. His act, to be cognizable criminally, or even civilly, must be wilful and corrupt. 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, though corruption is alleged. 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. In this country, there is no king, and no official person is so completely exempt as he. But nearest to him, in this respect, is the legislator, acting officially. If a legislator misbehaves himself, the leg-

1 May Parl. Law, 21 ed. 60, 70, 76, 102; 1 Kent Com. 235, 283; Anderson v. Dunn, 5 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. His v. Barrett, 3 Gray, 465. And see Vol. 11, § 467.

2 Story Const. § 768, 794.

3 Story Const. § 764; 1 Kent Com. 225, 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 Ante, § 461, and authorities cited in the notes.

5 1 Hawk. P. C. Curv. ed. p. 447, § 6; Yates v. Lansing, 6 Johns. 283, 2 Johns. 895; Cunningham, v. Bucklin, 8 Cow. 117; Hammond v. Howe, 2 Mod. 219; Floyd v. Barker, 12 Co. 33, 35. Judge, as to Civil Suit. — "Neither is the judge liable to a civil suit."


8 1 Br. Crimm. 221; 2 Woodl. Lec. 455.


10 Ante, § 460.

11 Wallace v. Commonwealth, 2 Va. Cas. 130; Commonwealth v. Alexander, 4 Hen. & McM. 529; Rex v. Horrison, 3 B. & Ald. 432; People v. Norton, 7 Barb. 471, 481; Rex v. Harrison, 11 East 232; Rex v. Seaford, Justice, 1 W. Bl. 482; Rex v. Smith, 7 T. R. 80; Rex v. Fielding, 2 Bur. 719; Rex v. Allingon, 1 Sca. 678; Lord Bradford, in Fergu-
§ 463. Impeachable or not. — Judges, not jurors, and the high officers mentioned other than legislative, are answerable in another form, impeachment.

§ 468. Effect of Impeachment — (Judgment 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. 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." As the United States courts have no common-law jurisdiction, 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.

2. Okley, 3 Mod. 46; Rex v. Phelps, 2 Ren. 510; Rex v. Davis, Lofft, 62; Rex v. Johnson, 4 N. & M. 125, 2 A. & E. 127; Bex v. Brooks, 2 T. R. 100; Rex v. Jones, 1 Wil. 7; Rex v. Comms, 2 Doug. 421; Jacobs v. Commonwealth, 2 Leigh, 700; Rex v. Angell, Cas. temp. Hardw. 124; The State v. Gardner, 2 Misco, 25; Living v. Banham, 2 Bay, 2 Bay, 2 Bay, 35; Re ---, 12 Eng. L. & Eq. 161; People v. Coon, 15 Wend, 277; The State v. Porter, 2 Treat. 994; Rex v. Rye Justice, 128, 35; Rex v. Dayia, 3 Brev. 1818; Rex v. Jackson, Lofft, 147; Rex v. Wykes, And. 238; Rex v. Harris, 13 Suz., 270; Rex v. Bishop, 5 B. & Ad. 912; Reg. v. Jones, 6 Car. & P. 401; Reg. v. Porter, 9 Brev. 175; and other cases cited ante, § 469, 460. In some States it is so by statute. Wickersham v. People, 1 Scanm. 723. As to Texas, see The State v. Baldwin, 28 Texas, 75; The State v. Baldwin, 29 Texas, 155.

1 § 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, 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 override 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 to this subject, 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 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 an executive to undertake the same thing against the judge. But I cannot pause to trace the line of argument fully here. There are several popular devices of 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. Elam, 3 Blackf. 72. And see The State v. Jennings, 4 Ohio State, 418. Not a trespass in Party. — If a judicial officer, of either general or special jurisdiction, acts erroneously or oppressively, in whose suit this occurs, is not therefore a trespass. Taylor v. Moffatt, 3 Blackf. 305. See Foulk v. Stoughton, 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 Misco. 420. And see The State v. Dunnoing, 13 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. 890. Inadequate Allegation. — Where a magistrate issued a warrant, upon which one was arrested, and held in trespass, 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. Hurst, 19 Wend. 504. — A contradicting Record. — In an action against a magistrate, he cannot defend himself by contradicting his record. Kendall v. Powers, 4 Met. 655. Jurisdiction. — A justice of the peace is liable for exercising authority where he has none. Bly v. Thompson, 8 A. K. Mar. 70.

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

23; Commonwealth v. Fowler, 10 Mass. 290; People v. Cook, 4 Seld. 67; The State v. Perkins, 4 Tab. 499; The State v. Albion, 12 Ohio, 18; McIntire v. Tanner, 9 Johns. 165; Blackman v. The State, 22 Ind. 596; People v. Collins, 7 Johns. 549; Burke v. Elliott, 4 Ir. 856; Gilliam v. Readick, 4 Ir. 369; Sticks v. Kirkpatrick, 1 Met. Ky. 188; Gilmore v. Holt, 4 Pick. 256; Foul v. Perine, 44 Ga. 454; Thayer v. Carroll, 28 Ga. 440; Kelley v. Story, 6 Heik. 229; Douglas v. Nell, 7 Heik. 437; Diggs v. The State, 48 Ala. 311; Walker v. Perkins, 52 Ga. 233; McCahan v. Leachworth, 9 Kan. 487; The State v. Lewis, 22 La. An. 55; Wayne v. Beers, 20 Mich. 170; Schol- harte v. Pindar, 3 Lana. 8; The State v. Tolar, 4 Vroom, 166; McCormick v. Rich, 14 Miss. 202; Devers v. The State, 44 Miss. 788; Levy v. McCaw- bin, 23 Wis. 684; Moore v. Graves, 3 N. H. 404; Ex parte Strong, 21 Ohio State, 610, 618; Commonwealth v. Mc- Cook, 3 Smith, 458; The State v. Hackett, 12 Wis. 340, to whom is an offi- cer 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, unless he has, or is about to have, a fair color of right, or an acquiescence of the public in his official acts so long as he may be presumed to act as an officer by right of appointment or election." 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 return of county books. — But a different rule prevails where the acts are for the benefit of the officer, because he is not permitted to take advantage of his own wrong. Venable v. Curdl, 3 Heid, 369; Patterson v. Miller, 2 Met. 532; Courtois v. Hanks, 2 Iowa, 75. And see People v. Treman, 20 Barb. 198; People v. Al- bany, &c., Railroad, 55 Barb. 514. Evidence. — That one acts as an officer is prima facie evidence of authority to act. Rex v. Vereck, 3 Camp. 452; Eided v. Sexton, 5 Ohio, 216; Commonwealth v. Tobin, 105 Mass. 490; Cerm. Proc. 2d Ed. § 884, 885. See United States v. Freilesz, 4 Day, 465; Commonwealth v. McGuire, 16 Gray, 235.

CHAP. XXXII.] PROTECTION TO GOVERNMENT. § 464

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 offense of assaulting, a mere officer de facto. And, though the decisions on it are not harmonious, 6 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. 7 So, also,—

1 Rex v. Borrca, 6 Car. & P. 124;
Nole v. The Overseers, 5 Watts, 589;

2 Fortcherry v. The State, 55 Miss. 298; The State v. Guer, 59 Maine, 256; See also Fain v. The State, 5 Texas Act. 142; Burke v. The State, 24 Ohio State, 78; Hamilton v. The State, 24 Ohio State, 82.

3 Olmsted v. Dennis, 77 N. Y. 375, 382; People v. Weber, 89 Ill. 247; Commonwealth v. Rapp, 9 Watts, 114.

4 This doctrine was expressed by Ruf- fin, 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 exercising the office, he adds: "A person who under- takes an office and is in office, though he might not have been duly appointed, and therefore may have a defensible title, or not have been competent 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. McEnery, 3 Iowa 171, 174. Compare People v. Stettin, 73 N. C. 648; Kiln v. Fag. 10 Mod. 288, 290.

5 See People v. Hoorna, 1 Denio, 574; Commonwealth v. Dugan, 19 Met. 256; Rex v. Gordon, 1 Leach, 4th Ed. 516, 1 East P. C. 312; United States v. Wood, 2 Gallis. 301; Bell v. Toole, 11 Ie. 606; Muir v. The State, 5 Blackf. 154; Mag. v. Newcom, 1 Car. & K. 849; The State v. Bole, 24 Maine, 190; People v. Cook, 3 Seld. 67; 1 Hawk. P. C. Div. ed. p. 432. See, as to the Scotch Law, Gunn v. Pro- ctor, Fiscal 2; Brum, 564; Cerm. Proc. 2d Ed. § 884, 885.

6 See to the Scotch Law, Gunn v. Pro- ctor, Fiscal 2; Brum, 564; Cerm. Proc. 2d Ed. § 884, 885.

7 See McKinnon v. Somers, 1 Pa. 207; Aulander v. The Governor, 1 Texas, 628.
$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, are punishable. 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 held that the party opposing such arrest becomes thereby particeps criminis; that is, an accessory in felony and a principal in high treason. Stil, 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, 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. If the indictment is on a statute, of course it must conform to the statutory terms, whatever they may be. Again, —

In re Boyle, 9 Wis. 204; Morse v. Calley, 6 N. H. 222.


Compare with Biggs v. Commonwealth, 11 Wash. 589.

2 Ex parte Snyder, 64 Miss. 68. See Smith v. Lynch, 29 Ohio State, 261.

2 Ante, § 232 et seq.


8 Vol. II. § 1006-1069.


10 See Vol. II. § 1006 et seq.

11 See Vol. II. § 1064 et seq.


13 The State v. Murray, 15 Maine, 100; Rex v. Martin, Russ. & Ry. 100; Reg. v. Allen, Car. & M. 266; Anonymous, 1 20, pl. 80; People v. Thompson, 9 Johns. 79.

14 See Vol. II. § 1064 et seq.


16 Rex v. Hassell, Russ. & Ry. 465; People v. Drell, 7 Johns. 445; Commonwealth v. Miller, 2 Ashm. 61; The State v. Dona, 7 Conn. 485.

17 Rex v. Farvett, 2 East P. C. 482; Vol. II. § 140.


19 The State v. Caldwell, 2 Tyler, 212; The State v. Halley, 2 Srob. 73; The State v. Lovett, 8 Va. 119; Rex v. Farvett, 2 East P. C. 482; See Confection v. Commonwealth, 5 Wash. 437.

20 The State v. Soffer, Harper, 414; Sante, 405; Vol. II. § 1012, 1013.


As to Resisting Castle, while being driven to pound, see The State v. Barrett, 42 N. H. 406.
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 Jury — 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; bribery, actual or attempted, of a judicial or other like officer; persuading a witness to make, in a judicial proceeding, a false oath, which he does, called in law subornation of perjury; attempting to induce him to make such oath; even tampering with him, short of this direct act, as by undertaking to intimidate him; endeavoring, by indirect means, to influence the judge or jury concerning the merits of a cause on trial or on the eve of trial, as by circulating papers respecting its merits; committing perjury; making or publishing false affidavits, prejudicial to justice, or to the workings of the government, in cases not amounting technically to perjury; preventing a coroner from holding an inquest, as by burling the body or otherwise, in a case where an inquest is required by law; personating or falsely pretending to be an officer, or a jurymen, or

1 The State v. Carpenter, 20 Vt. 9; The State v. Keyes, 8 Vt. 57; The State v. Early, 2 Harring. Del. 563; Rex v. Chandler, 2 Ld. Raym. 1398; Rex v. Chandler, 1 Sira. 612, 8 Mo. 386; last sec.; Roberts’s Case, 3 Inst. 136; Commonwealth v. Feeley, 2 Va. Cas. 1; Commonwealth v. Reynolds, 14 Gray, 87; 88; Martin v. The State, 28 Ala. 71; Crim. Proced. 1. § 450; II. § 697; The State v. Amos, 64 Maine, 388; Rex v. Hamp, 6 Cox C. 137. As to the Pennsylvania statute against sacrificing witnesses, see Commonwealth v. Phillips, 3 Pitts. 426; post, § 668.


3 Vol. II. § 1197.

4 2 Russ. Crimes, 31 Eng. ed. 608; Vol. III. § 1197. And see Ashley’s Case, 12 Co. 90.

5 Rex v. Johnson, 2 Shaw, 1; Reg. v. Darby, 7 Mod. 100.

6 Reg. v. Loughran, 1 Crow. & Dir. C. C. 73.

7 4 Bl. Com. 110.


10 Omoaty v. Newell, 8 East, 394; Rex v. De Beannet, 7 Car. & P. 17; Rex v. O’Brien, 2 Sira. 1144, 7 Mod. 378; Vol. II. § 1014, 1092.

11 Rex v. Seagrave, Andr. 201; Anonymous, 7 Mod. 10; Rex v. Froby, 1 Remy 260.

12 Scarlet’s Case, 12 Co. 98; Anonymous, March, 81. pl. 122. Usering 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 practicing attorney for two years.” And a

13 Serfes’ Case, Latch, 203. In this case, money was taken from the soldier for discharging him; so it would perhaps be more accurate to regard the offence as theft.


17 United States v. Evans, 1 Cranch C. C. 149.

18 Ante, § 464 and note; Souman v. Waithana, 46 Conn. 218.

19 Ante, § 467.

20 Crim. Proced. I. § 135, 186; ante, § 464.

21 § 463. Refusing to assist Officer. — From principles already laid down 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, one’s refusal without lawful excuse to undertake the service, or to proceed therein in statute makes it punishable, “if any person shall use or any office established by the constitution or laws of this commonwealth.” Consequently, if one who has not been a licensed practicing attorney for two years accepts the office on being elected, and receives its emoluments, he commits the statutory offence. Commonwealth v. Adams, 3 Met. 76. And see Wayman v. Commonwealth, 14 Bost. 469. 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 failing to execute his office. Kiedder v. The State, 24 Ohio State, 22. And see Daniel v. The State, 3 Hinks, 257; Lansing v. People, 77 Ill. 341; Commonwealth v. Connally, 97 Mass. 297; Brown v. The State, 43 Texas, 478; The State v. Wilders, 7 Baxter, 15.
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. 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." So —

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

§ 470. Oral Blander 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. 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.

§ 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 defeat these objects — as, forcibly or unlawfully preventing an election from being held, bribing or corruptly influencing an elector, receiving as an elector a bribe, casting more than one vote, "the taking or giving of a reward for office of a public nature," 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 Carlyle 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. 497.


4 Ante, § 240; Rex v. Kingston, 8 East, 41; Rex v. Gilkes, 8 Bl. & C. 430, 2 Man. & N. 454.

5 The State v. Soraghan, 40 Ill. 450; Drake v. The State, 60 Ala. 62; Avery v. The State, 63 Ala. 303; Commonwealth v. Chase, 137 Mass. 7; Thomas v. People, 10 Wend. 490.

6 Vol. II. § 348; Rex v. Poore, 2 Sim. 1167; Rex v. Revell, 1 Sim. 420; Rex v. Darby, 8 Sim. 193, Comb. 66; Ex parte Chapman, 4 A. & E. 773; Reg. v. Num, 10 Mod. 180, 187; Reg. v. Langley, 3 Salk. 100, 6 Mod. 124; Reg. v. Spiller, 2 Show. 297, 299; Anonymous, Comb. 46, 66, 66; Rex v. Staples, Andr., 238; Reg. v. Wrightson, 11 Mod. 105; Rex v. Lowe, Andr. 329. Queer, whether verbal slander of a justice of the peace is indictable, unless the words are spoken to him in his presence. Rex v. Wetjen, 2 Camp. 149; 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, 6 Q. B. 855; Reg. v. Ess, 7 Ir. Com. Law, 264. As denying that verbal slander is indictable in this country, see The State v. Wakefield, 8 Miss. Ap. 11.

7 Vol. II. § 42, 46, 49-51; Oldfield’s Case, 12 Co. 71.


* Commonwealth v. Silas, 9 Mass. 417; The State v. Bailey, 51 Maine, 62; The State v. Williams, 25 Maine, 661. See also Walker v. Wynn, 8 Mass. 249; Clark v. Blaney, 2 Pick. 112. Personating Voter at Municipal Election. — It has been held in England (Rex v. Bent, 1 Dec. C. C. 187), and in Canada (Rex 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 councillors; 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 being occupied the place of the common law. Voting at Municipal Election.—In The State v. Liston, 9 Hamp. 635, 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, § 540.

1 Hawk. P. C. 6th ed. c. 67, § 3; Rex v. Taggart, 1 Car. & P. 391.


2 Bl. Com. 149. In the fifth edition of the present work, § 472-476, as above, this subject is explained at length. In § 473, Stat. West. 1 (3 Edw. 1) c. 54 is given; in § 474, 475, are Lord Coke’s comments upon it, from 2 Inst. 225, 226; and in § 467, is given the statute of 2 Rich. 2, stat. 1, c. 6. I do not think it necessary to encumber the later editions with this matter in full. There are also slander and the like, as the Crown, and do not therefore appear important in this connection.
§ 477. [BOOK V.

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.

How with us. — This old doctrine of the English law belongs to a class, 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 "cælat" 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, 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 then 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 seised, and the person punished by law; that all books which are scandalous to the government may be seised, and all persons so exposing them may be punished. And further, that all writers of news, though not scandalous, seditious or subversive upon the government or the state, yet, if they are writers (as there are few others) of false news, whereof discovered, or occasion of disgust, 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 censor following: In presence of His Majesty's order in council to me directed, these are to give public notice, that if war is prevailed on Friday next, the 24th instant, at the palace royal, St. James's, at one of the clock, of which all heralds and purveyors 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 upon 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.

Scroggs's Case, 2 New Nantwich Calendar, 264.

2 Ante, § 92, 97.

3 Ante, § 189 et seq.

§ 478. Political Blunders, &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 crime 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 1 East P. C. 168. 3 1 East P. C. 158. 4 4 Bl. Com. 99; 1 Hawk. P. C. 6th ed. 17, § 54; 1 East P. C. 168. 5 Yet see, as to this country, Vol. II. 6 1 Russ. Crimes, 3d ed. 54 et seq. 261, 285-287.

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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.

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. But as these are of frequent application, it will be sufficient simply to refer to some cases under them and the like English statute. Enactments of this sort are not in affinmar 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 of existing together without law to regulate their mutual relations. This law is called the law of nations. It is in truth common law; 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, libelling a foreign prince or other person in official station abroad, 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; and the deceitfully, maliciously, and wilfully supplying of prisoners of war with unhomely food, not fit to be eaten by man.

§ 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.

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1 Ante, § 190-202.

4 Ante, § 8, 14; Bishop First Book, 802.


9 Ante, § 5, 14; Bishop First Book, 802.

10 Troves Case, 2 East P. C. 601.

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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. Their primary object is the collection of duties and other taxes. Still, by these laws, some crimes have been constituted.

1 United States v. Hoden, 10 Wall. 395; United States v. Three Tons of Coal, 6 Bl. 370.

§ 489. Indictable to endanger Public Health. — The public health is an interest of supreme regard. Therefore every thing of sufficient magnitude, 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; 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, or a horse having a disease communicable by infection to man, 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. So manufactures, lawful in themselves, may become nuisances, if erected in parts of towns where they cannot but greatly inconvenience 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. Again —

1 Auto. § 212 et seq.
3 See The State v. Purse, 4 McCord, 397.
6 Referring to 2 Rob. Abr. 139.
§ 491. Unwholesome Food and Drink. — It is indictable at the common law to corrupt a fountain of water which is to be drunk, or to render unwholesome any food which is to be consumed in the community, or to sell or cause to be used for food 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. And even the common carrier who brings them to market, with knowledge, is indictable. But the act is not indictable if the unwholesome provisions are not intended to be used for food. 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.

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 law. And there are modern statutes, English and American, in affinances of the ancient law.

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

§ 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.

§ 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.

The act is the selling of unwholesome provisions. To prevent which the statute 61 Hen. 8, c. 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, 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 adulfertion of wine is punished with the forfeiture of £400 if done by the wholesale merchant; and £40 if done by the vintner or retail trader.

1 See Rex v. Harris, 4 T. R. 392, 2 Leach, 4th ed. 619; The State v. Patterson, 14 Ga. 46.
5 Burnby v. Rollitt, 11 J. R. 827; 4 Bl. Comm. 102, where this learned commentator says: "A second offence against public health is the selling of unwholesome provisions. To prevent which the statute 61 Hen. 8, c. 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, 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 adulfertion of wine is punished with the forfeiture of £400 if done by the wholesale merchant; and £40 if done by the vintner or retail trader."

1 See Rex v. Harris, 4 T. R. 392, 2 Leach, 4th ed. 619; The State v. Patterson, 14 Ga. 46.
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; non-conformity to the worship of the church; beating a clerk in orders, as an offence higher than an ordinary battery; 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. But —

Apostasy, &c. — Imposture — Pretended Prophesies. — Whether it follows from this, that apostasy, which is a total renunciation of Christianity by those who have embraced it; those darker heresies which tend to overturn Christianity itself, and not merely some form of it; religious imposture, false and pretended prophecies, 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.

§ 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 2 C. 35.
2 4 Bl. Com. 53.
3 4 Bl. Com. 217.
5 290; Shover v. The State, 5 Eng. 290.
6 1 Bancroft Hist. U. S. 243; Vol. II. § 74.
§ 500. How protected by Law.—But however uncertain may be the extent to which the common law protects Christianity, plainly it deserves fully the public morals. And every act which it deems sufficiently evil and direct, tending to impair them, is punished as crime. Thus, —

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

and writings; the public utterance of obscene words; the indecent and public exposure of one’s person, or the person of another; and, generally, all acts of gross and open lewdness, are indictable at the common law. But, —

§ 501. Adultery—Fornication—Private Exposure of Person—Solicitations.—For reasons already considered, the same things, — as adultery and fornication, though committed with many persons, solicitations to permit these offenses, exposure of a man’s person to one female only, — 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 offense against public decency. 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

2 1 East, P. C. 5; The State v. Brooks, 6 Ida. 73; Nabors v. The State, 6 Ala. 200; The State v. Schmitte, 6 Rich. 260; And see The State v. Williams, 4 Ida. 400.
3 The State v. Brooks, 6 Ida. 73.
4 It is a mistake to suppose, that Sabbath-keeping is a thing only of religious observances, or a mere tone of a sect. There are, indeed, views as to the manner of the observance, or the particular day, peculiar to each; yet the setting apart, by the whole community, of one day 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 alteration 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 bire of prayer, should aim his gun where the ball would take effect on his nearest friend.
5 Acts, § 122 et seq. ⁴ Bl. Com. 168; Reg. v. Williams, 10 Mod. 63; 1 Ellis, 284; Smith v. The State, 9 Gill, 425; The State v. Evans.
6 The Act Required. [Book V.

811
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.  

§ 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.

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

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

Rand. 327; Commonwealth v. Isaac, 5 Rand. 624; Commonwealth v. Jones, 2 Ga. 565. And see Rex v. Johnson, Corp. Ch. 977; Rex v. Talbot, 11 Mod. 416; Chastain’s Case, 12 Mod. 508; The State v. Cone, 3 Humph. 414; Stat. Crimes, § 654.

1 In The State v. Dowson, 45 N. H. 543, it was said to be indictable as well under 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 were in the habit of being out at night for some wicked purpose. See Recoe’s Crim. Ev. 746, where this case is cited. In 1 Burn’s Jus. Crim. 765, night-walkers are said to be those who are ‘overdrop men’s houses, cast men’s gates, carts, and the like, upon ponds, or commit other outrages or misdemeanours in the night; or shall be suspected to be plunging or otherwise likely to disturb the peace, or to 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 demeanour. [Referring to Bouv. Law Dict. it. Night-walkers, and Bawdlers of Rowdy-houses; 2 Hawk. P. C. c. 6, § 38; c. 10, §§ 38 and 39; § 12, § 90.] From these authorities, it is obvious, we think, that, to constitute this offence, the habit of being abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrong 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 commis-sion of crime. p. 644, 646.

2 Rex v. Doleval, 3 Burn. 1484, 1485.
3 4 H. Com. 64, note; Commonwealth v. Sharpless, 2 S. & R. 91, 92.
5 4 H. Com. 64.
6 1 Bishop Mar. & Div. § 597.

§ 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”; yet Blackstone remarks, that, in the times of popery, it was subject only to ecclesiastical censure. Stat. 25, Hen. 8, c. 6, sufficiently early in date to be common law in this country, made it felony; 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.

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.

§ 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; and more broadly, that so is “every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals.”

Gaming and other Disorderly Houses.—And the keeping of a common gaming-house, or of a disorderly ale-house or inn, or of any other disorderly house, is a common-law offence, on account, 1 Hawk. P. C. 8th ed. c. 4, p. 287; Cory ed. p. 851.
4 Commonwealth v. Thomas, 1 Va. Cas. 207; Davis v. The State, 3 Har. & J. 154.
5 1 Bishop Mar. & Div. § 729; 2 H. Com. 644.
6 Rex v. Bradford, Combr. 304. And see Hall’s Case, 1 Mod. 58.
7 Knowles v. The State, 3 Day, 202; See Jacks v. The State, 22 Ala. 73; Rex v. Grey, 4 Fost. & P. 73; Rex v. Saunders, 1 Q. B. D. 15, 19, 18 Cox C. C. 116.
8 “The common law, which sanctions profane theatrical performances, denominates as unlawful such as are demoralizing, licentious, or obscene.” Robertson, J., in Ible v. Commonwealth, 2 Duvall, 86.
10 Stephens v. Watson, 1 Salk. 45; Hall v. The State, 4 Harring. Del. 151, 145.
11 The State v. Bailey, 1 Post N. H.
among other reasons, of its evil influence on the public morals. But, —

Gaming—Cook-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 cook-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

§ 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, 9 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 — not being adapted to the circumstances of our colonial condition — were not [by us] adopted, used, or approved. 10

1 Burn Ec. Law, Schools.
2 Id.; Rex v. York, 4 T. R. 450; Rex v. Lithfield, 2 Str. 1028.
3 Matthews v. Burdett, 3 Salk. 318; Anonymous, 2 Show. 155; Rex v. Fox, 12 Mod. 231; Stat. Crimes, § 166.
4 And see ante, § 28.
5 See Vol. II. Sepulture.
7 Abo, § 452-455.
8 Commonwealth v. Cooley, 10 Pick. 27; Kansan’s Case, 1 Greenl. 229.
10 Rex v. Lynn, 2 T. R. 733, 1 Leach, 4th ed. 497; Commonwealth v. Cooley, 10 Pick. 27; Kansas’s Case, 1 Greenl. 229.
11 See Vol. II. Sepulture.
§ 510. 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. 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.

§ 511. 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, 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. 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.

1 1 Bishop Mar. Women, § 475 et seq.
3 Post, § 647.
4 The crime of homicide partly concerned the king, whose peace was infringed, and partly, as Buxton expresses it, “the person who was killed.” 2 Beecres Hist. Eng. Law, 3d ed. 9.
5 1 East P. C. 223, 229; Rex v. Hughes, 5 Car. & P. 123; Reg. v. Allison,

§ 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. In our country, there are no restrains 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

6 Car. & P. 418; Rex v. Dyson, Huns. & Ry. 432; ante, § 209; Vol. II. § 1577. Moody, 386; Reg. v. Clerk, 7 Mod. 18; Hales v. Petri, 1 Brow. 252, 269, 261; Rex v. Ward, 1 Lev. 8; Vol. II. § 1167.
7 Post, §§ 516, 516, 516.
8 Vol. II. § 1187.
9 Dawes on Crimes, 72.
10 Anonymous, 8 Dy. 266, pl. 19.
§ 515. THE ACT REQUIRED. [BOOK V.

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.  

§ 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 injures himself a mayhem.  

§ 514. Injuries to One's own Property. — The law gives men full control over their own property, 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, once lays it down that a vagrant, as such, is not indictable.  

But we find, from early times, statutes authorizing summary proceedings against idlers, vagabonds, and rogues; to be regarded perhaps by us as regulations concerning pimps, not therefore belonging to our common law. 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.

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

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

§ 517. Owling. — Owling is an old offense, 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 4 Geo. 4, c. 47, § 2, to be indictable in England; and probably no one considers that it was ever a crime in this country.

§ 518. Forestalling, Regranting, and Engrossing: —

In General. — These are kinds of offenses, indictable both under

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

2 Ante, § 529. See Vol. II. § 1001 et seq.

Egan, 1 Crawf. 1 D. C. 328; Anonymus, 11 Mod. 5; Rex v. Miller, 2 Stras. 1058; Rex v. Talbot, 11 Mod. 415; Clinton's Case, 12 Mod. 654; Rex v. Brown, 8 T. R. 29; Rex v. Patchett, 6 East. 3594; Soldier's Case, 1 Will. 351; Rex v. Rhodes, 4 T. R. 210; Rex v. Hall, 3 B. R. 1053; 4 B. Com. 199; Dawes on Crimes, 85.

1 For a comparison of the English and Irish statutes, see 1 Gai. Crim. Law, 908. And see ante, § 509.

2 In the State v. Marcy, 1 McMe- linn, 504, the court held the South Carolina statute of 1839 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. Mavity, 14 Gray, 497; Commonwealth v. Carter, 100 Mass. 17; The State v. Gaster, 38 N. C. 599; Boulo v. The State, 49 Ala. 22; Allen v. The State, 51 Ga. 254; Walters v. The State, 52 Ga. 574.

3 4 Bl. Com. 166.

4 4 Bl. Com. 165.


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. 388.

7 4 Bl. Com. 164 and note.

8 See ante, § 492 et seq.

9 For the procedure connected with these offenses, see Crim. Proc. Ill. § 500 et seq.
§ 521. **The Act Required.**

[Book V.]

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 Vic. 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. 3, c. 14, as follows:

**Forestalling** — is "the buying or contracting for any merchandize 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 anything other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and punishable 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 necessities 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 necessities of life, is in sufficient supply, buy in large quantities and hoard the article for a higher price,—stimulating, therefore, production unduly, and compelling consumers to pay, while the stimulant is on, too much for it,—they do a wrong alike to producer, to consumer, and to the honest retail trader who is obliged to keep it in stock for his customers. The hoarder,

1 4 Bl. Com. 165. And see Rex v. Rusby, Peake Add. Cas. 161, and post, Davie's 1 Rob. 11; Rex v. Waddington, 8 528, note.
1 East, 143; Rex v. Webb, 14 East, 409; 2 Pettit v. Nutter, Thack. 7 Moore P. C. 230, 209.
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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 risk 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 in 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. Dana 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 sorely 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.** &c. — In Russell on Crimes, 8 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. 36, and see to the end of the chapter. See also Louisville & N. C. R. R. v. Louisville, 8 B. Monr. 601.
3 1 Barn. Crim. 96 Eng. ed. 158.
§ 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, as being detrimental to the supply of the laboring and manufacturing poor of the kingdom. 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

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.

§ 525. Continued.—Russell proceeds: "It has been sometimes contended, that forestalling, regrating, and engrossing were punishable only by the provisions of these statutes; but that doctrine has not been admitted, and they still continue offences at common law; though their precise extent and definition at the present day may perhaps admit of some doubt." 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.

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, C. C. R. 263; Rex v. Waddington, 1 East, 143.

3 1 Hawk. C. C. R. 15.

4 1 Russ. Crimes, 3d Ed. 188, 189; 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 to consider 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 of no evil was put in use, that is, no price was enhanced, et alia aliter, and thereof he pleaded not guilty. Whereby it appeared, that the attempt by words to enhance the price of merchandise was punishable by law, and did sound in forestalling; and is appeal by the book, that the punishment was by fine and reparations. 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 wool was abated; and, upon presentment hereof made, they appeared, and upon their confession they were put to fine and ran sum." 3 Inst. 106.
§ 527. Engrossing. — 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.  

§ 528. Regrating. — It is not easy to see how regrating, simply, as defined by Blackstone, 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.

1 See Crim. Proc. 2d. 439. 2 See 1st Thurlow, 1 East, 148; Rex v. Waddling, 1 East, 107. 3 See 1st Thurlow, 1 East, 148; Rex v. Wadding, 1 East, 107. 4 See 3rd Thurlow, 1 East, 148; Rex v. Wadding, 1 East, 107. 5 See 3rd Thurlow, 1 East, 148; Rex v. Wadding, 1 East, 107.
of forestalling, engraving, 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 near where he states what the judges hold; 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.\(^2\) See Vol. II. Concordia.

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\(^1\) Ante, § 212 et seq.


\(^3\) The State v. Commissioners, Riley, 146; Raug v. Stuberger, 2 Watts, 29; The State v. Commissioners, 3 Hill, S. C. 149; Commonwealth v. Bush, 2 Harris, Pa. 186.

\(^4\) Rex v. Timbrell, 1 Nev. & P. 710, 6 A. & E. 143. And see Commonwealth v. Alger, 7 Cush. 68.

\(^5\) Commonwealth v. Church, 1 Raw., 158; The State v. Thompson, 2 Stroh, 12; Rex v. Tafford, 1 B. & Ad. 924, 557; Rex v. Watts, 2 Raw. 676; Beavon v. Morris, 7 Hill, N. Y. 575; Rex v. Russell, 6 B. & C. 505; Cummings v. Sprague, 4 Harrington Del. 516.

\(^6\) See Vol. II. § 1296-1297.

\(^7\) Rex v. Edgerty, 131; Reg. v. Leach, 6 Mod. 145; Rex v. Stanton, 2 Show. 20; Commonwealth v. Eckert, 2 Browne, Pa. 249.


\(^9\) Rex v. White, 1 Bar. 323; Commonwealth v. Brown, 35 Met. 856; 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

§ 582. 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

1 Rex v. Smith, 1 Sra. 704; The State v. Halve, 30 Maine, 65. And see Commonwealth v. Smith, 6 Cush. 90.
2 Anonymous, 12 Mod. 424; Charleston v. Sheraton, 1 Swan, Tenn. 213; Rex v. Taylor, 2 Sra. 1167; Bradley v. People, 52 Barb. 72; People v. Sandis, 1 Johns. 78; 3007-1160. And see Williams v. Augusta, 4 Ga. 500. 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. Towns, 95 Mass. 587.
3 Rex v. Wharton, 12 Mod. 610; Rex v. Wigg, 2 Salk. 499; 2 Ld. Raym. 1163; Commonwealth v. Welby, 6 Rich. 729; Commonwealth v. Chapin, 5 Pick. 159.
4 Ante, § 490, 500, 502, 504; post, § 1073 et seq.
5 Ante, § 1325, 1270.
6 Reg. v. Mumpah, 11 Cox C. C. 908; Reg. v. Hadfield, Law Rep. 1 C. C. 558,
9 The State v. Grand Trunk Railway, 58 Maine, 175; post, § 1074-1076.
10 See Hall v. The State, 3 Harr., Del. 132, 141. As to what is an “Inn,” “Tavern,” “Hotel,” &c., see State v. Crimine, 9 Conn. 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 dispose with that tender;” 2 though, from a later case, it would appear that the tender is always necessary. 3 So if, having received the guest, he refuses to find for the guest food and lodging, he is indictable. 4 But, to produce these consequences, the person applying as guest must be a traveller. 5 Such is the clear English doctrine; and it is affirmed in a dictum of the North Carolina court. 6 Coleridge, J., seemed to put the liability on the ground that “innkeepers are a sort of public servants;” 7 and in this view perhaps we should have discussed the topic under a previous title. 8 Another view is, that the innkeeper who allows 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. 9 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. 10 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 Ante, § 457, 7 Car. & P. 462, 482.
2 See Norton v. Trigg, 1 How. 290, 300.
3 Tully v. Knight, 5 M. & W. 299, 3 Jur. 674.
5 Rex v. Loelihn, 12 Mod. 446.
6 The State v. Mathews, 2 Dev. & Bat. 454.
7 In Rex v. Inn, 7 Car. & P. 219, 220.
8 Ante, § 499 et seq.
9 And see ante, § 232.
10 Offences by Innkeepers enumerated. — Hales 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 actually 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 refuses 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 grievances, but may also be indicted and fined at the suit of the king.” 1 Hawk. P. C. Carwh. ed. p. 714, § 2. And see Reg. v. Rymer, 2 Q. B. D. 186, 10 Coxe C. C. 378.

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CHAPTER XXXIX.

PROTECTION TO THE PUBLIC ORDER AND TRANQUILLITY.

§ 533. In General. — Whatever, of sufficient magnitude for the law's notice, one wilfully does to the disturbance of the public order or tranquillity, is indictable at the common law. Thus, —

§ 534. Riot — Riot — Unlawful Assembly. — Riots, routs, and unlawful assemblies, three allied disturbances of the public tranquillity, are thus punishable. They severally require, says Blackstone, 3 three persons, at least, to constitute them. An unlawful assembly is where 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. 4 A riot 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

§ 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. 6

Salk. 646, 665; B. v. Ellis, Holt, 666; The State v. Russell, 45 N. H. 83. For other definitions, see Vol. II. § 1143 and note.

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 a high treason by Statute 3 Edw. 3, 6, 6, when the king was a minor, and a change in religion to be effected: but that statute was repealed by Statute 1 Mary, c. I, among the other treasons created since the 3 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 simple 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 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 the reign of Mary, when popery was intended to be re-established, which was like to produce great discontent: 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 contumaciously and continually disregard such command, they shall be felons without benefit of clergy. And further, 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 hindrances 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 such houses, they shall be felons without benefit of clergy."
Private Fighting together. — Fighting in a private place is either no offense or an assault and battery, according to the circumstances.

Public. (Prize-fight). — Of course, a public prize-fight is indictable. 8

§ 586. Breaches of Peace. — These offenses 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. 9

Thus,

Forcible Detainer. (Defense 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; 1 yet, if a man undertakes to retain what he knows to be a wrongful possession, by a force or by numbers reasonably exciting terror, he is indictable. This offense is called in law a forcible detainer. 10

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 real property, even though he is proceeding under a just claim. 8

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

§ 587. 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 several indictable at the common law, as either forcible entries or other breaches of the peace.

§ 588. Limits of Doctrine. — In these cases, the trespass is not alone indictable, for the thing done must go further; 9 while the

Humph. 266; The State v. Bennett, 4 Dev. & Bat. 43; The State v. Mills, 2 Dev. 490; The State v. Ray, 10 Ire. 37; The State v. Philips, 10 Ire. 17; The State v. Flowers, 1 Car. Law Repos. 97; See, as to real estate, The State v. Fort, 4 Dev. & Bat. 192.

1 V. Vol. II. § 483; Commonwealth v. Shattuck, 4 Cush. 141; Burns v. The State, 3 Rev. 415; The State v. Speirs, 1 Bre. 119; The State v. Pollock, 4 Ire. 306; The State v. Fiddic, 4 Ire. 99; The State v. Newlands, 4 Jur. 225; Rex v. Nicholls, 2 Key. 615; The State v. Toliver, 6 Ire. 452; Rex v. Smyth, 6 Car. & P. 201; Harding’s Case, 1 Greenl. 22; The State v. Morris, 3 Miss. 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; Beaucamp v. Morris, 4 Bibb, 312; Rex v. Storrs, 3 Bar. 1058, 1059.

3 The State v. Elliott, 11 N. H. 540.


5 Vol. II. § 517; The State v. McDevoll, 1 Hawks, 499; The State v. Watkins, 4 Humph. 266; The State v. Mills, 2 Dev. 490; The State v. Farnworth, 10 Yerg. 291; Rex v. Harris, 11 Mod. 118; And see Rex v. Gardiner, 1 Russ. Crimes, 34 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.

6 Rex v. Wyond, 7 Mod. 296. And see The State v. Toliver, 5 Ire. 452; Rex v. Harris, 11 Mod. 118.

7 The State v. Batchelder, 6 N. H. 549.

8 The State v. Wilson, 3 Miss. 125; The State v. Morris, 3 Miss. 127.

9 Commonwealth v. Taylor, 6 Bump. 277.

10 The State v. Phillips, 10 Ire. 17; Henderson v. Commonwealth, 3 Gratt. 705; Commonwealth v. Keep of Prison, 1 Ashm. 146; Rex v. Bake, 3 Ire. 371; Rex v. Smyth, 6 Car. & P. 201; 1 Moody’s Cases, 2 R. 153; The State v. Pollock, 1 Ire. 415; The State v. Ray, 10 Ire. 32; The State v. Mills, 2 Dev. 490; The State v. Watkiss, 10 Yerg. 291; Rex v. Harris, 11 Mod. 118; And see Rex v. Gardiner, 1 Russ. Crimes, 34 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.
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terror may be excited as well by numbers as by other means. Therefore, for example,—

Excessive Distress — Abusing Family. — A landlord does not commit crime by taking an excessive distress; 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.

§ 539. Peace actually broken — Tending to Breach. — To lay the foundation for a criminal prosecution the peace need not 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; going about armed, with unusual and dangerous weapons, to the terror of the people; riotously driving in a carriage through the streets of a populous city, to the hazard of the safety of the inhabitants; publishing libels, even in some extreme cases uttering words calculated to stir up resentments and quarrels; eavesdropping; being a common scold; and the like; are cognizable criminally by the common law. For —

The Reason. — The criminal law is as well preventive as vindic-

§ 541. Barratry — Maintenance — Champerty. — We have a triangle of analogous offences known as barratry, maintenance, and champerty, which are rather actual than attempted disturbances of the reposes of the community. The gist of them severally is, that they embolden 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;" 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;" and 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."

§ 542. Disturbing Meetings. — When people assemble for worship, or in their town meetings, or in others of the like sort, or probably always when they come together in an orderly way for

1 Ante, § 210.
2 Ante, § 438, 439; post, § 728 et seq.
3 Discuss Vol. II, § 68 et seq.
4 Discuss Vol. II, § 121 et seq.
5 4 Bl. Com. 124; Case of Barratry, 9 Co. 395, 397; Rex v. —, 3 Mod. 97.
7 4 Bl. Com. 134; Brown v. Dear-
8 champ, 5 T. B. Mon. 415.
9 4 Bl. Com. 135; Thurston v. Perdi-
10 va, 1 Pick. 415; Rust v. Larue, 4 Litt. 411, 417; Douglas v. Wood, 1 Swan, 493; Knight v. Sawin, 5 Greenl. 381; Byrd v. Ogden, 9 Ala. 272; Rex v. Vatter, 1 Ohio, 132; McMullen v. Guest, 2 Texas, 275; Lathrop v. Amerhart Bank, 2 Met. 452; Holloway v. Lowe, 7 Port. 488.
13 Campbell v. Commonwealth, 9 Smith, Pa. 266.
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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.

2 Ante, § 486.
3 The State v. Jasper, 4 Dev. 233.
4 Rex v. Wroughton, 3 Burr. 1688.
5 As to religious meetings, see 1 Russ. 356.

CRAP. XL. PROTECTION TO INDIVIDUALS. § 546

CHAPTER XL.

PROTECTION TO INDIVIDUALS.

§ 544-546. Introduction.
665-669. Against acquiring and retaining Property.
591. Against Personal Reputation.
625, 655. Combinations to commit Private Injuries.

§ 544. Scope of this Chapter.—We have already seen something of the principles on which the criminal law casts its protection over the individual, and of the extent of such protection.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. And there are in many of the States other divisions also, introduced by statutes. We have seen, that it is likewise a crime against the public.

Mayhem.—Another like offence, but less grave, is mayhem. It is an injury to a man by which he is rendered less able, in fighting, to defend himself or annoy his adversary.

§ 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 and battery. A battery is any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent; an assault is less than a battery, where the

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. An assault is included in every battery.

§ 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.

§ 550. Reason why—(Assault and Battery).—These offences are generally spoken of in the books as breaches of the peace, 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. 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, 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.

§ 551. Further of Reasons—Erroneous Old Dilett. Co.—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 inadvertantly from the lips of some old
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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 offenses, 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 offenses 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 offenses against the individual, of which the latter is included in the former, 3 are punishable by the common law.

Robbery. — Robbery, another common-law offense, is a violent larceny from the person (or from the immediate presence, which is termed 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. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
2 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
3 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
4 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
5 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
6 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.
7 4 Bl. Com. 219; 1 East P. C. 423; The State v. Rollins, 8 N. H. 550; Rex v. Bally, Comb. 10.

§ 554. Rangers. — 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, 8 or when she does not consent; 9 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. 9 Puberty in the female is not essential. 10

§ 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. 11 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; 12 but whether this statute is common law with us is a question not settled by adjudication. 13

§ 556. Further of Physical Force. — Let us proceed to further illustrations. — the doctrine being, it is remembered, 14 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; 15 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; 16 or, if the child dies,
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for a felonious homicide. And the same consequence follows if he neglects, being under legal obligation, to furnish it with suitable food and clothing; or thus neglects a servant, apprentice, or other person, where there is a legal duty.

§ 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; so, if the injury falls short of the deprivation of life, he may be punished for a misdemeanor. And

Unwholesome Food. — Partly on this ground rests the offence, already mentioned, of providing unwholesome food to be consumed in the community.

§ 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 is the breaking and entering, in the night, of another’s dwelling-house, with intent to commit a felony therein. The latter is the malicious burning of another’s house.


§ 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, 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; 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. 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. 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. 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. 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.
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." § 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 guilt or fraud cognizable by the criminal law,—being, indeed, a plain and admitted ground of common-law liability to indictment,—surely such guilt 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 harz 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. And later elementary writers follow Hale. But this proposition rests merely on private opinion, having never been affirmed in adjudication. And

1 The State v. Weare, Husee, 9, 13.
2 Hale, P. C. 426.
3 1 East, P. C. 266. And see Commissioners Phillips & Walcott’s Report on the Penal Code of Massachusetts, A. D. 1814, 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, 207, 2d ed. 177,—an authority which hardly sustains them. For instance, it is there said: “Among other charges against Patrick Kinmunmouth is that of breaking into a person’s house, and grievously alarming his wife, recently delivered, to the great injury (the bill says) of her health, and so that her child died, soon after, at her breast. The indictment 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 bill. 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.

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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.” § 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 not 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. So all the books

1 Erskine, J. in Reg. v. Pitts, Car. & 2 United States v. Freeman, 4 Mason, M. 695.
2 Rex v. Evans, 1 Russ. Crimes, 2d ed. 494 3d
3 Russ. Crimes, 2d ed. 493 4d
4 And see 1 Haw. P. C. 9th ed. c. 31, § 7

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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, there is a difficulty in making the act and intent appear concurrent in point of time, because he has lost power over this agent, and cannot prevent the execution if he repents. Probably this old doctrine is not to be deemed law at the present day. 1

1 Ante, § 810.
2 Ante, § 397.

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. Areon, 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 "Common Law Crimes." Two, of considerable consequence, not included within either the volumes, yet not so much as it is deemed best to occupy much space with, are the Slave Trade and Revolt.


4. Revolt. — Making and conspireing to make a revolt or mutiny on shipboard are also statutory offences against the

CHAP. XL.] PROTECTION TO INDIVIDUALS. § 567

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.

Compound Larceny. — A larceny committed under certain circumstances of aggravation is termed a compound larceny.

Thus,

From the Person — from Shop — from Dwelling-house — Robbery.

— Of this class are larcenies from the person, 4 from the dwelling-house, from the shop, 5 and robbery, 6 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, § 735, note.

2 Vol. II, § 922 et seq.

3 2 East C. C. 705, 706-708; Commonwealth v. Dimond, 3 C. C. 325; Rev. v. Thompson, 1 Moody, 78; Reg. v. Walls, 2 Car. & K. 214.


5 Ante, § 569; Vol. II, § 858, 1159.

6 Ante, § 569; Vol. II, § 858, 1159.
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

§ 588. 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 does this 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

§ 593. How in our States. (Misappropriation 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." 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; ⁴ but the prevailing and better opinion is, that it does.⁵

¹ Post, § 699.
² See, as exemplifying the nature of this offence, Rex v. Groves, 1 Moody, 447; People v. Dalton, 15 N. & Q., 381; Rex v. Chapman, 1 Key & K. 119; Rex v. Taylor, 8 B. & P. 506; Rex v. Jackson, 1 Key & K. 884; Rex v. Hall, 10 N. & Q., 463; 8 Stark. 67; Commonwealth v. Simpson, 2 Met. 198; Rex v. Creed, 1 Key & K. 68; Commonwealth v. Libby, 11 Met. 64; Rex v. Murray, 6 Key & P. 145, 1 Moody, 275; Rex v. Norman, 3 Key & M. 501; Rex v. Heublein, 2 Leach, 4th ed., 1038; Ross. & Ry. 100; The State v. Neill, 9 Key. 112; Vol. II, § 318 et seq.
³ § 4, Bl. Com. 240, 244.
⁴ See post, § 625.
⁵ The State v. Wheeler, 3 Va. 344, and see Elden v. Knight, 3 Texas, 312; Black v. The State, 2 Mo. 676; People v. Smith, 6 Key & C. 268; Loeb v. Edgerton, 19 Wend. 410; People v.
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 ques-
tion cannot be settled by legal argumentation.

1 Statutory Malicious Mischief. —
As to statutory malicious mischief, see Vol. II. § 985, 989, 990, 991, 995, 997, 1000; and particularly Stat. Crimes, § 155, note, 245, 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 imprison-
ment, a conspiracy to destroy a vessel in
order to defraud underwriters or per-
sons having a lien upon it; and the build-
ing or fitting out of a vessel to be so
destroyed. And they make it a capital of-
fence, as well as a misdemeanor, 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 enter into or otherwise destroy a ves-

sect. "to which he belongs" on the high

sea. And they make the unsuccessful attempt punishable, but less severely. These provisions are a mere re-enact-
mant of the old law, with changes of for-
mer ones; as see Act of March 28, 1824, and
Act of March 3, 1825, 2 Stats. at
Large, 290, and 4 Th. 122. And see, as
perhaps relating to some changes in phrasology, e. g., The State, 2 Head, 491; United States v. Johns, 1 Wash. C. C. 328, 4 Dall. 412. For En-

lish statutes which served as the origi-
nals of our own, see 2 East P. 1056 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 part; it is satisfied
when the vessel is unfit for service
beyond recovery by ordinary means.
Stat. Crimes, § 224. And see § 241 and
note, 225, 446. Therefore, when holes
were bored in a vessel's bottom, and she

flitted 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. 328, 4

Dall. 412. And see United States v.

Yarnam, 2 Wash. C. C. 146. But, says

Mr. East, "If the ship be only run

aground or stranded upon a rock, and be

afterwards get off in a condition to be

capable of being easily refitted, she

cannot be said to be "cast away or de-

stroyed."" — De Lando's Case, 2 East P.

C. 1082. "To defraud any person that

may have underwritten," &c. A

 corporation is a "person," within this provi-

sion. Stat. Crimes, § 212. And, on a

trial, an act of incorporation being

proved, it is only necessary to show that

the company was de facto or

organized, and conducting as a corporation,

and persons usually doing business as its

officers signed the policy. It was also

observed: "This law punishes the act

when done with an intent to prejudice;

it does not require that there should be

an actual prejudice. The prejudice in-
tended is to be to a person who has

underwritten, written, or with whom

the policy thereto, which, for which the

person known, is valid; and does not pre-

scribe 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. Coxe, 5 Mc-

Lean, 513. The Procedure. — See, as

to the form of the indictment and fur-

ther as to the proofs, United States v.

McAvoy, 4 Hatch, 418; United States v.

Johns, 1 Wash. C. C. 328; Reg. v. Rohn,

4 East & 65. Under State Laws. — It seems to fol

low, from principles already discussed

(see ante, § 152, and other places), that

it is now competent for the States to pun-

ish offenses of this sort, committed

beyond their territorial limits. For il-

lustration: The Massachusetts statute

provides, that "whoever willfully casts
away, burns, sinks, or otherwise destroys

a ship or vessel, with intent to injure or
defraud any owner of such ship or ves-

sel, 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. 101, § 76. But though the

writor 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. 555; Common-

wealth v. Eyton, 2 Mass. 77; Reg. v. Jones,

2 Id. Raym. 1013; Anonymous, Loof, 146; Anonymous, 7 Mad. 40; Rex v.

Govern, Say. 295; The States, Grow, 4

Stroth, 198; People v. Stone, 2 W. 162;

Commonwealth v. Warren, 6 Mass. 75;

Repulencia v. Tischker, 1 Dall. 386; Com-

monwealth v. Speer, 2 Va. Cas. 65; The

State v. Pattle, 4 Hawks, 480; Peo-

ple v. Gates, 13 Writ. 311, 312; Repul-

encia v. Powell, 1 Dall. 47; The State v.

Stilwell, 2 Me. 456, 466; Harris v. Com-

monwealth, 5 Barr. 80; Rex v. Bowles, 4 Car. & P. 502; Rex v. Fawcett, 2 East P. C. 802.

Anonymous, 6 Mod. 105; People v.

Babcock, 7 Johns. 201; Cross v. Peters,

1 Greenl. 375, 387; Commonwealth v.

Warren, 6 Mass. 72; People v. Stone,

9 Wend. 182; The State v. Strob, 1 Rich.

224; The State v. Pattle, 4 Hawks, 480;

Repulencia v. Powell, 1 Dall. 47. And

see Rex v. Plunt, Russ. & Rye. 490.

Rex v. Fawcett, 2 East P. C. 802;

Commonwealth v. Davidson, 1 Cush. 83;

Rex v. Dale, 7 Car. & P. 328; The State

v. Little, 1 N. H. 287, 288; People v.

Thomas, 3 Hill, N. Y. 160; People v.

Galloway, 17 Wend. 540. As to the

limit of the doctrine on this point, see

The State v. Mills, 17 Maine, 311.

Vol. II. § 181-184.

Anonymous, 6 Mod. 105, note; 2

East P. C. 802.

1 Gab. Crim. Law, 206.


75; and see Repulencia v. Powell, 1

Dall. 47.

Vol. II. § 490 et seq.

Ante, § 434, 435. It is said that for-

gery was indictable as a cheat at common

law.
§ 572.

§ 572 a. Fraudulent Conveyance — (Secrecy — Mortgaged, &c.) — The statute of 12 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 § 2, "all and every the parties" to the fraudulent conveyance, "and being privy and knowing of the same," who "shall willingly and willingly put in use, aver, 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 mainprize." 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

Frauds against Bankrupt Acts. — It is not proper to discuss these frauds. There have long been statutes in England against them and the like, under the insolvent laws; as see 1 Haw. P. C. Carv. ed. p. 588, 588; 2 Russ. Crim. 51 Eng. ed. 228 et seq., 236; 4 Ill. Com. 166. And the English books contain various reported cases on this subject, as — Reg. v. Mitchell, 4 Car. & P. 251; Reg. v. Walters, 5 Car. & P. 188; Reg. v. Radcliffe, 2 Moody, 61; Reg. v. Murrell, 2 Car. & M. 629; Reg. v. Landa, Deans 567, 38 Eng. L. & Eq. 536; Reg. v. Gordon, Deans 568; Reg. v. Slogett, Deans 569, 39 Eng. L. & Eq. 536; Reg. v. Scott, Deans 569, 39 Eng. L. & Eq. 536; Reg. v. Sheprid & Co., 536; Reg. v. Shephard, 536; Reg. v. Kell, 536; Reg. v. Millar, 536.

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§ 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


1 4 Bl. Com. 141; 1 Rest. Crimes, 32 Eng. ed. 142; 1 Hawk. P. C. c. 65, § 1; Reg. v. Tracy, 6 Mod. 38; Rex v. Hard- burt, 1 Ld. Raym. 143, 149; Rameau v. Fletcher, 15 Mass. 525; Essepinica v. Hammon, 1 Yeates, 71; The State v. Stotts, 6 Blackf. 490; People v. Whaley, 6 Cow. 661; Reg. v. Best, 2 Moody, 254; Smythe v. Case, Palmer, 318; Rex v. Baines, 6 Mod. 193; Commonwealth v. Bagley, 7 Pick. 579; Sheriff v. Woods, 1 Pick. 171; Reg. v. Woodward, 11 Mod. 127. See Vol. II, § 300, for a definition differing slightly from this in terms.

2 Ante, § 545.

3 Ante, § 550, 556.

4 Stat. Crimes, § 80-90, 125 et seq.

§ 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 lesser 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 Enters and Detainers. — These are indictable, not to protect the reality, but because of their disturbing the public peace.6

§ 578. Choses in Action — (Tarceny). — 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 Bliss v. Tobey, 2 Pick. 320, 325.

2 McNeal v. Wood, & Blackf. 492.

3 Atto, § 290.

4 Ante, § 303; Vol. II, § 301, 996.

5 Ante, § 565-670.

6 Ante, § 666.

7 Vol. II, § 495, 496.

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receive it. This exception has also been abrogated by statutes in most or all of the States. So—

Wild Animals — Animals fera naturae and unclaimed are not sufficiently property to be the subjects of common-law larceny; and, of this doctrine, only a few statutory modifications have been made.

§ 573. Too Small — (Larceny). — Lastly, we have the extensive influence of the maxim, that the law does not regard small things. 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, it is not to take the mere use 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

—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. 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; 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; and so, in these and other like cases, as, where an apprentice is seduced from his master’s service, the government merely permits the party injured to carry on, in its courts, a suit for civil redress, 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; while,
§ 584. The Act Required. [Book V.]

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 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. Forgerv — 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 misleading or altering it, thereby prevails on another to sign it, supposing himself executing what is different. 3 Yet circum-

1 Post, § 685.
2 Post, § 685.
4 Ante, § 671; post, § 595.
5 Ante, § 671; post, § 595.
8 Ante, § 672.
9 Ante, § 672.
10 The State v. Stoll, 1 Rich. 244; People v. Stone, 2 Wend. 126.
8 Ante, § 581.
5 Ante, § 571.
6 Ante, § 262.
8 Rex v. Fuller, 2 East P. C. 897; People v. Williams, 4 Hill, N. Y. 8; The State v. Simpson, 3 Hawks, 690; Commonwealth v. Wilbey, 4 Pick. 177, 178; People v. Crease, 4 Denio, 528; People v. Haynes, 14 Wend. 640, 567; McKenzie v. The State, 6 T. R. 594; Barrow v. The State, 7 Eng. 66; Rex v. Wawel, 1 Moody, 224; Rex v. Goodhall, Russ. & Ry. 461.
§ 589. THE ACT REQUIRED. [BOOK V.

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 in-
dictable 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 poses 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 pro-
ceedings. When, therefore, a man purchased three several pro-
missory 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 fur-
nishes 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. 223; The State v. Roberts, 34 Me.
228.
2 Ante, § 612; Vol. II. § 590.
3 Ante, § 622.
4 Ante, § 466.
5 Sorcesta's Case, 202; ante, § 498.
6 2 East P. C. 1010; Vol. II. § 162-155, 436.
7 Ante, § 641.
9 And see ante, § 504.
10 Ante, § 483.
11 Ante, § 467.
12 Ante, § 502.

CHAP. XL.] PROTECTION TO INDIVIDUALS. § 591

§ 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 pub-
lic offence.1

III. Offences against Personal Reputation.

§ 591. Damage to Reputations 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 ex-
ception 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 § 520 et seq., 268-269.
2 Conspiring against Reputation — A conspiracy, see post, § 592, to charge
one with an indictable offence, or with
being the father of a bastard child, is in-
dictable; but possibly this is not on the
ground of injury to the reputation. Com-
monwealth v. Tibberts, 2 Mass. 525; Reg-
v. Best, 2 Ed. Raym. 1159; 6 Mod. 127,
1856; Dunmore v. Childs, 1 Sib. 68; Rex
v. Armstrong, 1 Ham. 398; 1 Ga. Crim.
Law, 262. Yet, on the whole, the doc-
trone seems pretty clearly to be, that a
conspiracy to injure one's reputation is
indictable. — Rex v. Rispa, 1 W. Bl. 388, 8
Bur. 1220. And see Vol. II. § 216, 217, 255.
4 Ante, § 540.
5 Vol. II. § 970, 990.
6 Ante, § 600, 606; Vol. II. § 910.
7 Vol. II. § 916.
8 Cropp v. Tinsley, Holt, 422; Com-
monwealth v. Clapp, 4 Mass. 163, 168, 169;
The State v. Barnum, 9 N. Y. 84; Peo-
ples v. Crosswell, 3 Johns. Cas. 388; Com-
monwealth v. Blasing, 2 Pick. 394; Rex
v. Draper, 8 Smith, 390; The State v.
Lehre, 2 Tred. 890; Rex v. Halpin, 9 B.
& C. 65.

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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. 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. This combination is called conspiracy. The offence is not confined to injuries to individuals; but it extends also to those injuries which concern directly the public.

§ 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 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. This offence appears to have been misdemeanor at the common law; but, by 1 Jac. I, c. 12, it was elevated to felony. 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.

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 Commonw. v. Honnor, 9 Met. 410; Bartholemy v. People, 2 Hill, N. Y. 287; The State v. White, 7 Iowa 189; People v. Crowell, 8 Johns. Cas. 320; Rex v. Burdett, 3 B. & Ald. 717, 4 B. & Ald. 95; Vol. II. § 590.
2 Vol. II. §§ 173, 178, 181, 182.
3 Twitchell v. Commonwealth, 2 Barr, 211, 212; Rex v. Orrill, 6 Mod. 49; Rex v. Macarthy, 2 East P. C. 385, 5 Mod. 301; a. c. horn. Rex v. Macarthy, 2 Law. Raym. 1179; 2 East P. C. 824; People v. Stone, 9 Wend. 182; People v. Babeck, 7 Johns. 501; Commonwealth v. Warren, 6 Mass. 70; Anderson v. Commonwealth, 6 Rand. 627; The State v. Burnham, 18 N. H. 260; The State v. Murphy, 6 Ala. 765; Commonwealth v. Judell, 2 Mass. 249; Lambert v. People, 7 Cow. 188; 9 Cow. 576; Commonwealth v. Hunt, 4 Met. 114, 181; The State v. Bowley, 13 Conn. 101; Syder- siff v. Reg., 11 Q. B. 345, 12 Jur. 418; Rex v. Hilleboe, 2 Chit. 185; Commonwealth v. Ward, 1 Mass. 473; Patten v. Gurney, 17 Mass. 183, 184; Bean v. Benn, 12 Mass. 20, 21; Commonwealth v. Eastman, 1 Cush. 189; Rhoads v. Commonwealth, 8 Harris, Pa. 272; People v. Fisher, 14 Wend. 9; Commonwealth v. Kilgrew, 2 Asch. 247; Rex v. Cope, 1 Super. 144; Rex v. Compton, 2 Q. B. 284; Mifflin v. Commonwealth, 5 Watts & S. 461; Commonwealth v. Tibbetts, 2 Mass. 650; Rex v. Black, 5 Mod. 137, 186, 2 Law. Raym. 1167, Holt, 161; Timothy v. Childs, 1 Sim. 69; Rex v. Armstrong, 1 Vent. 304; The State v. Buchanan, 6 Har. & J. 317; Rex v. Worrall, 20 Hamps. 104; Rex v. Blackett, 7 Mod. 39; The State v. De Witt, 2 Hill, 6 C. 269; Contra, The State v. Hickey, 6 Hamps. 263, 300. 4 And see supra, § 492. 5 For the full discussion, see Vol. II. § 195 at seq.

1 Haw. 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. 547; The Devon Witches' Case, 8 Howell St. Tr. 1017; The trial of Witches, before Sir Mathew Hale, bound up among other papers with Jacob's Supp. to Hale P. C. And see 3 Inst. 46.
2 Haw. ut sup. § 2. But see 1 Hale P. C. 429.
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.


\(^{3}\) Stat. Crimes, § 482, 487-488; Brown v. The State, 26 Ohio State, 176; The State v. Recudder, 34 Texas, 565; Reid v. The State, 3 Texas, 430; Reg. v. Welch, 1 Q. B. 33, 13 Cox C. C. 121; Lott v. The State, 3 Texas, 497; The State v. Linde, 64 Iowa, 183; Street v. The State, 2 Texas, 45; The State v. Simpson, 73 N. C. 269; The State v. Hill, 79 N. C. 560; Shubrick v. The State, 28 Idaho, 240; Gaskill v. The State, 65 Ind. 650; The State v. Butler, 65 N. C. 399; Thomas v. The State, 50 Ark. 433; Orlatt v. The State, 19 Ohio State, 673; Branch v. The State, 41 Texas, 622; The State v. Heath, 41 Texas, 428; Hayworth r. The State, 14 Ind. 500; The State v. F eyel, 108 Mass. 504; Rex v. Mogg, Car. & P. 263; Borges v. The State 34 Ala. 100; Swartzbaugh v. People, 85 Ill. 467; Caldwell v. The State, 49 Ala. 38; Dunham v. The State, 49 Miss. 391; Darnell v. The State, 8 Texas, 487; The State v. Parker, 81 N. C. 545. And see Rex v. Buck, 1 Sim. 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." Pulford de Pace, 104 a. Among lawful assemblies are those "at the killing of a bull or bear." Id. 26 b. And see ex parte Hill, 8 Car. & T. 225 and 226.


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 statute 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, § 507.

\(^{2}\) Stingo Horse Cases, 15 Abb. Fr. x. & x. 81; Rood's Case, 3 City Hall Rec. 191; Shepherd, 1 Leach, 4th ed. 553; 2 East P. C. 1073; Stat. Crimes, § 438, 439; Vol. II. § 908, 909; Reg. v. Tidy, 1 Car. R. & K. 204; Stat. Crimes, § 434.


\(^{4}\) 5th ed. 410, 411.

\(^{5}\) Beardshall, C. J., in Ellis v. People, 6 Denver, 377, 378.
§ 597 a

THE ACT REQUIRED. [BOOK V.

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 evil 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 in-

1 Commonwealth v. Tilton, 8 Met. 292, 294.
2 Ante, § 405 et seq.
3 For a discussion of the statutory offence, see Stat. Crimes, § 1000 et seq.
4 United States v. Jackson, 4 Cranch 306.
5 Ante, § 592.
7 Vol. II. § 176, 175, 176.
8 Vol. II. § 176.
DIAGRAM OF CRIME.

REGION OF MISDEMEANOR

PUBLIC WRONGS NOT INDICTABLE BECAUSE TOO SMALL FOR THE LAW TO NOTICE.

REGION OF FELONY

REMEDIES.

REGION OF TRESPASS.

PUBLIC WRONGS.

NOTE. — E F & 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 1836, by Jos. Pontius, in the Clerk’s Office of the District Court of the District of Massachusetts.
itself not unfrequently makes an offender more heavily punish-
able 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 unjustif-
able 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 pun-
ished 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 aggra-
ivated, not in law. Of such a circumstance, the law took no cog-
nizance. 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 considera-
tions which aggravate an offence in morals may be taken into the
account. In the instances depending on positive law, the aggra-
vations must be set out in the indictment; 1 in these they need
not be, though sometimes in practice they are. Let us now pro-
ceed 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. Procud. I. § 77 et seq., 95 et seq., II. § 562-569.
medicate 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 accessory, 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 F I...
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 "Regio[n] 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.

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CHAPTER XLIII.

THE DIVISION OF CRIMES INTO TREASON, FELONY, AND MISDEMEANOR.

§ 607-616. Introduction.

611-615. Treason.

614-622. Felony.

623-629. 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. 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. A person against whose property a misdemeanor has been committed may immediately sue the offender; but, when the wrongfull act is felony, he must, according to the

1 Post, § 717.
§ 613. DIVISIONS AND DISTINCTIONS. [BOOK VI.

better opinion, wait until he has set on foot a criminal prosecution. 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.

§ 614. How this Chapter divided. — We shall consider, I. Treason; II. Felony; III. Misdemeanor.

I. Treason.

§ 615. English Treason — 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. In 1828, these petit treasons were abolished.

How with us. — Treason, with us, is reduced to a single form of what was formerly termed high treason. And petit treason is unknown to our laws.

§ 616. Treason is also Felony. — In the language of Mr. East, "all treason is felony, though it may be something more." 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.

§ 617. 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, § 204 et seq.
2 1 Hawk. P. C. Curw. ed. p. 103.
3 By 9 Geo. 4, c. 51, § 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.
§ 618. DIVISIONS AND DISTINCTIONS. [BOOK VI.

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."

§ 616. How under our Common Law. — Now, forfeitures and corruptions of blood, consequent upon crimes, are almost unknown in this country; yet the distinction between felonies and the other two grades is a part of our common law. 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." 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.

§ 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, founded on special reasons. Also we have seen, 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.

1 Gab. Crim. Law, 16, 16.
2 See Wooldridge v. Lucas, 7 B. Monr. 49.
3 Ante, § 279; post, § 970.
4 "The rule once fixed must remain until altered by the legislature." Lord Campbell in Rees v. Gray, 3 Craw. & Dix C. C. 293, 294. And see ante, § 275.
6 Commonwealth v. The State, 7 Blackf. 186; Wilson v. The State, 1 Wis. 134; The State v. Smith, 8 Blackf. 409; People v. Brightman, 3 Mich. 596; Randall v. Commonwealth, 24 Ga. 444; Nichols v. The State, 35 Wis. 608; Buford v.

§ 619. Effect of Discretion as to Punishment. — If, by the terms of the statute, the court or jury is at liberty to inflict some milder punishment instead of imprisonment or death, this discretion, it is held, does not prevent the offence from being felony. That the heavier punishment may be imposed is sufficient. 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.

§ 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. 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. So also it has been said in New York; but later authority there is possibly (the author does not say it is) the other way. 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.

§ 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. Yet, from other cases, and a consideration of the statutes and jurisprudence of the State, it seems not improbable that the question is here much as in the States just mentioned, where capital offences, and all punishable in the State prison, are felonies. Even in Louisiana,

Commonwealth, 14 B. Monr. 24, and the cases cited in the next three notes.
2 People v. Park, 41 N. Y. 21.
3 Stat. Crimes, § 154 et seq.
4 Drennan v. People, 10 Mich. 160.
7 Nathan v. The State, 8 Maine 631; Tharp v. Commonwealth, 3 Mo. Ky. 411; People v. War, 20 Cal. 117.
8 The State v. Scott, 24 Va. 107; R. S. of 1889, c. 102.
§ 623. How defined.—All crime less than felony is misdemeanor. 1

2. The State v. Rowe, 8 Rich. 17. And
see ante, § 616.
4. 1 Hale P. C. 703; 3 Inst. 91; 1 Hawk. P. C. Carw. ed. p. 72, § 5.
7. See also Rex v. Wyer, 1 Leach, 4th ed. 426; 3 Kent P. C. 785; 2 T. R. 77; Rex v. Solomonos, 1 Moody, 262; Rex v. Cala, 1 Moody, 11.
10. 1 Russ. Crimes, 3d Ed. ed. 453; Commonwealth v. Callahan, 2 Va. Cas. 400; Rex v. Powell, 2 B. & Ad. 75.

III. Misdemeanor.

§ 624. Further of the Word “Misdemeanor.”—The word misdemeanour 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 misdemeanour, 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 misdemeanour is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; misdemeanours comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisance. 4 Misdemeanours have been sometimes termed—

“Misperisions.”—Indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanour 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, means substantially misdemeanor, in distinction from felony; or, more especially, a misdemeanor of the less aggra-

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1. On the other hand, the word “misdemeanour” may even denote a mere civil trespass. The State v. Mann, 21 Wis. 692.
2. 1 Russ. Crimes, 3d Ed. ed. 45. I copy, in connection with the extract, the author’s notes.
3. 3 Burn Just. tit. Misdemeanor, citi
4. 4 El. Com. 6, note 2; 3 Burn Just.
tit. Misdemeanor.
5. 1 Hawk. c. 20, § 2, and c. 69, § 1, 2; Burn Just. tit. Felony.
6. 1 Hawk. P. C. c. 69, § 5.
7. See, for a modern illustration, 1 Russ. Crimes, 3d Ed. ed. 675, where it is said, that though trespass was 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 “trespas” 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 Aston. 61, 68; Clark v. Parker, 2 Broad. 939. And see Worlom v. Commonwealth, 5 Rand. 699; The State v. Hunt, 7 Miss. 821.
8. For example, in Reg. v. Tracy, 6 Mod. 99, 101, 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. Westbury, 1 Leach, 4th ed. 12, 14, we are informed, that the question arose,
§ 625 divided 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, 5 Kel. 29; Rex v. Newton, 2 Lev. 111; 2 Hawk. P. C. Carw. 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. 136. See also 4 Bl. Com. 96.

§ 627

CHAPTER XLIV.

PROXIMITY OF THE OFFENDER TO THE COMPLETED CRIME.

§ 626. Nearest 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; and it is the same if, the act
being divided into parts, each proceeds with his several part
unaided. And,—

§ 631. Acting by Agent.—Since an act by an agent has in
law the effect of a personal act, if one employs another to do
a criminal thing for him, he is guilty the same as though he
had done it himself. Nor is his guilt the less if the agent

1 People v. Mather, 4 Wend. 229, 259; Reg. v. Hennessy, 2 Car. & K. 308; Reg. v. Mazeran, 9 Car. & P. 676.
3 Lewin, 119, 277; Reg. v. Kelly, 2 Cox C. C. 171; Smith v. People, 1 Cal. Ten. 121.
4 Broom’s Max. 2d ed. 643.
5 United States v. Morrow, 4 Wash. C. C. 173; Reg. v. Williams, Car. & M. 259; Schmitz v. The State, 14 Miss. 173;
7 Rex v. Dyson, Russ. & Ry. 623; The State v. Bow, 21 Vt. 484; Commonwealth v. Hill, 11 Mass. 156; And see Riving v.
8 Thompson, 18 Miss. 153; Caldwell v. Sears, 1 N. Y. 284; Leggett v. Simmons, 7 Sm. & M. 638.
10 Ante, § 312 et seq.
12 Doan v. The State, 20 Ind. 495.
13 Rex v. Hunt, 1 Keny. 108; Rex v. Perkins, 4 Car. & P. 587; Rex v. Billing ham, 2 Car. & P. 234; Rex v. Murphy, 5 Car. & P. 103; Rex v. Forney, 6 Car. & P. 197; The State v. Straw, 32 Maine, 556; Williams v. The State, 9 Miss. 370. And see Reg. v. Young, 8 Car. & P. 644.
14 Butler v. Commonwealth, 2 Duvall, 483; The State v. Farr, 29 Iowa, 555; The State v. Hardy, Dudley, S. C. 396; People v. Woodward, 45 Cal. 203; People v. Ah Ping, 27 Cal. 489. So mere knowledge that an offence is about to be committed will not involve in guilt a person who takes no part in it, and is not present at its commission. Tillis v. The State, 41 Tex. 569.
16 Burrell v. The State, 18 Texas, 718. And see United States v. Paige, 6 Me. 89.
§ 634. Divisions and Distinctions. [Book VI.

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. 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

634, and Mosk's note. Compare this case with Vol. II. § 311.


§ 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 maiming.7 And —

Assault ending in Mayhem. — It has been ever 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.8 But the correctness of this decision is doubtful.9 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.10 Yet a man who invites another to a place to be murdered by an accomplice is accessory to the homicide when committed.11 Again, —

Robbery by One. — Where a statute had made the obtaining of goods on a false charge of sodomy a different offence from robbery,2 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.13

§ 636. Acts within Common Plan. — But, as we saw in another connection,14 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, 3 Ind. 565. 2 Rex v. Collison, 4 Car. & P. 525. And see Reg. v. Howell, 9 Car. & P. 437. 3 Rex v. White, Ross & Ny. 99. 4 The State v. Abcarta, 4 Port. 397. And see Frank v. The State, 27 Ala. 57; Brennan v. People, 16 Ill. 611; Thompson v. The State, 25 Ala. 41. 5 Post, § 636. vol. 1. 35 385

1 Ante, § 316-320.
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 resorted 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, 1 Kel. 169, 114, 119; United States v. Gilbert, 2 Summer. 19.
2 Mansell’s Case, 2 Dyer. 126, pl. 60; Rex v. Murphy, 6 Car. & P. 306; Ashton’s Case, 2 Mod. 296; Rex v. Kent, 5 Mod. 293, 292; Sir C. Stanhope’s Case, J. Kel. 296; Rex v. Edmunda, 6 Car. & P. 366; 1 East P. C. 296; Reg. v. Tyler, 8 Car. & P. 616; Reg. v. Howell, 9 Car. & P. 437; Brennan v. People, 13 Ill. 511; Thompson v. The State, 25 Ala. 41; Reg. v. Russell, 1 Post. & F. 240; Rex v. Jackson, 7 Cox C. C. 307; Reg. v. Caton, 12 Cox C. C. 624, 10 Eng. Rep. 505; Reg. v. Harrington, 5 Cox C. C. 291; Ferguson v. The State, 32 Ga. 668. But see Frank v. The State, 27 Ala. 37. The State v. Absence, 1 Port. 897.
3 Commonwealth v. Campbell, 7 Allen. 611.
4 Ante, § 631.
5 Reg. v. Sharpes, 1 Cox C. C. 258; Vol. II. § 1168, 1163.
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 steal another; or, to commit a felony of one kind; and he commit another of a quite different nature, — as, to rob J. 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 Pown- den, in his report of Saunders’s Case (Reg. v. Saunders, 2 Formal. 475, 476), 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 was 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 shall not be an 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 accessory, that he knew the house which he was commanded to burn; for, if he did not know it, but

1 Blunt’s Case, 1 Howell St. Tr. 1409, 1411. And see 1 East P. C. 98.
2 The State v. Morris, 3 Hawks. 358; Reg. v. Wallis, 1 Selk. 304, Holt. 434; Rex v. Warner, 1 Moly. 890, 5 Car. & P. 506.
3 1 East P. C. 296.
4 Ante, § 631.
5 Reg. v. Sharpes, 1 Cox C. C. 258; Vol. II. § 1168, 1163.
§ 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. Should the offence be one requiring a specific intent, and the charge be that he was present abetting the others, his knowledge of their intent must also be shown. If, in those 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.

After Offence completed. — When a crime has been fully committed, one not already guilty is too late to be a sharer in it, though, if it is a felony, he may become an accessory after the fact.

§ 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.

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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 volitions or another's, his

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1. See ante, § 210; post, § 642, 651.
2. Williams v. The State, 47 Ind. 475.
3. Crim. Procd. II. § 3.
4. 1 Russ. Crimes, 3, Eng. ed. 28; Griffin's Case, 1 Flow. 97, 98, 101; Foster, 247, 248.
5. 4 Russ. Crimes, 3, Eng. ed. 28; Griffin's Case, 1 Flow. 97, 98, 101; Foster, 247, 248.
6. Crim. Procd. II. § 8; The State v. Mairs, Coke, 168; The State v. Anthony, 1 Mc Cord, 259; Rex v. Cunningham, 3; Cawie & D. C. C. 106; Rex v. Greens, 1 Cawie & D. C. C. 106; The State v. Cameron, 2 Chand. 172; Ransone v. Oliffe, 3 Con. 34; Rex v. Williams, 1 Salk. 20; Rex v. Anderson, 1 Salk. 101; Rex v. Craine, 1 Salk. 20; Rex v. Jenkins, 1 Salk. 20; Foster, 247, 248.
7. 4 Russ. Crimes, 3, Eng. ed. 28; Griffin's Case, 1 Flow. 97, 98, 101; Foster, 247, 248.
8. 4 Russ. Crimes, 3, Eng. ed. 28; Griffin's Case, 1 Flow. 97, 98, 101; Foster, 247, 248.
the criminal act, either wholly or in part, is not an accessory.  

§ 651. Act through Innocent Agent. — And because there must always be a principal, one is such who does the criminal thing through an innocent agent, though personally absent. If a dose of poison, or an animate object like a human being, with or without 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.  

§ 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. 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. But does the person who takes his own life occupy the position

1 In an English jury case, Creswell, J., on consultation with Patteson, J., ruled, that, if one of two confederates undertook the crime of a room in which a felony is to be committed, then goes away, and the other confederate comes and steals the goods, the former is not a principal in the theft. Reg. v. Jeffries, 3 Cox C. C. 69. 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 entered 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 was not merely ad

2 Ante, § 409.  

3 Vaux's Case 4 Co. 44; Reg. v. Michael, 9 Car. & P. 360, 2 Moody, 129.  


5 Anonymous, J. Kel. 53. And see Reg. v. Tyler, 8 Car. & P. 616; Reg. v. Michael, 9 Car. & P. 360, 2 Moody, 129.  

6 Wixon v. People, 4 Parkers C. C. 119; Reg. v. Monley, 1 Cox C. C. 104.  


8 Reg. v. Allison, 8 Car. & P. 418. And see 1 East, C. C. 36; The State v. Ludwig, 70 Miss. 112.  

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§ 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 abstaining him, unless in a position to render, if necessary, some personal assistance. If the will of the other contributes to the act, the text, to determine whether he is a principal rather than an accessory, is whether he is so near, or otherwise so situated, as to make his personal help, if required, to any degree available. He need not be in the actual presence of the other principal; but, if he is constructively there, as thus explained, it is enough. And, for reasons already

3. Ante, § 652, 491.
4. Post, § 603.
5. Commonwealth v. Knapp, 9 Pick. 496, 515-518; Rex v. Manns, 7 Car. & P. 281; Rex v. Stewart, Miss. 905; Green v. The State, 11 Miss. 282; Rex v. Soner, Miss. & Ry. 26, 2 East P. C. 974; Rex v. Kelly, Miss. & Ry. 426; Rex v. Jones, 9 Car. & P. 701; Tate v. The State, 6 Black. 110; Rex v. Davis, Miss. & Ry. 114; The State v. Wisdom, 8 Port. 511; Porter v. People, 10 Cow. 377; Rex v. Perkins, 12 Eng. & Eq. 657; Breeze v. The State, 12 Ohio State, 166, 167; Waddell v. People, 5 Parker C. C. 110; Trim v. Commonwealth, 18 Grat. 630; The State v. Nash, 7 Iowa, 647; Doan v. The State, 26 Ind. 460; Seivridge v. The State, 30 Tex. 69.

§ 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. So may one be who is in a lower room while his confederate is operating in an upper room. And if death occurs in a duel, the seconds are principals in the murder. 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.

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, — a question for the next chapter.

1. Ante, § 649.
2. Rex v. Passey, 7 Car. & P. 292; Rex v. Lockhart, 7 Car. & P. 600; Rex v. Franklyn, 1 Leach, 4th ed. 256, Cald. 344; And see Rex v. Berwick, 1 Doug. 207; Rex v. Harris, 7 Car. & P. 416.
5. Rex v. Cuddy, 1 Car. & P. 219; Rex v. Young, 8 Car. & P. 644; Rex v. Barmel, 1 Doug. 61; Vol. II, § 811.
6. Rex v. Davis, Miss. & Ry. 118. And see for similar facts, Rex v. Elze, Miss. & Ry. 123. 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.
DIVISIONS AND DISTINCTIONS. [BOOK VI

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. And the possession of a thing by one, contrary to the prohibition of a statute, is the possession of all. 2

§ 657. Misdemeanors distinguished. — But when we ascend from the lower misdemeanors, we find some differences occasioned by the smaller degree of blameworthiness involved in an offense, 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, these terms furnish the rule for the court. Or, if the expression is general, then, if the offense 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 Edmonds v. McGarren, 4 Daly, 407; The State v. Potter, 30 Iowa, 657.
3 See ante, § 212 et seq.
4 Why ? And Connected Views. — In Commonwealth v. Wilford, 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, advise, 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 more legal and technical distinction between felony and misdemeanor. One consideration, however, is manifest in all the cases, and that is, that the offense proposed to be committed by the counsel, advice, or encouragement 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 malum in se, or criminal in themselves, in contradistinction to malum prohibitum, or acts otherwise indifferent that as they are restrained by positive law." p. 478. And see, as confirming this doctrine, The State v. Hopkins, 4 Jones, N. C. 306; The State v. Weight, 4 Jones, N. C. 209; and see Rawles v. The State, 15 Texas, 681. The question thus adjudged in the Massachusetts court was decided in the same way in New Hampshire. The State v. Bond, 61 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 approaches so nearly to the direct act, as a purchaser does, is not liable as an aider and abettor because of the comparatively insignificant character of the main offense." p. 397. But, while in thus disclaiming, 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 malum prohibita, the fact that the penalty is in terms imposed upon only one of two parties whose concur- rence is requisite to the commission of the offense, 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. 304. As sustaining this doctrine he referred to Browning v. Morris, Comp. 790; Williams v. Hodley, 8 East, 373; Tracy v. Talman, 14 N. Y. 182, 181-185; Curtis v. Leavitt, 16 N. Y. 9; Buffalo City Bank v. Godd, 19 N. Y. 168; Richardson, C. J., in Boyer v. West, 4 N. H. 260, 268, 269; Perley, C. J., in Present v. Norris, 82 N. H. 101, 105; White v. Franklin Bank, 25 Pick. 151; Sargent, J., in Butler v. Northumberland, 80 N. H. 33, 34, 35. Now, as we have seen (ante, § 657), 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, 86; Commonwealth v. Boyton, 116 Mass. 545. 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 loaned him to commit the offense, by purchasing liquor from him, is an aider and abettor, and as much guilty, as a principal offender, of a misdemeanor, if the seller had been of his own color." And McKinney, J. said: "In the case of a white woman it cannot be seriously controverted, that, upon general principles, the purchaser of intoxicating liquor, in violation of the statute, passed to suppress drugging, is as much guilty of the larceny and as much amenable to criminal prosecution and punishment, as the seller. They are, in all respects, parties compri- sers; they are alike willful 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 he regard his interest, or the effect, and consequences of his act, as 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
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 degrees 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, 16 Texas, 961.
2 The State v. Clemens, 3 Dev. 472.

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CHAPTER XLVII.

THE ACCESSORY BEFORE THE FACT, AND THE LIKE. 1

§ 660. Scope of this Chapter.—On the "Diagram of Crime," 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. 2

Distinguished from Principal. — If the participant is a principal, though not of the second degree, he cannot be held under an indictment charging him as accessory; 1 if he is an accessory, he cannot be held as principal. 3

§ 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. 4 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, —

Guilty not exceed Principal's. — He can neither be guilty of a higher offence than his principal; nor 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 Leonb. 4th ed. 515, 1 East. P. C. 352; Reg. v. Perkins, 12 Eng. L. & Eq. 587; The State v. Larkin, 49 N. H. 39. Thad in some respects this was formerly thought otherwise by some writers, see Foster, 361, 362.
2 See ante, § 565.
3 See Crim. Proc. II. § 1 et seq. 4 See ante, § 665.
4 Ante, § 602.
5 See ante, § 665. 6 Cox C. C. St.
9 See ante, § 651. And see People v. Collins, 53 Cal. 166.
10 Ante, § 611.
such presence, they would have been principals in killing." 2

Again,—

§ 687. 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 attainer of the principal. 5 If there are several principals, the accessory may be tried in respect of such as are already attainted, before the attainer 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

§ 688. 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 an attaint); no judgment can

be pronounced against the accessory. Thus, said Lord Hardwicke: “Before the statute of 1 Ann. c. 2, o. 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." 9 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 attainture.” 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

§ 689. Deny Principal’s Guilt. — Though the record of the principal’s attainture is, as against an accessory tried separately, prima facie evidence of the guilt of the former, 9 it

1 Ante, § 658.
8 See post, § 700 and note.
§ 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 against the accessory, irrespective of the case against the principal offender. The statutes are not all in these terms; but, in Massachusetts, Maine, Missouri, Illinois, Ohio, Iowa, California, Nevada, Kansas, and probably some of the other States, the accessory before the fact is in law, as in reason, either actually or substantially a principal. So he is in England, since the statute of 11 & 12 Vict. c. 46.

"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.

"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-

§ 672. Doctrines of last Sub-title. — What is said in the last sub-title belongs also under this. It was separated from this because relating equally to the accessory after the fact.

§ 673. How defined. — An accessory before the fact is a person whose will contributes to a felony committed by another as principal, while himself too far away to aid in the felonious act.

Nature and Origin. — The distinction between such accessory and a principal rests solely in authority; being without founda-

II. Before the Fact in Felony.

1 Rex v. Smith, 1 Leach, 4th ed. 298; Commonwealth v. Knapp, 10 Pick. 477; Rex v. Turner, 1 Moody, 471; Keithly v. The State, 10 Sm. & M. 192; The State v. Duncan, 8 Iowa 98.
3 11 S. c. 134, § 2; Gen. St. 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. 493.
4 The State v. Ricker, 29 Maine, 84.
5 Longbridge v. The State, 8 Miss. 654.
6 Baxter v. People, 3 Gilman, 368; Brennan v. People, 18 Ill. 511, 516; Dempsey v. People, 47 Ill. 522; Yoe v. People, 49 Ill. 410.
7 Nolan v. The State, 19 Ohio, 131.
8 Bowell v. United States, 1 Greene, Iowa, 111.

1 People v. Beers, 10 Cal. 58; People v. Trim, 39 Cal. 78; People v. Campbell, 40 Cal. 129; People v. Outeniers, 48 Cal. 19; People v. Shepardson, 48 Cal. 109.
2 The State v. Jones, 7 Nev. 408; The State v. Chapman, 9 Nev. 223.
4 As to North Carolina, see The State v. Goff, 1 Morph. 276; The State v. Goode, 1 Hawks, 498. As to Kentucky, see Able v. Commonwealth, 5 Bush, 263.
5 Reg. v. Manning, 2 Car. & K. R. 887, 903; Reg. v. Hughes, Bell C. C. 212.
6 The State v. Goff, 1 Morph. 276; The State v. Goode, 1 Hawks, 498. As to Kentucky, see Able v. Commonwealth, 5 Bush, 263.
8 40th. Anal. 8th. 24 Ind. 214.
10 Simmons v. The State, 4 Ga. 455; Ogden v. The State, 12 Wis. 555. 406.
§ 675. 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, Jr., "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. 8

1 Broom Leg. Max. 2d ed. 648; Co. Lit. 262 a. "The principle of common law, Qui facit per alium, facit per se, is of universal application, both in criminal and civil cases." Homer, C.J., in Barkhauser v. Parsons, 2 Conn. 1, 3, 2 Hawk. C. C. Curw. ed. p. 449, § 11; Foster, 351, 362; 4 Bl. Com. 22, ante, § 666; Rex v. Higgins, 2 East, 5, 18, 19, 21.

8 See Rex v. Morris, 2 Leach, 4th ed. 1090; Ante, § 255, 260; post, § 678.

9 Ante, § 648.

8 See ante, § 276. For some unsatisfactory reasons by Blackstone, see 4 Bl. Com. 32, 40.

7 People v. Mathes, 4 Werd. 280, 295. Possibly the relation of the particular words to their context might have influenced the construction.

§ 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, § 294 et seq., 286 et seq. These English cases were decided under the misapprehension that the uttering was felony.

2 Reitler v. The State, 10 Sm. & M. 102.

3 See ante, § 619-621, 633-635.

4 See ante, § 648, 649.

5 1 Hale P. C. 522.

6 Parker's Case, 2 Dy. 186, pl. 2; 2 Hawk. P. C. Curw. ed. p. 444, § 18.

7 1 Hawk. P. C. Curw. ed. p. 448, § 18. 2 Hawk. P. C. Curw. ed. p. 436; Rex v. Cooper, 5 Car. & P. 685; McDonald's Case, Foster, 131, 132; 4 Bl. Com. 37; 2 Hawk. P. C. Curw. ed. p. 428, § 1. And see Rex v. Williams, 1 Den. C. 974; Rex v. Elles, Russ. & Ry. 145, 146; G. C. 549; post, § 656. This volume was published under the misapprehension that the uttering was felony.
§ 679. **DIVISIONS AND DISTINCTIONS.**

§ 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. Plainly this is the ordinary doctrine, yet probably a form of manslaughter may appear, admitting of this accessory; 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. Also, —

In Murder of Second Degree. — Murder of the second degree admits of accessories before the fact. And —

*Wife.* — A wife may be an accessory before the fact in a crime by the husband.

§ 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." 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." In these prosecutions," says East, following Lord Coke, "the valuation ought to be reasonable; for, when the statute of Westm. 1, e. 15 was made, silver was but 20d. an ounce,

and at the time Lord Coke wrote it was worth 5s., and it is now higher."

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," understood afterward to be imprisonment, together with the same forfeiture of goods as in grand larceny. Petit larceny was, in England, elevated to the higher degree by Stat. 7 & 8, Geo. 4, c. 29, § 2.

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. There are States in which petit larceny is even reduced to misdemeanor. 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. 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, it has no accessories. Those who, in grand larceny, would be accessories before the fact, are principals in petit larceny; those who would be accessories after are not, it has been held, deemed criminal at all in petit

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2 Hildreth's Case, 4 Co. 431; Goose's Case, Sir F. Moore, 481; 2 Hawk. P. C. 113. See 1 S. Taylor, Law Rep. 2 C. C. 147, 12 Cox C. C. 63.
3 The State v. Coleman, 5 Port. 33; and, under the Ohio statute, Hagan v. The State, 10 Ohio State, 450; under the Indiana statute, Goff v. Primo, 10 Ind. 180.
4 Jones v. The State, 13 Texa. 168.
5 3d ed. 1, note; 11 Law Mag. & Rev. 282.
7 Mr. East, by misprint, gives the Statute as Westm. 1, c. 26.
§ 682. DIVISIONS AND DISTINCTIONS. [BOOK VI.

Larceny. In North Carolina, these rules apply to all larcenies, even of things of the greatest value; because they are all by statuto made petit. 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, there were accessories the same as in felony. 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. This proposition, however, does not accord with the adjudged law as to the accessory after the fact; and, as to the accessory before, it requires some observation, though the present author accepts it as correct.

§ 682. No Accessories before. — To repeat, there are no accessories before the fact in treason, but they who were in felony would be such accessories are principals. 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 plea, 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, — either method according with the established

§ 683. Accessory before the Fact. [§ 684]

Practice in all other pleadings, civil and criminal. 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, 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. 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. This expression has been echoed by later writers; and, in 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.

2 Reg. v. Tracy, 6 Mod. 30, 32; United States v. Morrow, 4 Wash. C. C. 785; and other cases cited post, §§ 656, 658; Crim. Proc. 1, § 332.
3 Ante, § 673.
4 1 Hale P. C. 214, 215; 1 Gage, Crim. Law, 856; 1 East P. C. 127; Reg. v. Tracy, 6 Mod. 30, 32; Rex v. Roy, Vern. & S. 540. See United States v. Burr, 4 Cranch, 469, 470, 496-498.
5 § 681 P. C. 322.
6 Poster, 346; 1 East P. C. 209, 211; 1 Hale, Crim. Law, 894; Hawkins, however, lays down the true doctrine; but one of his editors, Leach, following Lord Hale, sets him wrong. 2 Idaho, P. C. 396 ed. c. 29, § 2, Curw. ed. p. 347, § 411 and note.
7 United States v. Burr, 4 Cranch, 470, 474; Burr's Trial, passim. Too many counsel and too Brummants. — 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 error, but diminishes in the 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 necessary follow- ing, 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. But this doctrine, we have seen, 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. 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. 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, being captured by his wiles; and, when they find nothing proceeding from his worthy of regard, to 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, § 609.
3 See post, § 692.
4 Charge on Law of Treason, 2 Wall. Jr. 134, 137; United States v. Hanway, 2 Wall. Jr. 180, 186; 56 part, Bollman, 4 Cranch. 76. And see Throgmorton’s Case, 1 D. 98, pl. 66. Judge Tucker combats this doctrine. See § 4 Bl. Com. Tucker ed. Appendix, 49, and at various other places. From the 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 accessories criminally in the very act.” 8 Lord 188.
5 8 Lord 188.

§ 686. Accessory before the Fact. — § 687. Assault and Battery — Setting 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; or to bet for him on an election; or to pass counterfeit money, where this offence is misdemeanor; or to make an arrest, amounting to an indictable false imprisonment; or to sell, contrary to a statute, intoxicating liquor without license; or to throw dirt into the highway, being a common-law nuisance; or to set fire to a building, where the burning is misdemeanor; or to obtain money for him by false pretences; or to keep a bawdy-house; the employer may be indicted, as doing the thing, either before or after with the person whom he employs.

1 Ante, § 212 et seq.
2 See ante, § 692.
4 The State v. Lynburn, 1 Brev. 497; Rex v. Jackson, 1 Lev. 124; Bell v. Miller, 5 Ohio, 264, a civil case; Greer v. Brown, 1 Term. 12, a civil case; Baker v. The State, 12 Ohio State, 214.
5 Williams v. The State, 12 Sm. & M. 58.
7 Floyd v. The State, 7 Eng. 45; Reg. v. Tracy, 5 Mod. 709.
11 Reg. v. Moland, 2 Moody, 278.
§ 687. Intent to concur with Act.—For one to be guilty, his intent must concur sufficiently with his act.1

§ 688. Small Offences—(Votting at the polls).—For reasons already mentioned,2 the accessorial act must draw closer to the principal one as the misdemeanor is lighter. Yet in a small offense, 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 offenses can be committed in like manner. And—

Statutory Offences.—The offenses 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. Pollock, 4 Ira. 302; The State v. Hunter, 6 Ira. 309.
2 Ante, § 212 et seq., 667-669.
3 See ante, § 685, 690, and the authorities there cited.
4 Stat. Crim., § 1094. And see ante, § 673.
8 See the first note to this section; ante, § 657, 667; Stamper v. Commonwealth, 7 Daily, 613.

§ 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 accessary 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.1

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.1 An accessory after the fact is one who is made answerable for the principal’s offence in violation of this

1 See Criminal, II. § 1 et seq. 2 See the first note to this section; ante, § 657, 667; Stamper v. Commonwealth, 7 Daily, 613.
§ 693. Divisions and Distinctions. [Book VI.

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; 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 accessory, and its perpetrator an accessory. To distinguish him from an accessory before the fact, who is punishable from a different reason, 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.

§ 693. Felony completed. — If, when one assists a felon, the felony is not fully accomplished, he becomes a principal with the other. It is only help given subsequently to the completion of the felony that can make him an accessory after the fact.

And, —

Guilt known. — To be an accessory after the fact, a man must be aware of the guilt of his principal. Therefore —

Helping escape. — One cannot become such an accessory by helping a prisoner convicted of felony in escape, unless he has notice of the conviction, or, at least, of the felony committed. So —

In Homicide — On this ground, and also, according to some opinions, because of the non-completion of the felony, if a man

1 Ante, § 321, 473.
2 Ante, § 873.
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 promise, 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."

§ 694. How far Assistance proceed — (Compounding — Misprision). — Compounding a felony, and a misprison of it, 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, or agrees not to prosecute him. A fortiori, one does not become an accessory who merely receives back his own stolen goods, or charitably supplies a prisoner with food; 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. 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."

But —

Keeping Witness away. — One is not thus chargeable who, by persuasion or intimidation, keeps a witness from appearing against

1 2 Hawk. P. C. Curw. ed. p. 448, § 85;
2 2 Hawk. P. C. Curw. ed. p. 448, § 86;
3 Harvel v. The State, 39 Miss. 762. 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. 116.
4 Post, § 700 et seq.
5 Post, § 716 et seq.
7 1 Hale P. C. 695; 4 Bl. Com. 83.
9 4 Bl. Com. 39; Vol. II. § 1066-1068.
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 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, 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, 7 a man may become an accessory after, by helping the accessory

before, the same as by helping the principal felon, to elude justice. 1 And such accessory after is deemed as 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 is done, however, admit of accessories after the fact. 4

§ 699. Receiving Stolen Goods.—The receiver of stolen goods, knowingly 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. 3, § 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 9 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

2 See as to the law of Tennessee, The State v. Payne, 1 Swan, Tenn. 365.
3 Rex v. Jarvis, 2 Moody & B. 40; Reg. v. Parr, 2 Moody & B. 445; Cassel v. The State, 6 Yerg. 149; Wright v. The State, 5 Yerg. 164. And see ante, § 677.
4 See, as affording much light on this question, Rex v. Burridge, 8 P. Wms. 439, 459, 460; Commonwealth v. Miller, 2 Asm. 61.
5 1 Cal. Crim. Law, 900, 910; Jenk.
6 Cent. 171; ante, § 821; Anonymous, 1 Dy. 99, pl. 60; Kyle v. The State, 10 Ala. 281; The State v. Murray, 18 Maine, 100; Reg. v. Allan, 1 Car. & M. 245; People v. Duell, 2 Johns. 449; Rex v. Stokes, 6 Car. & P. 132; Commonwealth v. Miller, 2 Asm. 61; Rex v. Hayswell, Russ. & My.
7 4th ed. t. seq.
8 Post, § 717 et seq.
10 The State v. Butler, 3 McCard, 888.
12 2 East P. C. 244; Foster, 373; 4 Bl. Com. 133.
13 2 East P. C. 746, 745; Foster, 373, 517; 4 Bl. Com. 133. And see Rex v. Wilkes, 1 Leach, 4th ed. 102; 2 East P. C. 746; Rex v. Pollard, 8 Mod. 204, 205. See ante, § 660.
15 12 Stat. 343; 7 Car. & P. 170; Rex v. Maxwell, 2 Car. & P. 476; Rex v. Austin, 7 Car. & P. 796. And see Rex v. Wyer, 1 Leach, 4th ed. 498. The crime of the receivers, however, is not, like that of the principal, haramy. People v. Maxwell, 24 Cal. 418.
§ 701. In General. — The books tell us, that there are no accessories after the fact in treason; but 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 accessory nature of their offence, and they cannot be convicted in advance of the one by whose direct volition the traitorous act was performed. 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; just as it makes accessories after the fact in felony felons.

§ 702. How in Statutory Treasons. — The English statutes of treason were evidently intended to abolish all common-law treasons; yet they have not been always, in all respects, so interpreted. 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, 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.

§ 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, 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." But —

Misprision. — Doubtless the receiver of a traitor is guilty of a misdeemeanor, within the act of Congress concerning misprision of treason.

§ 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

2 4 Bl. Com. Tucker ed. App. 1; 1 Hale P. C. 236, 337; 1 G. C. Crim. Law, 885. "You are deceased, to conclude all treasons by the statute of 35 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 he not expressed by that statute, as the judges can declare." Throckmorton’s Case, 1 Harg. St. Tr. 63, 72, 1 Howell St. Tr. 809, 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 committed high treason," as an "example" of treason at the common law, 3 Inst. 138.
3 Ante, § 692.
6 Ante, § 198.
7 Const. U. S. art. 8, § 8.
8 Post, § 722.
common-law treasons. But in such States it would seem, from principles already laid down, that the accessory after the fact to the treason is a felon. Yet his felony must remain accessory to the treason, and retain also the peculiar quality of admitting the producer to sustain to it the same legal relation as the doer. 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 accessory treason.

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.

§ 706. Small Offences. — There are under this head things too small for the law's notice. Therefore —

Receiving Vagrant — One charged with Bastardy. — No indictment lies for entertaining a vagrant knowingly; or for harboring one against whom there is a warrant in a bastardy case, knowing him to be guilty. 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. And we have seen, 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.

2 Ante, § 617.
3 Ante, § 618, 619.
4 United States v. Burr, 4 Cranch, 460, 470.
7 Ante, § 617.
8 Ante, § 613 et seq.
10 Vaughan's Case, Ropham, 184, 2 Rot. Abr. 75.
11 ² Rex v. Booty, 2 Blair 864; s.c. nom.


Stratton v. The State, 45 Ind. 444.

**MAP. XLVIII**. ACRASS.-AFTER THE FACT. § 708

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. 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; 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, § 614.
CHAPTER XLIX.

COMPOUNDING.

§ 709. Scope of this Chapter. — The subject of this chapter is indicated on the "Diagram of Crime" 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. 3

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." 2 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, not after the manner of felony and treason, but of misdemeanor, where the offender may be proceeded against without reference to any prosecution of the principal. 3

§ 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. 3 Yet —

1 Ante, § 692.
7 Ante, § 708.
8 People v. Backlund, 13 Wend. 593.
9 Jones v. Rico, 15 Pick. 440; Commonwealth v. Pease, 10 Mass. 51; Pomer v. Smith, 5 N. H. 553; Rex v. Stone, 4 Car. & P. 479; Collins v. Blaney, 2 Wise, 541, 549; Johnson v. Ogilby, 3 P. Wms. 377; commented on, 6 Q. B. 316.
10 Train & Heard, Prece. 138. And see Por-

Small Offences. — Various teachings of the criminal common law, already considered, show, that a misdemeanor may be so small, or so much of the nature of a private injury, 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. c. 5). — 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, 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. 4 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

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. Yet this does not justify a compromising 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, 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 indelicate.

§ 715. Restoration.—There are exceptions by officers, and other obstructions of public justice by persons in and out of office, analogous to compromising, and punishable on nearly the same grounds, while not usually classed under this title.


6. Where a part of the penalty was going to the crown, a power to remit the defendant to compound with the prosecution was denied, after verdict of guilty; "for the king's moiety of the penalty is wasted by the conviction, and then it is too late to compound," Bray v. Levy, 1 W. C. 445.
8. See People v. Bishop, 5 Wend. 111; Randway v. Le Worthy, 9 Johns, 261; Price v. Van Doren, 2 Southard, 378. In Georgia the statute provides, that "it shall be lawful, in all criminal offenses against the person or property of the citizen, not punishable by fine and imprisonment, only by a fine and imprisonment, 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 offense 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. 107; Chandler v. Johnson, 43 Ga. 98; Statham v. The State, 41 Ga. 601. In Louisiana, "in all cases of assault and battery and misdemeanor, when the parties compromise, and the prosecution is withdrawn, no charges shall be brought against the parties; 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, Nolla Prosequitur.—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. Hamer, 14 La. An. 71. See also Bous v. The State, 18 Ark. 109.

1. Ante, § 694. And see ante, § 696.

2. Ante, § 694. And see ante, § 696.
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 "misprison" to neglects; and such, it is believed, is the better modern usage.

How defined. — Misprison 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 Misprison of treason is the same of treason.

Misprison of Misdemeanor — is unknown equally in the facts and the language of the law; because, for reasons already explained, 4 it is too trivial a dereliction from duty to engage the attention of the tribunals.

In Misdemeanor. — Misprison 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 misprison of felony are misdemeanors. 5

§ 718. Two Forms. — The reader perceives, that the neglect which constitutes a misprison may be in either of two forms, — a neglect to prevent a treason or felony, or to bring to justice its 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." 6 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. 7 It is only misprison 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. Misprison 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." 8 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 Misprison, stated. — The doctrine of misprison, 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. 9 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; 6 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 Ante, § 692.
2 4 Bl. Com. 119. See further, as to the meaning of the word, ante, § 694.
3 1 Hale P. C. 484.
4 Ante, § 213 et seq. 297. "It may be the duty of a citizen," said Marshall, 4 Bl. Com. 120; Eden Pen. Law, 3d ed. 298. And see 1 Hale P. C. 374. And see ante, § 710.
5 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. 566, 575.
6 4 Bl. Com. 120; Eden Pen. Law, 3d ed. 308. And see 1 Hale P. C. 374.
7 Ante, § 710.
8 1 Tyrer's History, Boston ed. of 1844, p. 87.
9 1 Comyn's Inst. 186; Derwent v. The State, 18 Texas, 715; ante, § 663, 664.
11 1 East P. C. 377; 1 Russ. Crimes, 169; Burwell v. The State, 18 Texas, 715; ante, § 663, 664.
12 Case de Libelli Parnoei, 5 Co. 125.
§ 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, 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, § 23, 29; 4 Hawk. P. C. 6 The State v. Leigh, 8 Dev. & Bat. 137; Carv. ed. p. 73, § 2; 4 Bl. Com. 121, 1 Hale P. C. 871, 874. And see ante, 2 3 Inst. 136. § 267-269. § 269-270.

1 And see ante, § 271.

2 1 Ruhe. Crimes, 3d Eng. ed. 45. And see 1 East P. C. 139; 1 Hale P. C. 872; 480

§ 723. Scope of this Chapter.—The subject of this chapter is indicated in 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. 8 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 minutier 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 guarantees in attempt, see Crim. Proc. II. 3 Ante, § 822.

4 Crim. Proc. II § 11.

§ 71 et seq.
§ 729. Division and Distinctions. [BOOK VI.

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, § 294-297, 432.
² Ante, § 219, 222 et seq.
³ People v. Lewton, 68 Barb. 125; Cunningham v. The State, 49 Miss. 655.
⁴ Ante, § 491 et seq. and other places.
⁵ Rex v. Sutton, Cas. temp. Hardw.

The State v. Marshall, 14 Ala. 411; Cunningham v. The State, 49 Miss. 655.

Leigh & C. 442; 9 Cox C. C. 471; Sullivan v. The State, 3 900.

2 Post, § 735, 736; Eden Penal Law, 89 et seq. 87; Rex v. Boyce, 1 Moody, 29.

³ Commonwealth v. Martin, 17 Mass. 212; Slatery v. People, 55 N. Y. 386.

I. The General Doctrine of Attempt.

§ 730. Murder — Attempt to Murder. — To constitute murder, the guilty person need not intend to take life;² but, to constitute an attempt to murder, he must so intend.

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 minutest 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 Miss. 665.
² Post, § 735, 736; Eden Penal Law, 89 et seq. 87; Rex v. Boyce, 1 Moody, 29.
⁴ As to what is meant by “substantive crime,” see ante, § 665.
which, added to the appropriate act, would constitute an ordinary substantive offence. So —

Civil Wrong. — We saw, under a previous title, 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 overpower the woman’s will.3

§ 732. Change of Purpose. — A crime, once committed, may be pardoned, but it cannot be obliterated by repentance.5 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.6 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.8 Or if, after he has made the assault with the 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 — (Label) — Sawdrow — 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, labels 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 sawdrow-houses, because their tendency is to corrupt the public morals; forgeries, as tending to defraud individuals6 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 Anti. § 2546.
2 Taylor v. The State, 50 Ga. 79; Reg. v. Wright, 4 Co. & C. 497.
4 See the cases in the next section; also The State v. McDaniel, Winston, No. 1, 249; observations of Gibson, C. J., in Shannon v. Commonwealth, 2 Harris, Pa. 229. 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.
5 And by the Austrian code, "Criminal attempt is punishable when the criminal has committed an act tending to the commission of a crime, which crime, however, was hindered by circumstances independent of the will of the author." Ib. 90. But these codes cannot control the principles of an unwritten jurisprudence.
6 Lewis v. The State, 35 Ala. 389, 390.
7 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 Osery [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 purify the crime." See Taylor v. The State, 60 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.
8 The State v. Black, 7 Jones, N. C. 38.
9 The State v. Cross, 12 Iowa, 298; post, § 706.
10 Pinkard v. The State, 30 Ga. 757.
12 Hughes v. The State, 6 Humph. 112.
13 Reg. v. Nun, 10 Mod. 194.
14 Rex v. Woodfall, 100, 776; Rex v. Lovett, 5 Car. & C. 482.
16 Neeley v. Newell, 8 East, 384.
17 Hamper’s Case, 3 Leon. 230.
18 The State v. Carpenter, 20 Vt. 8.
19 See Williams v. East India Company, 3 East, 182, 192, 201; Reg. v. Chapman, 1 Den. C. 452; The State v. Taylor, 3 Brew. 343; Smith v. The State, 1 Stew. 604; Holmes’s Case, 1 Ex. C. 376; Barefield v. The State, 14 Ala. 603; Reg. v. Darby, 7 Mod. 100; Rex v. Phillips, 6 East, 484; Reg. v. Rashaw, 11 Ill. 610; Smith’s Case, 1 Brown, 290; Gibson’s Case, 2 Brown, 393.
§ 785. 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 Irv. 138; Cole v. The State, 5 Eng. 516; Rex v. Howlett, 7 Car. & P. 274; Rex v. Holt, 7 Car. & P. 518; Jeff v. The State, 27 Miss. 321; Jeff v. The State, 30 Miss. 595. And see Rex v. Moore, 2 B. & Ad. 184; Rex v. Bailey, 4 B. & Ad. 2; Smith v. The State, 1 Miss. 215; Sullivant v. The State, 5 Conn. 228; The State v. Jefferson, 3 Harring. Del. 571; Dains v. The State, 2 Humph. 493. 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 or 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, 290. 2 Ante, § 729-730. 3 Ante, § 729-730. 4 Reg. v. Ryan, 2 Mckey & R. 218, overruling Rex v. Lewis, 6 Car. & P. 161; Rex v. Duck, Russ. & Ny. 355; Rex v. Thomas, 1 Leach, 4th ed. 509, 1 East P. C. 417; Rex v. Holt, 7 Car. & P. 518; Money 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. 411; McCoy v. The State, 8 Eng. 541; Rex v. Jarvis, 2 Moody & R. 40; The State v. Boyden, 13 Iro. 606. 6 The State v. Jefferson, 3 Harring. Del. 571; Moore v. The State, 18 Ala. 681; Reg. v. Sullivan, 4 Car. & M. 290; Reg. v. Crane, 8 Car. & P. 641; Rex v. Holt, 7 Car. & P. 618; Rex v. McElhine, 1 CRAWF. & DIX C. C. 153; Rex v. Kelly, 1 CRAWF. & DIX C. C. 166; People v. Shaw, 1 Parker C. C. 355; Davidson v. The State, 9 Humph. 446; and see The State v. Hallstead, 2 BLACK. 267; Dains v. The State, 3 Humph. 493; Cole v. The State, 9 Eng. 516; Rex v. Hunt, 1 Miss. 98; Reg. v. Stringer, 2 Moody, 201; Reg. v. Nicholas, 9 Car. & P. 267; Reg. v. Griffiths, 8 Car. & P. 246; Rex v. Davis, 1 Car. & P. 300; Rex v. Mogg, 4 Car. & P. 614; Roberts v. People, 10 Mich. 401; People v. Wood, 64 Cal. 30.

CHAP. II.]  

ATTACK.  § 786. 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 horse post recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it falls upon a person passing by and kill him, this would be by the common law murder. 3 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; 4 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, 5 though unintentionally his act therein amounts to a felony. He may be convicted of the unintended felony done therein, but not of burglary. 6 On the other hand,—

Name of Crime—Thing meant no Crime. —The name of a crime is no part of it. 7 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 offense. And he is guiltless of the attempt if it is not such, though he supposes it is. 8 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 Lee, 314, 617; The State v. Seymour, 1 Miss. Crim. 505; Washington v. The State, 63 Ala. 29; The State v. Neel, 37 Miss. 468; Seitz v. The State, 23 Ala. 42; Rapp v. Commonwealth, 14 B. Mon. 614; The State v. Bever, 5 Harring. Del. 506; Ogletree v. The State, 28 Ala. 693; Jeff v. The State, 37 Miss. 321; Walker v. The State, 8 Ind. 290; Morrison v. The State, 24 Miss. 64; The State v. Stewart, 39 Miss. 410; King v. The State, 21 Ga. 220. Statutory Modifications. —There are States in which this doctrine is more or less modified by statute; as, in Texas. “Whenever it appears upon a trial for assault with intent to murder, that the offense 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. 450; and see Pugh v. The State, 2 Texas Ap. 50; Stapp v. The State, 3 Texas Ap. 128; 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. 82; Ferguson v. The State, 4 Texas Ap. 86; Walker v. The State, 7 Texas Ap. 697. 8 Moore v. The State, 18 Ala. 598. 1 Ante, § 550; Vol. II. § 90. 2 Ex Parte P. C. 500; Rex v. Dobbs, 2 East P. C. 615. 3 And see Rex v. Thomas, 1 Leach, 4th ed. 329, 1 East P. C. 417; Rex v. Tranty, 1 East P. C. 418; The State v. Eaton, 3 Harring. Del. 664. 4 Crim. Proceed. L. § 416; ante, § 599. 5 Post, § 747, 748, 752. The State v. Brooks, 78 N. C. 1. See United States v. Tharp, 6 Cranch C. C. 399. 643
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.\footnote{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;\footnote{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.\footnote{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.\footnote{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.\footnote{5} And, —

Shooting into Crowds. — 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.\footnote{6} The greater includes the less.

\footnote{1} And see Vandermark v. People, 47 Ill. 122.
\footnote{2} Commonwealth v. McMahan, 12 Conn. 818; Matter of Case, 1 East P. C. 411. And see Rex v. Payne, 4 Car. & P. 568; Rex v. Curran, 3 Car. & P. 387; Sharp v. State, 10 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. Siaw, 1 Parker C. C. 287; The State v. Nichols, 8 Conn. 439; 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 Ten. & M. 616. See Morgan v. The State, 24 Missis. 64; post, § 747.

\footnote{3} People v. Quin, 60 Barb. 128; Rhodes v. The State, 1 Coh. 451; People v. Brown, 27 Cal. 447; The State v. Brooks, 70 N. C. 1; Johnson v. The State, 63 Ga. 356; post, § 746.


\footnote{6} In the Indiana case of Kunkle v. The State, 32 Ind. 220, 230, 231, Elliott, J., after referring to the earlier case of The State v. Swalls, 8 Ind. 634, observed: "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 combined, 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?"

\footnote{2} Reg. v. Sheppard, 11 Cox C. C. 662; The State v. Napper, 8 Nev. 110.

\footnote{3} Post, § 746 et seq. 483
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, determines Indictability.—The follow-
ing 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 punish-
ment 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 conscientiae 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 pre-
vious 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 1846, 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, § 8, 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. The acut-
2 Anno, § 112 et seq.
3 Anno, § 326 et seq.
4 Rex v. Kamerer, 1 Stra. 193, 196.
5 Anno, § 204, 284.
6 Anno, § 863 et seq.
7 Rex v. Collins, Leigh & C. 471. Con-
tra, in the United States. See post, § 745.
8 The English text-books have since

intimated that this would be punishable
on the distinction stated ante, § 436, 480,
9 Reg. v. Goodhall, 1 Den. C. C. 187;
10 s. e. nom. Reg. v. Goodall, 2 Cox C. C.
41; ex n. reg. v. Goodchild, 2 Car.
& K. 393. In the earlier case of Rex v.
§ 742. Divisions and Distinctions. [Book VI.]

§ 742. Unseen Impediments in Reason how regarded. — A further word, as to how an unseen impediment should in legal reason be

Held in 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 prosecutor which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for determination 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 same time nothing in the pocket, that is an attempt to commit larceny. We are far from saying, that, if the question whether there was anything in the pocket of the prosecutor which had been left to the jury, there was not evidence on which they might form their judgment, there might not be a conviction. In this case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutor, the charge of attempting to commit larceny is not sustained. The case is governed by that of Reg. v. McPherson, and we think that an attempt to commit larceny on the supposed conviction is not, and the proof was not, admissible. If, at the rendering of final judgment, Mr. Heard had only said, according to Cox, when the case of Reg. v. McPherson was mentioned at the argument, he remarked: 'That case proceeds on the ground that there was nothing in the pocket, and 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 case. 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, § 752, it will clear the explanation. In 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 those points. When, there

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 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 is it. But in 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.

6. Again; it is impossible that any legal tribunal could have seriously entertained an untenable position as it is attributed to that court by Mr. Heard. None of the reports of this case gave 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 said 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 offense 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 then being to steal, the person charged being mistaken in supposing there was in it such property, surely these words describe the offense as accurately as any words could do. 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 said 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 offense was not proved as laid. Consequently it is simply absurd to say that there 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 look into the other case, Reg. v. Goodshall, 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 prosecution showed that there was no fetus to be removed, and the court holding that there need be none. The statute on which the indictment was framed (2 Will. & M. 66, § 5) is "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. 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 make an effigy in female dress for a real woman, and undertake to ravish it, 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. 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 Dea. C. C. 187) says it was supposed immaterial under the "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 & 26 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. Goodall. 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, the statute of Victoria was enacted in 1861, and Reg. v. Goodall was decided in 1846, so that the statute could not have governed the decision."

1 Commonwealth v. Rogers, 5 S. & R. 468.
3 See, for the principle, ante, § 441.
probable that the defendant had in view any particular article, or
had any knowledge whether or not there was anything 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 offense complete. It was an ex-
periment, and an experiment which, in the language of the sta-
ture, failed; and it is so 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 ascen-
tioned that there was in fact money or valuables in some one of
the pockets on which the thief had experimented.” ² This obser-
vation opens to view what the author has set down in these sec-
tions 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 Pennsyl-
vania, 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 Offense.”—“There must,” in the words of
Cookburn, C. J., “be an attempt which, if successful, constitutes
the full offense.” ⁵ There can be no doubt of the soundness of
this doctrine. We have seen,⁶ that, in law, a man does not

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 acci-
dent, 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 accom-
plish the whole, so neither can he 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 physi-
oc 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 down⁴ to say, that, if all which the
accused person intended, would, if 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 neces-
sary 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 in-
tent to rob; because, if he had got off with the order, the trans-
action 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, § 738.
² Ante, § 783; Vol. II. § 1117.
³ Reg. v. Philips, 8 Car. & P. 776; Reg. v. Edwards, 6 Car. & P. 531.
⁴ Rex v. Eldershaw, 3 Car. & P. 356; Williams v. The State, 14 Ohio, 222; The
⁵ State v. Hasty, 3 Haring, Del. 664; The State v. Givens, 5 Ala. 747.
⁶ People v. Randolph, 2 Parker C. C. 218; Rex v. Taylor, 1 Leach, 4th ed. 214, 2
⁷ The State v. Sam. Winston, No. 1, 800; Rex v. Bollard, 1 Leach, 4th ed. 83, 2 East P. C. 905; Vol. II.
⁸ Ante, § 784, 746.

⁴ Ante, § 738, 746.
⁵ Ante, § 738-739, 786, 736.
⁶ Ante, § 783-785, 736.
⁷ Ante, § 738, 746.
⁸ Ante, § 783.
§ 750. DIVISIONS AND DISTINCTIONS. [BOOK VI.

Injured by the cheat,—or, if the forged writing were it genuine, would be neither apparently nor really valid in law; or if, for any other reason, it could not defraud any one,—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; for, without this element, they create no harm, and the public repose is not threatened. 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.

§ 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. In a subsequent Indiana case,

1 Reg. v. Tyndey, 1 Den. C. C. 319; People v. Peabody, 25 Wend. 472; The State v. Givens, 5 Ala. 747; Vol. II. § 690. 2 Rex v. Burke, Rug. & Ry. 438; People v. Harrison, 8 Barb. 560; Vol. II. § 583 et seq.


4 Ante, § 798.

5 Ante, § 740, 742.

6 See and compare Kunkle v. The State, 32 Ind. 220; Mulliken v. The State, 45 Ala. 43; The State v. Napper, 8 Nev. 118; Reg. v. Gamble, 10 Cox. C. C. 343; The State v. Epperson, 37 Miss. 266; Reg. v. Dale, 6 Cox C. C. 14; Smoother v. The State, 11 N. J. 274; People v. Blake, 1 Wheeler Crim. Cas. 490; Reg. v. Goodman, 23 T. C. C. P. 358.


1 Kunkle v. The State, 32 Ind. 220.

2 Rex v. Crooke, 2 Stru. 901.

§ 754. **Divisions and Distinctions.**

committed. This doctrine, which was thus enunciated 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

§ 755. **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, no man can legally intend what is legally impossible. An instance of this is, that, as already stated,⁴ 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.

§ 756. **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 —

Doctrines stated. — The necessary intent existing, the act must 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 same attempt.¹

Why? — The reasons for this doctrine will sufficiently appear in the foregoing discussions under the present sub-title.

§ 757. **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.

§ 758. **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 Commonwealth v. Jacobs, 9 Allen, 274, 275. Entailing 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 sustained, although the person solicited thus to leave the State was not fit to become a soldier. "there being no evidence that his unfit ness for military service was manifest or known at the time of this unlawful act." p. 275.

² Kemble v. The State, 32 Ind. 220, 222. See ante, § 750 and note.
³ Rex v. Edwards, 6 Car. & P. 531 and see Nugent v. The State, 18 Ala. 621.
⁴ Ante, § 294.
⁵ Ante, § 740.

¹ This enumeration of doctrine was copied and followed in Kemble v. The State, 32 Ind. 220, 222. And see ante, § 756.
² The State v. Clarissa, 11 Ala. 57. And see, as illustrative, Commonwealth v. Manley, 12 Pick. 172; Rex v. Coe, 6 Car. & P. 401; Rex v. Williams, 1 Den. C. C. 59; Rex v. Hughes, 6 Car. & P. 138; Rex v. Lodgington, 9 Car. & P. 70.
§ 758. DIVISIONS AND DISTINCTIONS. [BOOK VI.

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 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 expressly derived from this case. 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. Again, it is held that —

§ 758. "Shoot at." — One does not "shoot at any person" 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.

"Loaded Arms." — Neither does one attempt to discharge "loaded arms," if the touch-hole is so plugged that the gun cannot possibly be fired; or if, from not being primed or otherwise, it does not contain a charge capable of doing the mischief intended. 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 coals indiennes 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.

"Personating." — There cannot be a "personating" of a supposed individual who never existed; there can be, of one who has lived and is dead.

§ 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. How great it must be, and how far progress, is matter not reducible to exact rule.

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; 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, whether
§ 762. Attempt.

per se, such is not the adjudged law. The foundation principle in attempt is, we have seen, 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." 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, and in some circumstances it is so for a single individual to prefer the false accusation. 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." 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 were 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, be the act next preceding the one which would complete the substantive crime intended; and, in reason, the act may be less in magnitude and nearness as the crime is heavier. Perhaps the only practicable method is for the judge, in each case, to consider the special facts without

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1 Ante, § 730.
2 Rex v. Meredith, 8 Car. & P. 589.
3 Ante, § 591, ante; Vol. II. § 218.
4 Ante, § 594, ante, Vol. II. § 218.
5 Ante, § 596; Rex v. Cowper, 5 Mod. 220.
6 § 566, § 596; note.
7 Rex v. Simmons, 1 Wils. 629.
8 Ante, § 730.
9 Ante, § 734.
10 Post, § 734.
11 § 764; Rex v. Cowper, 5 Mod. 220.
12 Ante, § 591 and note.
§ 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; and they would, with us, be called attempt, 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. On the other hand, —

"Last Proximate Act." — The act, as already intimated, need not be the last proximate act prior to the consummation of the felony attempted to be perpetrated. 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 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." 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.

§ 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. So —

Burning Own House to burn Neighbor's — Carnal Abuse. — One may attempt to burn his neighbor's house, by burning his own;
or, to carnally abuse a girl between ten and twelve years old, by doing with her consent what otherwise would be an assault, it being legally in the power of such a girl to consent to the assault but not the carnal act.

§ 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.” But this has already been illustrated.

§ 767. Solicitation. — A common form of attempt is the solicitation of another to commit a crime; the act, which is a necessary ingredient in every offence, consisting in the solicitation. Thus, —

To Larceny — Sodomony — Adultery — Bribery — Threatening Notice. — To incite a servant to steal his master’s goods, or other person to undertake a larceny; to make overtures to one to commit sodomy, or adultery where it is a statutory felony; to offer, merely, a bribe; to request, it seems, one to post up a threatening notice; are several 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.

Solicitation not nearest to Substantive Offence. — A solicitation 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.” While not “the last proximate act prior to the consummation,” it need not be. Consequently,

§ 768. Solicitation to Lighter Offences. — Though, to render a solicitation indictable, it is, as in other attempts, immaterial whether the thing proposed to be done is technically a felony or a misdemeanor; still, as the soliciting is the first step only in a gradation reaching to the consummation, the thing intended must, on principles already explained, 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; 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.

§ 768 a. Solicitation to Higher Offences. — The illustrations previously given 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. 109, § 4, goes but little, if at all, beyond a mere affirmation 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, § 759, ante.
2 Ib. And see, as illustrativo, ante, § 330, 340; Reg. v. Eagleson, Deans. 515, 585, 54 Law J. N. S. 115; 1 Rev. S. 946, 95 Eng. L. & Eq. 640.
3 Ante, § 754.
4 See the cases cited to the last section.
5 Ante, § 760, 764.
6 Ante, § 761.
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. Still, if the offence committed 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. Yet,—

§ 783 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. On the other hand,—

§ 783 c. Denying that Solicitation is an Attempt.—In one of the American cases, already stated and explained, 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, inexpediency 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 would have fallen within this rule; and yet it was held there that a count was not good, which charged that the defendant 'did attempt to assaulted 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 th.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." 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 invite" a person named to commit the substantive offence, without any further specification of overt acts. 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, Paterson, 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." 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, and following the blunder of a writer, without looking into either case,—

§ 783 d. Novel Distinction—(Acest—Sodomy).—The Illinois
court drew a distinction before unknown. It is, that solicitations to offences which are breaches of the peace, or corrupting to the body politic, or 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, therefore, supposing it to be sound in every respect, is flat against the distinction. The other case cited by the Illinois court, simply affirms the doctrine as to the lighter offences 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 case, one 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. 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. Where it is committed between two men, or a man and woman contrary to nature, it is a sexual deliction in principle not unlike incest. And ever since the statute was passed, the English law has held a solicitation to sodomy to be an indictable common-law attempt. 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, bigamy, 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

§ 769. Adaptation. — From the doctrine of adaptation, already considered, 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 affirmation 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. And there are other delictions within the like principle. 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." 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. And, at least, a little different wording of the statute would produce a contrary result.

1 And see post, § 772 n.; Int., long note.
2 Ante, § 768 c. et sq.
3 Rex v. Hooft, 2 East P. C. 909; Rex v. Elliot, 2 East P. C. 961; 8 c. n. om.
5 Rex v. Griffith, 1 Car. & K. 188.
6 Rex v. Cos. 6 Car. & P. 468.
7 Rex v. Hennah, 13 Cox C. C. 547; People v. Van Delre, 42 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 a to a felonious act an—

¹ Ante, § 504–507, 287, 430 et seq.
² Ante, § 726, 730.
³ Ante, § 772.
⁴ Ante, § 507.
⁵ Ante, § 503–504.
⁶ 1 Hawk. P. C. 411; Dwyer, 44 Ca. 2d ed. 794.

CHAP. II.] ATTEMPT. § 772 a

other who in his absence undertakes it and fails, both may be indicted together for the attempt;¹ though, had the effort succeeds, 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. 129; ante, § 692, 698. ¹ Ex parte Max, 44 Cal. 579; The State v. Swann, 65 N. C. 533; Mackay v. People, 1 Parker C. 459; Pinson v. The State, 33 Texas, 579; Usher v. Commonwealth, 2 Div. 394; O'Neill v. People, 16 Mich. 275; Reg. v. Woodhall, 12 Cox C. C. 240, 4 Eng. Rep. 620; The State v. Archer, 54 N. H. 664; Hamilton v. The State, 36 Ind. 206; People v. Bars, 43 Cal. 291; Neville v. The State, 7 Ool. 78; Jones v. The State, 3 Heik. 445; The State v. Scott, 72 N. C. 467; The State v. Brown, 60 Mass. 141; Hill v. The State, 52 Ga. 129; Meredith v. The State, 60 Ala. 442; The State v. Doorin, 48 Iowa 650. ² And see ante, § 717. ³ Ante, § 693, 694; Train & Head, 15 Prev. 5, 6. ⁴ Rex v. Jackson, 1 Crawf. & Dix C. 143; 1 Hawk. P. C. 2nd ed. p. 12, § 27, 30–33; Rex v. Tooke, 1 East P. C. 50; Reg. v. Harris, Car. & M. 661, note. ⁵ Ante, § 457, 458; Rex v. Stone, 6 T. L. 57; Rex v. Gordon, 2 Doug. 509; 6 Inst. 4. ⁶ 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.
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
un成功地 soliciting another to commit the proposed crime
does not morally differ from him who, in felony, solicits success-
fully, 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 undictable: 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.

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§ 778. Division and Distinctions. — 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 D E denoting so much of the transaction as is not indictable, or, if indictable, is not a part of the particular crime.

§ 779. Methods of Defining Crime. — 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 punished 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 mediates 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 disloyalty, 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, 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; 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.

§ 780. Crime enclosed within Crime. — A common sort of combination occurs where one crime is, in a sense, enclosed within another, as represented in the figure here to attached. Thus, A K L may represent a simple assault; A I 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 aforesight;" and A B C murder of the first degree, where the "malice aforesight" is aggravated by being "deliberately premeditated."

§ 781. Other Forms. — But this doctrine is not limited to what

217; Rex v. Belton, 1 Moody & R. 227; 1 Hawk P. C. 6th ed. 33, § 1, 3
Lorton v. The State, 7 Miss. 65.
1 Ante, § 777.

1 Ante, § 611.
DIVISIONS AND DISTINCTIONS. [BOOK VI.

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 A C B E, or for A E B F, or A F B D, or A C B E, 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. The murder and the arson are two offences, each one of which, in the particular instance, includes some element belonging to the other.

§ 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. 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.

§ 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

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. Commited 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.\(^2\)

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§ 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 —

**Mergur.** — Mergur, to be discussed in this chapter, creates a sort of exception to that doctrine.

§ 787. Merger defined. — Mergur, 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

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\(^1\) Ante, § 609, 616.


\(^3\) Johnson v. The State, supra.


\(^5\) Ante, § 791, 604.
§ 780. **DIVISIONS AND DISTINCTIONS.** (BOOK VI.)

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." For illustration,

§ 788. In Rape—Murder.—An act which amounts to the common-law felony of a rape or a murder 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. The Connecticut court has held, that proof of a rape will sustain an indictment for an assault with intent to commit a rape. 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], he cannot be found guilty of the trespass, but ought to be indicted anew." 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 does amount to felony, but only to an enormous trespass, it seems agreed, that judgment may be given as for a trespass only.

Also, if the jury find a special verdict on a general indictment for felony, and the crime be adjudged upon such verdict to be 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 had 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. But the contrary is said to have been holden by the late Chief Justice Holt.

§ 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, that it has been so altered as to prosecutions, under some circumstances, for knowingly receiving stolen goods. And there are, in some of our States, statutes abrogating or modifying the rule in other cases.

§ 790. Course of Discussion—Conclusion.—This subject will be continued in the next chapter, to which the present one is introductory.


2 *Commonwealth v. Allen*, 12 Pick. 496.

3 *Post*, § 804-815.

4 *The State v. Shepard*, 7 Conn. 64.


6 *Commonwealth v. Allen*, 12 Pick. 496.

7 *Post*, § 804-815.

8 See post. § 626.

9 *Attie*, § 826.

10 *As to which see post*, § 826 et seq.

11 See post, § 816.

12 See post, § 816-815.


14 *Attie*, § 626, 627.
CHAPTER LIV.

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 held 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. 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. 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; or for manslaughter, and murder is shown; or for larceny, and it was perpetrated in the course of a burglary, or a robbery; or for malicious mischief, and the facts appearing would equally sustain a charge of larceny; or for inflicting a battery on one man, when in truth the blow took effect on two; or for the non-repair of one street, when the neglect covered several streets; or for being accessory to one person, while more persons also were guilty of the principal offence,—in those 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. Moreover, as a practical suggestion, the prosecuting power ought to be cautious how it carves; because, not only may a misjudgment 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.


1 Wyatt v. The State, 1 Blackf. 257; People v. Smith, 67 Barb. 46. 2 Hickey v. The State, 23 Ind. 21; United States v. Fayeterville, 2 Murph. 571; The State v. Bonnell, 9 Eng. Ind. 460. 3 The State v. Leavitt, 32 Maine, 188. 4 The State v. Damon, 2 Tyler, 387. 5 The State v. Fayeterville, 2 Murph. 571. 6 Stoops v. Commonwealth, 7 S. & R. 491. And see ante, § 665. 7 Post, § 798 et seq.

1 The State v. Moioitreive, Rice, 158; The State v. Benham, 7 Comm. 414; The State v. Eire, 1 Bailey, 1; The State v. Fayeterville, 2 Murph. 571; The State v. Johnson, 12 Ala. 520; Rex v. Chambers, 2 Moody & R. 26, 2 Lewin, 52; Hinkle v. Commonwealth, 8 Dana, 419; The State v. Damon, 2 Tyler, 387; Holcomb v. Cornhill, 8 Comm. 876; Frazier v. The State, 6 Miss. 196; People v. Ward, 15 Wend. 231; The State v. Cooper, 1 Green, N. J. 281; The State v. Thaxton, 3 Harrison, 8; The State v. Coombs, 52
CHAPTER LIV. RELATIONS OF OFFENSES.

§ 795. 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 allega-
tion 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 Rapiishment — 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 intent to commit

Maine, 539; The State v. Mahler, 35
Maine, 525; Smith v. Commonwealth, 7
Grat. 665; Rex v. Smith, 7 Mod. 371;
Rex v. Reynolds, 5 East, 318; The State
v. Sprague, 52 Mass. 653; Shaw v. The
State, 18 Ala. 547. In Lareeney.— As
to larcenies, see Reg. v. Beatle, Car. &
M. 609; Rex v. Jones, 4 Car. & P. 217;
The State v. Williams, 10 Hampf. 101;
Lorton v. The State, 7 Miss. 545; Reg.
v. Ricard, 2 Car. & K. 765; The State
v. Nelson, 29 Maine, 829; The State
v. Thurston, 2 Mo. McMillan, 382; Rex v.
Richards, 4 Car. & P. 388. In Burglary.—
As to burglary, and the like, see Com-
monwealth v. Hope, 22 Pick. 1; Judson
v. Commonwealth, 6 Met. 236; The State
v. Squires, 11 N. H. 37; Commonwealth
v. Brown, 3 Mell. 297; The State v.
Brady, 14 Va. 353; Jones v. The State,
11 N. H. 209; Stoops v. Commonwealth,
7 S. & R. 491; Rex v. Comer, 1 Leach,
4th ed. 30; Rex v. Vandercook, 2 East
P. C. 519; a. m. Rex v. Vandercook,
2 Leach, 4th ed. 718; Commonwealth v.
Tuck, 20 Pick. 556; The State v. Moore,
12 N. H. 42; Commonwealth v. Doro, 3
Va. Cas. 25. 2

And see § 794; ante, § 797—799; post, § 804 et seq.

Post, § 805.

Swinney v. The State, 8 Sum. & M. 376;
Reg. v. Reid, 1 Eng. L. & Eq. 366,
665; A.Jay, 181; The State v. Nichols, 8
Conn. 357; Durham v. The State, 1
Blackf. 83; Wilson v. Commonwealth,
12 B. Monn. 2; Reg. v. Wynn, 1 Den.
C. 306, 2 Car. & K. 836; Rex v. Com-
opull, 3 Car. & P. 418; Commonwealth v.
Harney, 10 Met. 422; Wills v. The State,
4 Blackf. 657; Rex v. Yawen & C.
81, 9 Cox C. C. 91; Rex v. Smith, 84
U. C. Q. R. 559; Heller v. The State,
28 Ohio State, 582; Hanna v. people,
192; Reg. v. Canwell, 11 Cox C. C. 289;
Reg. v. Taylor, Law Rep. 1 C. C. 194,
11 Cox C. C. 261; Reg. v. Dingman, 22 U.
C. Q. R. 835; and the other cases cited to
sections next following. And see Smith-
erman v. The State, 27 Ala. 123, post,
§ 803; Crim. Proc. Id. § 418, 419.

C. J. Kelly, 62—108; The State v. Flem-
ing, 2 Strob. 454; Reynolds v. The State,
1 Kelly, 282; King v. The State,
3 How. Miss. 780; Watson v. The State,
5 Miss. 407; Pinnabell v. The State,
1 Miss. 231; The State v. Gaffney, Rice,
481; Commonwealth v. Childs, 7 S. & R.
423; The State v. Arden,
1 Day, 487; The State v. Franklin,
6 Md. 157; Gordon v. The State,
5 Lavor. 419; Wroce v. The State, 20 Ohio
State, 290; The State v. Huber,
8 Kan. 447; Davis v. The State,
99 Md. 355; The State v. Sloan,
47 Miss. 604; Davis v. The State,
26 Ind. 21.
And see The State v. Taylor, 8 Orego-
10; Hamilton v. The State, 26 Ind. 280.

1 Gardenheir v. The State, 6 Texas,
348; The State v. Hahn, 7 Port. 456;
The State v. Coy, 2 Ark. 181; Stew-
art v. The State, 5 Ohio, 241; Clark v.
The State, 12 Ga. 350.
2 McRae v. The State, 2 Eng. 374.
3 Commonwealth v. Stockbottle, 4 Met.
354; Rex v. Dawson, 3 Stark. 62;
People v. McDonald, 9 Miss. 160.
4 And see Smith v. The State, 33
1 Texas, 550; The State v. Shepard, 10
Town, 199; White v. The State, 13 Ohio
State, 550.
5 Runticles v. Roberts, 2 Dallas, 121, 1
Yeates. 6 The State v. Cowell, 4 Ire.
221. And see The State v. Pearce, 2
Blackf. 818; The State v. Cox, N. C.
Terr. 1. 186.
6 Commonwealth v. Goodhue, 2 Mat.
193. And see Crim. Proc. I. § 419.
7 Rex v. Flemings, 2 Show. 26; The
State v. Townsend, 2 Harding. Del. 640;
Rex v. Heaps, 2 Selk. 688. It would
appear, however, that an indictment for
riot may be so framed as, on the prin-
ciple stated post, § 653, not to include an
assault. Reg. v. Ellis, Holt, 625. And
see The State v. Allen, 4 Hawks, 357.
Commonwealth v. Pender, 2 Va. Cas. 297;
Chiles v. The State, 16 Ark. 304.

§ 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 offen-
s, the conviction may be for the larceny alone. 30 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 Palmer v. People, 6 Hill, N. Y. 427.
2 Stoope v. Commonwealth, 7 S. & R.
417; The State v. Townsend, 2 Harding.
Del. 640; Commonwealth v. Leamy, 11
H. 575; Coleman v. Commonwealth, 11
Met. 581; Jones v. The State, 11 N. H.
209; Commonwealth v. Hope, 22 Pick.
1; Jesslyn v. Commonwealth, 8 Met. 395;
Commonwealth v. Tuck, 20 Pick. 556;
Pepper v. The State, 10 Ga. 511; The State
v. Moore, 12 N. H. 42; Rex v. Comer,
1 Leach, 4th ed. 30; Rex v. Vandercook,
2 East P. C. 519; a. m. Rex v. Vander-
cook, 2 Leach, 4th ed. 718; Commonwealth
v. Brown, 3 Rawle, 397; Clarke v.
Commonwealth, 25 Grat. 908; The State
v. Alexander, 66 Misses. 191.
3 The State v. Tracy, 14 Va. 358;
Anonymous, 51 Maine, 692; The State v.
Grisham, 1 Bayw. 13; Rex v. Withal,
1 Leach, 4th ed. 88, 2 East P. C. 651, 617;
Commonwealth v. Hope, 22 Pick. 1; The
State v. Cocke, 3 Harding. Del. 640;
Reg. v. Reid, 1 Eng. L. & Eq. 565, 609, 11
Jun. 181. See Reg. v. Clarke, 1 Car. &
K. 421.
4 Fuller v. The State, 46 Ala. 717;
Bell v. The State, 46 Ala. 683; People v.
Garnett, 29 Cal. 623;
terms to charge the higher; the statutes prescribing that the degree shall be specified in the verdict. Or the conviction may be for any lower grade of killing. 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.

§ 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. 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 offense, whatever is thus proved is the same in degree as the entire matter charged, or different in degree, or in nature. 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; one charged with a larceny of property of more than one hundred dollars in value may be found guilty of the larceny in a lesser 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. 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, — the conviction may be for petit larceny.

Alternative Clauses of Statute. — We have seen, 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.

§ 800. Joint Indictment against Two or More. — In like manner, where two or more persons are indicted together for one offence, a part may be convicted and the rest acquitted; or some may be found guilty of the offence in a higher degree, others in a lower. 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. Therefore,

§ 801. In Conspiracy. — Though one of two conspirators may be proceeded against after the other one is dead, or they may

1 See, for a full view of this question, Crim. Procd. II. §§ 560-566. See, also, Bishop First Book, § 401 and note, 450; Stat. Crimes, § 371, 372, 471. And see the State v. McCormick, 27 Iowa, 492, where, in an able opinion, the court unanimously affirm the doctrine which I had laid down in Crim. Procd.

2 See ante, § 673.

3 The State v. Bennet, 3 Brew. 516, 2 Tread. 583; the State v. Wood, 1 Mill, 29; the State v. Murphy, 5 Blackf. 410; 2 Hawk. P. C. Curw. ed. p. 629, § 6. And see the State v. Adlin, 7 Post, N. E. 116; Wills v. the State, 4 Blackf. 457.

4 Stat. Crimes, § 383; ante, § 780.

5 Stevens v. Commonwealth, 6 Met. 241.

6 Crim. Procd. I. § 416-430; Benham v. the State, 1 Iowa, 542; Pinfocini v. People, 42 Ill. 217; the State v. Butler, 42 N. H. 499; the State v. Dunphay, 4 Minn. 483.

7 See, for a full view of this question, Crim. Procd. II. §§ 560-566. See, also, Bishop First Book, § 401 and note, 450; Stat. Crimes, § 371, 372, 471. And see the State v. McCormick, 27 Iowa, 492, where, in an able opinion, the court unanimously affirm the doctrine which I had laid down in Crim. Procd.

8 Eng. L. & Eq. 323; the State v. Allen, 4 Hawks, 392; Bloombell v. the State, 3 Blackf. 205; Ward v. the State, 22 Ala. 16. And see Commonwealth v. Pers. Day, 2 Va. Cas. 227; the State v. Allison, 3 Teng. 429.

9 Rev. v. Butts, 609; Shouse v. Commonwealth, 5 Barr, 83; the State v. Arden, 1 Ray, 487.

10 Query as to Rev. v. Quali, 1 Crawf. & Durr. C. C. 191.

11 Rev. v. Ellis, Holt, 609; the State v. Malon, 1 Mo. 240. As to the limitations of the rule, see the State v. Allison, 3 Teng. 428. And see Rev. v. Hughes, 4 Car. & P. 573.

12 Rev. v. Nolle, 3 Str. 1227; People v. Onloc, 2 Johns. Cas. 501.
§ 802. Charge Joint or Several. — When two or more are on trial for an 
officine laid in a single count as committed jointly; 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. But when the 
indictment 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.

§ 803. Allegation to be Sufficient. — The law never condemns 
without accusation. So that, as already mentioned, the 
foregoing doctrines do not apply where the thing proved is not 
allegedly set down in allegation. Therefore, for example, —

1 Stark: Crim. Procd. 2d ed. 48, 44; 

2 Ance, § 794, 798.

3 The State v. Shoemaker, 7 Mass. 
177; Rex v. Hughes, 4 Car. & P. 378; 
Rex v. Furlanis, Bom. & Ry. 445; Reg. 
v. Pyle, 1 Car. & R. 73; Van Alten 
burg v. The State, 11 Ohio, 684; The 
State v. Jesse, 3 Dev. & Bat. 98; Reg. 
v. Reid, 2 Ten. C.C. 86, 1 Eng. L. & Eq 
595; Reg. v. Holcroft, 2 Car. & R. 541.

4 Carpenter v. People, 4 Scam. 137; Com 
monwealth v. Fichbahl, 4 Met. 344; The 
State v. Haines, 8 McCord, 658; Child 
v. The State, 16 Ala. 229.

5 1 Stark: Crim. Procd. 2d ed. 48, 44; 

6 Ance, § 794, 798.

7 The State v. Shoemaker, 7 Mass. 
177; Rex v. Hughes, 4 Car. & P. 378; 
Rex v. Furlanis, Bom. & Ry. 445; Reg. 
v. Pyle, 1 Car. & R. 73; Van Alten 
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595; Reg. v. Holcroft, 2 Car. & R. 541.

8 Carpenter v. People, 4 Scam. 137; Com 
monwealth v. Fichbahl, 4 Met. 344; The 
State v. Haines, 8 McCord, 658; Child 
v. The State, 16 Ala. 229.

§ 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, 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. 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. 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. 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. The reason usually assigned is, that, —

1 Rex v. Plant, 7 Car. & P. 575.

2 Rex v. Gordon, 1 Leach, 4th ed. 615, 
1 East P. C. 352.

3 Swed., in v. The State, 19 Ark. 205.

4 Ante, § 787.


6 Ante, § 788, 789.

7 Ante, § 788; The State v. Durham, 
72 N. C. 447; Johnson v. The State, 2 
Dutcher, 415, 434, and the authorities 
cited in the next note.

8 2 Hawk. P. C. Curw. ed. p. 621; 
Rex v. Weatherby, 2 Sten. 1133, 1 Leach, 
4th ed. 12; Commonwealth v. Gable, 7 
S. & R. 428; Rex v. Eaton, 3 Car. & P. 
417; Rex v. Gleson, 2 Car. & R. 784; 
Rex v. Goodfery, 2 Car. & R. 782, note; 
Commonwealth v. Rolfe, 12 Pick. 350; 
366, 368; Wright v. The State, 5 Ind. 
627; Reg. v. Dunger, 4 Post. & R. 99, 
Reg. v. Woodhall, 12 Cox C. C. 240, 4 
Reg. Rep. 529; Reg. v. Nicholls, 2 Cox 
483.
§ 806. Doctrines and Distinctions.

Doctrines Derived from Procedure. — When this rule was established, persons indicted for misdemeanors had certain advantages at the trial, such as to make a full defense 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, wherein, as it was said afterward, “the judges appear to be transported with zeal too far.”

But, —

§ 805. Changed Procedure — How with us. — It is inequitable to deny one charged with felony any privilege which he ought to have in a 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 misdemeanors on indictments for felony; discarding the old rule, in obedience to the maxim, cessant ratione legis, cessat ipsea lex; while in other States it has been followed.

§ 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


§ 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 a misdemeanor can; and the judge must be embarrassed as to the admission of the testimony, if in doubt whether the verdict, should be 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. And the court of Massachusetts, sustaining the rule, rejected altogether those more common reasons, deeming it to rest on “the broader consideration, that the offenses are, in legal contemplation, essentially distinct in their character, and that this is manifest from an examination of the authorities.”

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 misdeemeanor reasons, other reasons for adhering to it may exist in addition to the other-mentioned ones. 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.”

Yet this court, at a later period, turned again and embraced its former doctrine, apparently without being aware of the intermediate decision.

1 Arne, § 275. 2 Ante, § 274. 3 The State v. Wheeler, 3 Vt. 344, 347, overruling The State v. McLellan, 1 Atk. 231, and The State v. Cuy, 3 Atk., 181. 4 Commonwealth v. Hoby, 12 Pick. 466, 506.
§ 809. Conviction of Attempt or 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, 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, now in force, and 7 Will. 4 & 1 Vict. c. 85, § 11, repealed, which provides, that, on the trial of any person for any of the offences herebefore 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 the felony, and to find a verdict of guilty of assault against the person indicted; if the evidence shall warrant such finding.17 There are some American statutes following more or

1 Ante, § 789.
2 Commonwealth v. Drum, 19 Pick. 472; Commonwealth v. Deane, 100 Mass. 849, 920.
3 Pneudville v. People, 42 Ill. 317; The State v. Johnson, 1 Vroom, 185; Green v. The State, 3 Head, 267. As to other American statutes and the decisions upon them, see The State v. Philpkins, 5 Ala. 477, 493; Britain v. The State, 7 Humph. 189; The State v. Valentine, 6 Serg. 522; The State v. Howling, 10 Humph. 52; Commonwealth v. Newell, 7 Mass. 245; Commonwealth v. Raby, 12 Pick. 498, 506; Commonwealth v. Cooper, 15 Mass. 187; ante, § 780.
4 Ante, § 740.
5 Ante, § 757.
6 Known as Lord Denman’s Act, Reg. v. Dungey, 4 K. & Q. 507. As to other American statutes and the decisions upon them, see Reg. v. Edwards, 2 D. C. C. 94; Eng. L. & Eq. 448; Reg. v. Watkins, 2 Moody, 217, 2 Car. & P. 594; Reg. v. Elam, 8 Car. & P. 517;


And see, on this subject, Wolf v. The State, 41 Ala. 412; Hanna v. People, 12 Mich. 316; The State v. Jarvis, 21 Iowa, 297; The State v. Wilson, 80 Conn. 300; Clifford v. The State, 10 Ga. 422; Stephen v. The State, 11 Ga. 255; 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, through the effect of this decision on its constitutionality. Common-wealth v. Raby, 12 Pick. 498, 507.

3 Ante, § 788. And see Crim. Proc. I. § 537.
4 Stephen Pond, 578, 542; Laver v. Commonwealth, 12 Met. 294; Rex v. Medocin, 1 Law. 14th ed. 377; Rex v. Hall, 1 T. R. 820, 822; People v. Lowman, 2 Barb. 218, 239; Lowman v. People, 1 Const. 379; Crim. Proc. I. § 476. 487

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 may 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 law 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
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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, have often lain but indistinctly in the minds of judges; yet they are sufficiently deducible from the decisions. Some cases, therefore, in Massachusetts, Vermont, and Maryland, 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.

§ 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. 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.

1 See ante, § 140, note.
3 The State v. Wheeler, 3 Vt. 346, 347.
5 Commonwealth v. Squire, 1 Met. 268.
6 Nelson v. The State, 10 Humph. 518. The like doctrine is also held in New York, People v. Abbott, 19 Wend. 192.
8 See also ante, § 376, 380, note, 391, note.

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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 justices 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.”

§ 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; 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, 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, order the proceedings to be suspended, until an indictment can be brought forward for the felony. 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
§ 814. MISPRISION OF FELONY OR TREASON. — Every treason includes a misprision of felony, for which misprision, though only a misdemeanor, 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 — a rule, the authorities agree, not applicable where the object of the conspiracy is a misdemeanor. This doctrine, the reader perceives,

3 Commonwealth v. Squire, 1 Met. 268, 269, 292.
5 1 East P. C. 140.
6 1 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 more detail. Also, Commonwealth v. Delany, 1 Grant, 16. 224; Johnson v. The State, 5 Denbo, 463; Ellis v. People, 28 N. Y. 177. In Kentucky, it has been laid down that a conspiracy to commit a felony, consummated by committing treason, is treason. — Commonwealth v. Blackburn, 1 Davall, 4.
9 The State v. Murray, 15 Maine, 100; People v. Mather, 4 Wend. 229, 266; People v. Richards, 1 Mich. 210; Commonwealth v. McGowan, 2 Parm. 381.

is contrary to just principle; it has been rejected in England; and, though there may be States in which it is binding on the courts, it is not to be deemed general American law.

§ 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.

2 Johnson v. The State, 5 Denbo, 453; ante, § 761.
3 Rex v. Evans, 2 Cor. & R. 458; Rex v. Anderson, 2 Mosby & R. 459. As to this, however, Lord Denman has observed, "that the misdemeanor of obtaining goods by 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."
4 Where that is the case, there appears to be no bar to a second inquiry where both are charges of felony and the other of misdemeanor. — Reg. v. Button, supra, 13 Q. B. 949, 947; 2 Cox C. C. 293, 294. And see United States v. Kindelkopf, 9 Bi. 359.

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