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## FELONIES AND MISDEMEANORS.

In the later days of the common law crimes were divided into three classes, treason, felonies and misdemeanors. Treason was considered not only "the highest civil crime which any man could possibly commit," but also a class of crime distinct from that of felony or misdemeanor.[1] This was not always so. "In ancient time," says my Lord Coke,[2] "every treason was comprehended under the name felony." This seems to have been the law as late as the time of Edward III, for the famous statute of treasons, passed in his reign, used the expression, "treason or other felony."

In the United States, at the present time, treason is perhaps nowhere regarded as a class of crime distinct from felony. The question is of but little importance. The distinctive characteristics which formerly marked off treason from felony, no longer exist, and the distinction, if it exists at all, is a mere matter of names.

### ETYMOLOGY OF FELONY.

The origin of the term felony seems to have been a puzzle to law writers.[3] Some of the juridicial lexicographers derive it from the Greek word, phelos, an impostor or deceiver; others from the Latin word, fallo, felfilli; to countenance which they would have it called fallonia.

Sir Edward Coke declares that it is *crinnen animo felleo perpetratum*, with a bitter, gallish inclination. Blackstone calls

[1] 4 Black. Com., 94.
[2] 3 Inst., 15.
[3] Lynch v. Com. 88 Pa., 189, per Agnew, J.
[4] 1 Inst.. 391.

this a strange etymology and, following Spelman, says, "Felon is derived from two northern words: *fee*, which signifies the fief, feud, or beneficiary estate, and *lon*, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man gives up his fief. As we say in common speech, such an act is as much as your estate or life is worth."[5] Tho Blackstone's etymology has been frequently approved, it has also been severely criticized as being an "inverted etymology" and opposed to principle, precedent, and the authority of Blackstone himself.[6] By recent investigators we are told that Coke's guess may be right after all, and that of the many conjectures proposed, the most probable is that the word is a derivative of the Latin *fell, gall*, and that the original sense of the word felon was one who was full of bitterness or venom, for gall and venom were closely associated in the popular mind.[7]

DEFINITION OF FELONY AT COMMON LAW.

The definition of the term felony is involved in as much doubt as its etymology. "Felony as a term," says Agnew, J., "is incapable of any definition."[8] "It is not easy," says Stephen, "to give any exact definition of it."[9] "To define felony becomes impossible; one could do no more than enumerate the felonies."[11]

There seems to be no doubt that the word came to England from France, and that in France and elsewhere, it covered only the specifically feudal crimes, those crimes which were breaches of the feudal nexus. A mere common crime, however wicked and base, was not, according to the continental law, a felony. To constitute a crime a felony there must have been some breach of that trust and faith which should exist between lord and man.

For a time the word was used in England in this restricted sense, but later it came to include every crime of any considerable gravity and seems to have had no reference whatever to the feudal bond save in one respect, namely, the felon's lands es-

[5]4 Black. Com. 95.

[6]2 Wilson Works 348. 2 Black. Com. 251.

[7]Oxford Eng. Dict. s. v. felon. 2 Pol. and Mait. 465. Y. B. 21-2 Edw. I. p. 355.

[8]Lynch v. Com., 88 Pa. 189.

[9]Stephen's Hist. Crim. L., Vol. 2, page 192.

[10]2 Pol. & Mait., 466. See also McClain Crim. L. 18.

cheated to his lord. It came to stand for "serious crime;" it once had stood for "breach of feudal bond."[11]

Various definitions of the term felony are to be found in the books. They all define felony by enumerating the legal consequences attendant upon a conviction. No definition has been discovered which turned on the *quality* of the crime. Such a definition is unattainable. Perhaps the most frequently quoted definition is that of Blackstone. "The only adequate definition of felony," says he, "seems to be an act which occasions forfeiture of either lands or goods, or both, at common law, and to which capital or other punishment may be superadded according to the degree of guilt."[12] This definition has been quoted and approved in many cases[13] and is perhaps the orthodox definition of the bench and bar. It has not, however, the approval of the most learned legal historians and the justness of their criticism is apparent upon examination.[14]

In a recent Pennsylvania case it is said, "Felonies, in England, comprized originally every species of crime punishable with forfeiture of lands and goods. At common law the principal if not the only felonies, after treason, were murder, manslaughter, arson, robbery, rape, sodomy, mayhem and larceny. By statutes, however, running from the earliest period, new felonies, were, from time to time, created; until finally, not only every heinous offense against person and property was included within this class, but it was held that whenever judgment of life or member was affixed by statute, the offense to which it was attached became felonious by implication, tho the term felony was not used in the statute.[15]

The term misdemeanor as a word of art is of much later origin than felony. "Misdemeanors include all indictable offenses which do not amount to felony."[16]

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[11]1 Pol. & Mait., 303, 351; 2 Pol. & Mait., 465.

[12]4 Black. Com. 95.

[13]12 Cyc. and cases cited. 8 A. & E. Encyc. 280 and cases cited.

[14]2 Stephen's Hist. Crim. L. 192; 2 Pol. & Mart. 465; In McClain's Crim. L. it is said, "As used in the American colonies the popular distinction seems to have been between offenses punishable by death and those not so punishable."

[15]Com. v. Schall, 12 Co. Ct., Rep., 544.

[16]Com. v. Gable, 7 S. & R. 435.

FELONIES IN PENNSYLVANIA.

The classification of crimes as felonies and misdemeanors has been recognized by the constitutions, statutes and decisions of Pennsylvania from the earliest to the present time. It has been declared to be illogical, useless and unintelligible but its existence has never been denied.[17] In Com. v. Randolph, 146, Pa. 83, it was argued that by the various statutes providing punishments for crime all distinction between felonies and misdemeanors had been abolished. The court decided against this contention, saying, "It is stating the case much too broadly to say that all distinction between felonies and misdemeanors has been abolished in Pennsylvania. Let it be conceded that forfeiture of lands was the particular incident which gave the name felony to certain crimes, and that that particular punishment no longer exists; then the incident which gave the name to these crimes no longer exists. But that was not the only thing that distinguished and still distinguishes these classes of crimes from each other."

Forfeiture as a punishment for crime having been abolished, and the death penalty having been restricted to the single crime of murder in the first degree, the former test or tests by which to determine what is felony and what is not, have at the present time little or no practical value. In some states there are statutes defining a felony as an offense punishable by death or imprisonment in the penitentiary. Pennsylvania has no such statute nor any statute defining what is felony, and therefore the rule at common law obtains here unless changed by statute. "Felonies in this Commonwealth, are, therefore, those offenses which are felonies at common law, or which are expressly made so by the statute creating the offense and providing the punishment."[18] Thus, tho we have lost the old tests, we hold that to be felony which was felony when the old tests were operative.

IMPORTANCE OF DISTINCTION.

The distinction between felonies and misdemeanors was one of the most important known to the common law. It affected both the substantive and adjective law of crimes, and even the civil rights of parties were frequently determined thereby. Re-

[17]Com. v. Hutchinson, 6 Super. Ct., 405; Lynch v. Com., 88, Pa. 189.
[18]Com. v. Schall, 12 Co. Ct. Rep. 554.

medial legislation and the gradual evolution of the common law have done much to lessen the importance of the distinction, but it is still of considerable importance. In the following pages the principal cases in which the distinction was, and is, of importance are set forth.

SUSPENSION OF CIVIL REMEDY.

As early as 1606, and from time to time thereafter, dicta are to be found in English decisions to the effect that when an act constitutes a felony as well as a tort, the tort is merged in the felony.[19] It has recently been asserted that "there is no express decision of an English court enforcing this rule,"[20] and certain it is that according to the great weight of authority the civil remedy is at most merely suspended until after the termination of a criminal prosecution against the offender, and not absolutely taken away.[21]

Indeed a doubt whether the rule, even in this limited form, ever existed has been recently expressed,[22] and there is apparent in quarters of high authority a strong, tho not unanimous disposition, to discredit the rule as a mere cantilena of text writers founded on ambiguous or misapprehended cases or on dicta which were themselves open to the same objection.

The question whether the rule, in either form, existed in Pennsylvania was left undecided by a Pennsylvania court in 1836.[23] In a later case it was decided by the Supreme Court that the civil remedy was not merged in the felony but was merely suspended until the public prosecution for the felony had terminated.[24]

It has been said that the rule no longer exists in Pennsylvania,[25] and this would seem to be the result of the seventy-first section of the Act of 1860, which provides that "in all cases of felony it shall * * * be lawful for the person injured or aggrieved by such felony to have and maintain his action * * * *in like manner as if the offense committed had not been felon-*

[19]Higgins v. Butcher, Gelv. 89. 20 A. & E. Encyc. 600.
[20]Burdick on Torts, 13.
[21]20 A. & C. Encyc., 600
[22]Wells v. Abraham, L. R. 7; Q. B. 500.
[23]Piscataqua Bank v. Turnley, 1 Miles, 312.
[24]Hutchinson v. Bank of Wheeling, 41 Pa. 42.
[25]20 A. & E. Encyc. 602.

*iously done; and in no case whatever shall the action of the party injured be deemed taken or adjudged to be merged in the felony or in any way affected thereby.*[26]

Five years after the passage of this statute the Supreme Court decided that the bringing of an action of trover for goods stolen need not be delayed until after the termination of criminal proceeding against the thief but that the trial of the former would be suspended until after the disposition of the latter. The effect of the act of 1860 was not discussed by counsel or court.[27]

The common law rule postponing a civil suit to a criminal prosecution was never applied in cases of misdemeanor.[28]

MERGER OF OFFENSES.

At common law, because of the marked difference between felonies and misdemeanors, arising not only from the dissimilarity and extent of the punishment and consequences to the accused, but also from the method of procedure, the doctrine of merger was evolved and generally obtained. This doctrine found expression in several important rules.

The general rule of the common law that upon an indictment charging a particular crime the defendant might be convicted of any lesser offense included within it, was subject to the qualification that there could be no conviction for a misdemeanor upon an indictment charging a felony, tho the misdemeanor formed a constituent part of the felony charged and was complete.[29]

The reason of this qualification of the general rule was that persons indicted for misdemeanors were entitled to certain privileges at the trial, such as a right to make a full defense by counsel, to have a copy of the indictment, and a special jury. These privileges were not accorded to those indicted for felony, and it was considered that persons who were merely guilty of misdemeanors should not be deprived of these rights through the device of a too severe allegation in the indictment.[30]

As a particular application of this qualifying rule it was held that on an indictment for felony there could not be a con-

[26]Act Mar. 31st, 1860, sec. 71 P. L. 427.

[27]Keyser v. Rodgers, 50 Pa. 281.

[28]McClain Crim. L., sec. 17; Com. v. Dickerson, 7 W. N. C. 433.

[29]Hunter v. Com., 79 Pa. 503.

[30]Hunter v. Com., 79 Pa. 503.

viction of an attempt, because an attempt to commit a felony was by the common law a misdemeanor.

The common law rule was followed in some of the United States, but modern legislation and judicial decision seem to have almost entirely abrogated it, and it may now be stated as a general rule, prevailing throughout the United States, that a person charged with an offense may be convicted of any constituent offense, provided such minor offense is substantially included within the description in the indictment, and this without regard to the technical line of demarcation between felonies and misdemeanors.[31]

The existence of the common law rule in Pennsylvania has been asserted in several cases. In Com. v. Gable, 7 S. & R., 424, the jury returned a verdict of "manslaughter" to an indictment for murder. The court held that this necessarily meant voluntary manslaughter because involuntary manslaughter was a misdemeanor, and it was "well settled that there could not be a conviction of a misdemeanor on an indictment for felony." And in Dinkey v. Com., 17 Pa., 129, it is *said:* "On an indictment for a felony there cannot be a conviction of a minor offense included within it if such an offense be a misdemeanor." But in a later case, Hunter v. Com., 79, Pa., 505, it was held that on an indictment charging felonious assault there could be a conviction of simple assault. The court said: "We have no hesitation in declaring that the old common law rule no longer exists in Pennsylvania. The reason of the rule has no application in this state. On the contrary the advantages, if any, upon the trial, are all in favor of those charged with felony. The reason of the rule having ceased the rule itself ceases in obedience to the maxim, *cessante ratione legis cessat ipsa lex.*"[32]

It seems, however, that the common law rule has not been entirely abrogated. In Com. v. Adams. 2 Sup. Ct., 51, it is held that if any injury to the rights of the defendant would result by reason of his trial for a constituent misdemeanor the common law rule is still applicable. Therefore there could be no conviction of simple assault on an indictment charging murder, because it would deprive the defendant of the opportunity and right to settle the misdemeanor, which was conferred by

[31]20 A. & E. Encyc., 604.

[32]See also Com. v. Parker, 146 Pa. 343.

section nine of the Act of March 31, 1860, and compel him to defend without notice against murder, manslaughter, assault with intent to murder and simple assault and battery.

At common law if one was indicted for a misdemeanor and the evidence proved that the wrongful act had been carried to an extent which made it a felony, the misdemeanor was said by some authorities to be merged in the felony, and the courts would direct an acquittal and order that the prisoner be indicted and tried for the felony. According to other authorities such action on the part of courts was discretionary.[33] The doctrine of the latter cases has been put into statutory form in both England and Pennsylvania.[34]

SPECIFIC INTENT OF BURGLARY.

An essential element of the crime of burglary at common law was the felonious intent. No breaking and entry, however atrocious and forcible, amounted to burglary unless accompanied with the specific intent to commit a felony. An attempt to commit a misdemeanor was not sufficient.

The statutory definition of burglary in Pennsylvania differs in important particulars from the common law definition, but the specific intent to commit a felony is an essential element of the crime as defined by statute.[35]

Another statute, providing for cases not covered by the crime of burglary at common law, and making it a crime to enter in the night time without breaking, or in the day time with or without breaking, also requires that in either case the entry should be made with the specific intent to commit a felony.[36]

SOLICITATIONS.

There are crimes the solicitation of the commission of which by one man of another will itself constitute a crime, even tho the solicitation is not followed by the commission of a crime, nor by an attempt, nor even by the consent of the person solicited.

It is difficult to draw any precise line of distinction between the cases in which the law holds it a misdemeanor to solicit a

[33]Reg. v. Button, II, I. B. 729; 3 Cox, 229.

[34]14 and 15 Vict. C. 100, Sec. 12. Act of March 31, 1860, Sec. 51, P. 427. The doctrine that the defendant was entitled to an acquittal was acted upon by the lower court in Com. v. Par, 3, W. & S. 345.

[35]Act of March 31, 1860, Sec. 135, P. L. 415.

[36]Act of March 13, 1901, Sec. 1, P. L. 49.

crime and cases in which it does not. There seems to be no question that solicitation to commit a felony is a misdemeanor,[37] and there are cases which seem to hold that solicitation to commit a misdemeanor is not a misdemeanor,[38] but it has been truly said that the classification of a crime as a felony or a misdemeanor, being wholly arbitrary and governed by no fixed principles, affords no just criterion by which to determine whether solicitation to its commission is an offense at law, and that the true test is whether the crime solicited is "one which especially affects public society or injuriously affects the public police and economy." If it does, the solicitation to commit it is an offense at common law, whether the substantive crime solicited be a felony or misdemeanor and whether it is so designated by common law or by statute.[39]

ATTEMPTS.

It has been stated generally that it is an indictable misdemeanor at common law to attempt to commit any crime, whether the crime intended is a felony or misdemeanor, and whether it is a common law or statutory crime.[40]

There are cases, however, which hold that this rule does not apply to statutory misdemeanors which are merely *mala prohibita*. But the extent of this exception is not clear.[41]

ACCESSORIES.

The sacrosanct distinction between principals and accessaries was predicated of felonies. In misdemeanors, all concerned therein, if guilty at all, were regarded as principals and might be indicted, tried and punished as such.[42] In former times when the rules that an accessory could not be tried without his consent until the guilt of the principal had been legally ascertained by a conviction, etc., prevailed, this distinction was of great importance, but the passing of statutes providing in substance that an accessory before the fact "may be indicted, tried, and convicted in all respects as if he were a principal felon," and an ac-

[37]Com. v. Hutchinson, 6 Super. Ct. 407; Com. v. McGregor, 6 Dist. 346; Stabler v. Com., 85 Pa. 318; Com. v. Randolph, 146 Pa. 83.

[38]Smith v. Com., 54 Pa. 209; Com. v. Randolph, 146 Pa. 83.

[39]Com. v. Hutchinson, 6 Super. Ct. 410; Com. v. McGregor, 6 Dist. 346.

[40]Smith v. Com., 54 Pa. 209, Clark Crim. L. 127.

[41]3 A. & E. Encyc. 252; Clark & Marshall, p. 179.

[42]1 Encyc. L. & P. 283, Geigler v. Com., 22 W. N. C. III.

cessory after the fact "may be indicted and convicted whether the principal shall or shall not have been previously convicted or shall or shall not be amenable to justice"[43] has rendered the distinction of no importance.

ARRESTS WITHOUT WARRANT.

It is not necessary in all cases that an arrest for an infraction of the criminal law should be under the authority and by command of a warrant. The legality of an arrest without a warrant is determined by (1) the character of the crime, as a felony or misdemeanor, for which the arrest is made and (2) by the character of the person making the arrest.

A private citizen as well as an officer of the law may under certain circumstances arrest without a warrant in cases of felony. The rights of a private person and an officer are not, however, the same. The distinction is this: an officer may arrest without a warrant one whom he has reasonable grounds to suspect of having committed a felony tho no felony was actually committed; a private person may arrest without a warrant only when (1) the felony charged was actually committed by some one and (2) there is reasonable ground to suspect that the party arrested committed it.[44]

Neither a private person nor an officer has authority to arrest without a warrant for a misdemeanor unless the misdemeanor (1) is committed in his presence and (2) amounts to a breach of the peace.[45] It has been said that in such cases an officer may arrest at the time of the commission of the offence or immediately thereafter or in fresh pursuit of the offender, but that "there is no power for a private person to apprehend after the offence has been committed.[46]

RIGHT TO KILL IN EFFECTING ARREST.

An officer or a private person attempting to arrest a felon may use all the force necessary to apprehend him even to the ex-

[43]Act of March 31, 1860, Sec. 44, 45; P. L. 427; Stewart's Purdon Vol. 1, p. 1043.

[44]Russell v. Shuster 8 W. & S. 308; Wakely v. Hart 6 Binn. 317; Brooks v. Com. 61 Pa. 352.

[45]Com. v. Jayne 11 Super Ct. 459; Philadelphia v. Campbell 11 Phila, 595, Com. V. Krubeck 8 D. R. 521; Com. v. Bryant 9 Phila. 595; Com. v. McMull 1 Wood Dec. 423. 5 Encyc. L. & R. 474, 483.

[46]See Sadler's Crim. Proc. 147, 150.

tent of taking life. This right to kill exists when the party is fleeing and cannot otherwise be taken as well as when he is engaged in violent resistence.[47] It has been said that a killing by an officer arresting upon suspicion of a felony without a warrant cannot be justified unless a felony was in fact committed, and that a private person is justified in killing one who is fleeing only in case the person killed was actually guilty of a felony.[48]

Some courts have applied the same rule to misdemeanors, but the doctrine of the Pennsylvania courts is that where an attempted arrest is for an ordinary misdemeanor life can only be taken where the person arrested resists with such force and violence as to put the person arresting in danger of death or great bodily harm. In such cases the latter's justification in killing his opponent rests upon the ground of self defence.[49]

UNINTENTIONAL HOMICIDE.

Persons are frequently held criminally responsible for the death of others altho they did not intend to kill such others. Where a person is killed by another while the latter is engaged in a criminal act which is malum in se, the intent to commit the criminal act is, by implication of law, transferred from that offense to the homicide actually committed so as to make the killing criminal.

In determining the *degree* of the responsibility of a person killing under such circumstances the law makes use of the distinction between felonies and misdemeanors. The rule is that the killing is murder if the crime intended was a felony, and involuntary manslaughter if the crime intended was a misdemeanor unless the act intended was one which was naturally dangerous to life in which case the killing is murder.[50]

It has even been held that where the legislature creates new felonies out of offences which were only misdemeanors at common law, the rule applies, and a new class of murders is created in case of the killing of a human being by a person engaged in

[47] Com. v. Long 17 Super. Ct. 641; Brooks v. Com. 61 Pa. 352, Com. v. Long 17 Super. Ct. 641.

[48] Com. v. Greer 20 Co. Ct. Rep. 535, Com. v. Long 17 Super. Ct. 641.

[49] Com. v. Rhoades 23 Super. Ct. 517; Com. v. Greer 20 Co. Ct. Rep. 537.

[50] Com. v. Green 1 Ash. 289; Com. v. Gable 7 S. & R. 423; Com. v. Belderback 2 Pars. 447.

the perpetuation of one of such newly created felonies; and that where the legislature reduces a felony to the grade of a misdemeanor, a killing by a person while engaged in such offense will no longer be murder but will be involuntary manslaughter.[51]

HOMICIDE TO PREVENT CRIME.

It is a well settled principle of the common law that any person, whether he be a peace officer or merely a private individual, may kill another, if necessary to prevent him from committing a felony by violence or surprise, such as murder, rape sodomy, burglary, robbery and arson. This doctrine applies, it has been held, to felonies created by statute, if they are forcible felonies' altho they may not have been crimes at all at common law.[52] The doctrine does not apply to the prevention of felonies not attempted by violence and surprise. It does not apply to secret felonies like larceny.[53]

It is equally well settled that a homicide committed to prevent the commission of a misdemeanor is not justifiable. There is one exception to this rule. Tho riot is only a misdemeanor at common law, it is generally so serious an offense that life may be taken, if necessary, in order to suppress it.[54]

COMPOUNDING OFFENCES.

In order to constitute the crime of compounding it is not necessary that the offense compounded should be a felony.[54] It has been said that a distinction formerly existed in this respect between felonies and misdemeanors but that this distinction is no longer recognized except in a few minor offences the prosecution of which is matter of little or no public interest.[55] The distinction between felonies and misdemeanors is highly artificial. There are misdemeanors the compounding of which militates far more against the public welfare than does the compounding of some felonies, and the rule may be said to be now well settled that the true test as to whether it is a crime at common law to compound an offense, is not the character of the crime compound-

[51] People v. Enoch 17 Wend. 159.
[52] 21 Cyc. 798, State v. Moore 31 Conn. 479.
[53] Reg v. Murphy Beale 318.
[54] 21 Cyc. 800, Com. v. Hare 2 Ill. 467.
[54a] 8 Cyc. 494.
[55] Pearce v. Wilson 111 Pa. 14.

ed as a felony or a misdemeanor, but the effect which the compounding would have upon the public interest.[56]

The tenth section of the Act of March 31st, 1880, makes it a misdemeanor to compound misprison of treason, murder, manslaughter, rape, sodomy, buggery, arson, forgery, counterfeiting or passing money or notes, burglary, house-breaking, robbery, larceny, receiving stolen goods, kidnapping, bribery, perjury, subornation of perjury.[57]

Whether or not the common law would prevail as to offences not named in this statute has never been decided. It is highly probable that as to offences not named in the statue the common law would govern. The criminal code specifically provides that "every felony, misdemeanor, or offence whatever, not specially provided for by this act may and shall be punished as heretofore.[58]

SETTLEMENT OF OFFENCES.

Statutes have been passed in many jurisdictions providing in substance that if certain offences are settled in a certain way, such settlement will constitute a bar to a prosecution by the state. The right to settle is usually confined to misdemeanors.

In order that a crime may be settled under the Pennsylvania statute it must be (1) a *misdemeanor*; (2) to injury or damage of the party complaining; (3) not committed with intent to commit a felony; (4) not an infamous crime; and (5) for which there is also a remedy by action.[59]

CONSPIRACY.

There is a considerable conflict of authority as to whether a conspiracy to commit a felony is merged into the higher offense, when the object of the conspiracy is accomplished. According to some authorities where the felony, which is the object of the conspiracy is committed, the conspiracy, being a misdemeanor, is merged in the higher offense. Dicta in several Pennsylvania cases support this doctrine.[60] There are, however, many decisions in other jurisdictions which hold that the conspiracy may

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[56] 8 Cyc. 495.

[57] P. L. 387.

[58] Act of March 31st, 1860, sec. 178, P. L. 425; Com. v. Mohn 52 Pa. 243.

[59] Act of March 31, 1860, sec. 0 P. L. 427; Pearce v. Wilson 111 Pa. 14.

[60] Com. v. McGowan, 2 Pars. 341; Com. v. Delany, 1 Gr. 224.

be punished as a misdemeanor, altho the felony has been actually committed.

It is well settled that if the act which is the object of the conspiracy is a misdemeanor, the conspiracy may be punished as a distlnct crime, notwithstanding that the act which was the object of the conspiracy has been done, and is also punishable.[61]

The importance of the distinction between felonies and misdemeanors is also manifested in the rules regulating exemptions from arrest, preemptory challenges, presence at trial, etc. These and other cases will be discussed in a subsequent issue.

[61] 8 Cyc. 643, Com. v. McGowan, 2 Pars. 341; Com. v. Delany, I Gr. 224.

W. H. HITCHLER.

# MOOT COURT

## HUNTER v. ATCHISON AND THE HYGIENIC ASSOCIATION.

### Pest House—Lessening Security of Mortgage.

SATEMENT OF FACTS.

John Atchison mortgaged his tract of land worth $20,000 to Wm. Hunter for $16,000. It consisted of 25 acres in the environs of Philadelphia. The debt was payable in five years. The year after making the mortgage, Atchison leased the premises to a corporation as a hospital for victims of contagious diseases, and the buildings were adapted to this use by the corporation. Such a use persisted in for four (4) years would cause a loss of the selling vaiue of the property to the extent of $10,000. This is a bill by Hunter to enjoin against the proposed use.

Stevenson for Plaintiff.

McKinney for Defendant.

OPINION OF COURT.

SMITH, R. B., JUDGE.—There is no authority or valid reason why an injunction should not be granted to the complainant in this case. The question is one whether a mortgagee out of possession of the mortgaged premises, has a right to prevent the mortgagor from doing any act or acts which will be detrimental to the premises. Kerr on Injunctions, page 119, Pgh. 81, it is stated, "A mortgagor in possession is in equity the owner of the estate, and may exercise all acts of ownership, and commit waste, *provided he does not diminish the security or render it insufficient.*" It is self-apparent from the facts stated that the security would have

been rendered insufficient if the mortgagor would be allowed to lease the premises. In Schmaltz v. York Mfg. Co., 204 Pa. 1, a case somewhat analogous to one at issue it was held, that where the mortgagor who is in possession, or any one acting under his authority or direction, threatens to commit waste apon the mortgaged premises, to such an extent as will impair the security of the mortgagee, equity will grant the latter an injunction to restrain the anticipated injury. An injunction was granted in Righter v. Hamilton, 10 C. C. 260, on the authority of Martin's Appeal 9 Atl. Rep. 490, and court said: "Equity will by injunction enjoin a mortgagor from committing waste on the mortgaged premises *at the suit of the mortgagee.* The mortgagee is entitled to all the protection his pledge unimpaired gives him." In case at hand the pledge, the mortgaged premises, would be impaired and mortgagee's interest in it would suffer in relation to the valuation of it. Any mortgaged premises which are injured to the extent of $10,000 by an act of mortgagor, greatly imperils the interest of the mortgagee. The same doctrine as cited *supra* is laid down in 194 Pa. 449, and 88 Pa. 368.

The act of June 16, 1836, 2 Stewart Purdon's Digest 1409, gives to the Court of Common Pleas, Phila. Co., the powers of a Court of Chancery, and authority to lay down equitable principles. The part of act bearing on case at hand is to give the court the jurisdiction for the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, *or the rights of individuals.*" As there is no doubt as to the act contemplated by the mortgagor in the case being "prejudicial to the rights of individuals;" there can be no doubt as to right of court of Phila. Co., having jurisdiction over the present case.

Injunction granted.

## OPINION OF SUPREME COURT.

The land mortgaged, was, at the time of making the mortgage worth $20,000. The use to which the lessee will put the premises, if continued until the maturity of the mortgage, will reduce the selling value of the land to $10,000. The principal of the debt is $16,000. There may be defaults in the payment of interest. It is evident then that the plaintiff's security will be very seriously impaired if the lessee makes the proposed use of the premises.

Although it is *said* that the mortgagee may expel the mortgagor from the possession prior to the maturity of the mortgage and prior to any default, (12 P. & L. Dig. 20557) no case is remembered in which such expulsion has been ordered or accomplished unaided, or even approved by the court. The general understanding is that the mortgagor may retain possession until default. The plaintiff cannot be required to resort to an ejectment in order to remove the mortgagor, or his lessee, and thus prevent the acts which are alleged to threaten the integrity of the security.

The mortgagor in possession may make the uses which are ordinarily made of the premises. He may sell the lumber, firewood, coal, ore, grain. (Hoskins v. Woodward, 45 Pa. 43.) (Witmer's Appeal, 45 Pa. 455.) He may let the premises to tenants for ordinary purposes and collect the

rents. But neither he nor the tenants may lessen the selling value of the land, in a way not fairly in the contemplation of the parties at the time of giving the mortgage. They cannot remove machinery. (Witmer's Appeal, 45 Pa. 455. Schmaltz v. York Manuf. Co., 204 Pa. 1.) They cannot operate a brick-yard, excavating the clay, and so lessening the selling value of the land, (Real Estate Co., v. Hatton, 194 Pa. 449,) or open sand or stone quarries, (Martin v. Ambler, 6 Sadler, 312; Righter v. Hamilton, 10 C. C. 260.)

In the cases cited, the mortgagee was aided by the injunction of the court, in preserving the land from such modifications as would reduce its value.

The reduction of the selling value of the premises mortgaged to the plaintiff will not occur in consequence of any destruction of buildings, ablation of machinery, excavation, removal of stone, sand, coal, or other valuable constituent, but in consequence of the impregnation of the buildings with contagious disease germs, and of the reputation which will be thus created for the premises, by the dissagreeable and repellant and terrifying associations in the general mind, which such uses will engender. It matters not that the diminution of value occurs in this mode rather than the more usual mode. The plaintiff should not be exposed to the loss of his debt by the decrease of the value of his security. (Cf. Delano v. Smith, Mass., 92 N. E. 500; Hersey v. Chapin, 162 Mass. 166.

Appeal dismissed.

## FIELDING v. FIELDING.

### Power of Appointment—Mode of Exercise.

STATEMENT OF FACTS.

John Fielding directed that his widow should have his farm for life, and at her death it should go in such parts as she should define by her will, to such of the children as she should therein designate. There were four sons. The widow died leaving no will, but having made a contract in writing to convey the farm to one of them, James, for $3000. James paid the $3000 to his mother, but no deed was made to him. This is ejectment by James against his three brothers.

Hollister for Plaintiff.

Roger for Defendant.

OPINION OF COURT.

KUNTZ, J.—The plaintiff claims the land in question by his contract with the widow of John Feldon. Mrs. Feldon had the power to designate who of her children would take the title to the land. The plaintiff was one of the children. But by the terms of the original devise, the property "should go in such parts as she should define by her will, to such of the children as she should therein designate." The contract between her and plaintiff was an agreement by her to convey the farm, which was the land in question, for $3000, which was paid. The other three of her children are defendants in this action of ejectment.

By contracting to convey the land, in such a way as to secure its value for herself, we think Mrs. Feldon plainly defeated the intention of the testator and exceeded her power; for she virtually treated her interest and power in the land as a fee simple. And so we think the plaintiff took no title whatever by the contract, nor would he have taken any title, even if he had been given a deed. So in a Maryland case, reported in 1 L. R. A. 545, a deed by a woman, having a particular power of appointment, such as the one in the case at bar, was held invalid, because the consideration for it was that the donee by the deed should pay the personal debts of her, who had the power.

"In case of a limited power of appointment, such as a power to appoint among a particular class, the selection of the particular appointee, or of the respective shares, being left to donee's descretion, donee in order to render execution valid must act with good faith and sincerity and with an entire and single view to the real purpose and intent of the power and not to accomplish or carry into effect any ulterior purpose or object beyond such purpose and intent. Am. & Eng. Enc. of Law, Vol. 22, P. 1152.

But aside from the fact that the donee did not act in good faith, nothing passed to the plaintiff by the contract which would enable him to maintain this action. Donee was directed to appoint by will, and in order to pass the title, had to do so. A contract was not sufficient. "A will does not take effect until after testator's death, and is always revocable by him," and so the contract to plaintiff could not be construed as such, as it would not have been a contract had it been revocable. And "where any method of execution is distinctly pointed out by the instrument of creation it must be followed. Power of appointment exercisable by will, cannot be exercised by deed; and the will must be a real will, with all the essential characteristics of one." [Leading cases in Am. Law of Real Prop. Vol. IV., P. 46.] So, in 60 Md. 40, an appointment by "an irrevocable will" was held bad as an appointment by will, a will being "essentially ambulatory" until the death of the testator. In 3 Johns. Ch. 113, the court said power to appoint by will does not mean that the appointment may be likewise made by deed.

So, no title to the land passed to plaintiff. "In ejectment plaintiff cannot recover on weakness of defendant's title, but must show title in himself." 3 S. & R. 283.

Judgment for defendants.

## OPINION OF SUPREME COURT.

The will of John Fielding directed that, at the death of his widow, his farm should go to such of his children, and in such parts as she should define and designate by her will. As he could select an appointer of his estate, and no other could appoint it, so he would determine how the selected appointer should appoint it. He has chosen to limit the execution of the appointment to a will. "If the power should require a deed only," says Williams Real Property, P. 352, "a will will not do; or if a will only, then it cannot be exercised by a deed, or by any act to take effect in the lifetime of the person exercising the power." 1 Tiffany, Real Property,

P. 626, Reeves Real Rroperty, 1224. Duncan J. thought in 1817, that "where the power is given to the devisee of a particular estate, the most strict adherence to all the forms and ceremonies prescribed, would seem to be required, and all the circumstances prescribed in the creation of the power internal and external, reserved by the owner to be exercised over his own estate demand a strict observance." Baker v. Turner, 3 S. & R. 108.

It was assumed that a seal being required to a will, a will without a seal would not be an effective appointment. Cf. Hacker's Appeal, 121 Pa. 192. There may be good reason for limiting the appointment to a will. The will remains ambulatory until death. The propriety of the contemplated appointment may then be reconsidered as often as the donee of the power chooses to reconsider it, if he makes a will. If he makes a deed, or an enforceable contract to convey, the power of reconsideration is taken away. The purpose of the appointer at the moment of making it, becomes stereotyped, irreversible, and unchangeable.

The opinion of the learned court below also suggests that allowing a contract to convey to be made by the donee of a special power, for a consideration inuring to his own benefit, would induce an improper exercise of the power. The testator evidently did not intend the power to be exerted for the benefit of the widow. In giving her a life-estate, he gave her all that he intended her to take for her own advantage. The remainder was to pass to the children, some or all of them, and the power of selection was conferred on the widow, not that she might for her own enrichment, sell the exercise of it. The learned court below has clearly and satisfactorily vindicated its judgment.

Affirmed.

## COMMONWEALTH v. RICHARDS.

### Competency of Physician as Witness.

FACTS OF THE CASE.

Richards on trial for larceny defended on the ground of his insanity. His counsel and the District Attorney agreed that he be examined by three physicians. The examination was made, and two of the physicians thought him sane, the third thought him insane. The third was called and testified that Richards was insane, and had probably been so at the time when the larceny was committed. The Commonwealth then proposed to call the other two physicians, when the defendant objected to their competency. The Court admitted them. Motion for a new trial.

Dickson for Plaintiff.

Marianelli for Defendant.

OPINION OF THE COURT.

PUDERBAUGH J.—In all criminal cases, there is a presumption in favor of the Commonwealth that every man is sane. If that presumption were not indulged in, the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. A

requirement of that character would seriously delay and embarass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every man charged with crime is sane and thus supplies in the first instance the required capacity to commit crime.

The view in Pennsylvania, dealing with insanity in criminal trials and adopted by an increasing number of courts is that the accused has the burden of proving insanity in the sense that he has the risk of persuading the jury to that effect by a preponderance of the evidence. 83 Pa. 131; 86 Pa.. 260; 100 Pa. 573; 72 Pa. 414; 78 Pa. 122; 88 Pa. 291.

A reasonable doubt as to the prisoner's insanity is not enough. 72 Pa., 414.

But this one physician, being the only one to testify, might have given a sufficient preponderance of the evidence to enable the jury to infer that the prisoner was insane. How was the commonwealth to rebut this but by testimony of the other two physicians? It is said in United States v. Holmes, 38 Wigmore cases, "Whenever the accused has offered his acts, conduct and declarations before and after the homicide, the government may offer evidence of other acts, conduct and declarations of the accused within the same period, to show that he was sane and to rebut the evidence introduced by the defence."

The physicians had presumably the same opportunity of observation, and one being permitted to testify as to his insane tendencies, there is no reason why the other two should not be allowed to testify as to his sane tendencies. Although the evidence by the physician who testified for the defence might not have been sufficient to overthrow the presumption in favor of the commonwealth, and had the other two not testified the accused would have been convicted without proceeding any further thus making the testimony of the two who testified for the Commonwealth superfluous, which is a ground for a new trial in criminal cases, this we are not able to ascertain from the given facts of the case.

Regarding the agreement between the counsel for the defence and the District Attorney we are unable to find anything declaring this to be illegal.

We, therefore direct the motion for a new trial to be discharged.

## OPINION OF SUPERIOR COURT.

The objection by the defendant to to the testimony of the physicians, has been properly overruled by the trial court.

That it was opinion evidence, is no valid cause for excluding it. The defendant himself first presented the opinion of one of the physicians. He cannot complain that other opinions were received because they were unfavorable to himself.

The Act of June 18th; 1895, 2 Stewart, Pard. 1503, for the first time introduces an incompetency of physician to testify, but it is in terms, restricted to civil cases. In any civil case a physician or surgeon shall not be allowed to disclose any information he acquired in attending a patient in a professional capacity, which information was necessary to enable him to act in that capacity, and which would blacken the character of the patient.

This Act is manifestly inapplicable. (a) The proceeding is not a civil action. (b) The information acquired by the physician was not acquired while attending the prisoner as patient in a professional capacity. (c) The information was not necessary to enable him to act in the capacity of physician to patient. (d) The testimony of the physicians objected to, was that he was sane. To declare a man sane is not to blacken his character. Possibly to declare him insane would be to blacken him, but it was the physician whom he himself called, who thus blackened him, and that physician was called by him for that very purpose. The blackening, then, was with his consent. Affirmed.

## COMMONWEALTH v. VANNERMAN.

### Purposed Killing by Excitement.

STATEMENT OF FACTS.

Vannerman knowing that X was afflicted with heart disease and was susceptible to shock from unusual sights and sounds, suddenly presented, rushed upon him in disguise in the dusk of the evening, shrieking and gesturing menacingly, hoping and intending that X should become so excited as to die. X did become so excited and did die. This is an indictment for murder.

Narcowich lor Plaintiff.

Peppets for Defendant.

OPINION OF THE COURT.

HOLLISTER J.—Murder at common law is unlawful homicide with malice aforethought.

Here all the essential elements of murder are present. But there was no contact, or physical injury done by the accused, therefore, death in this case cannot be said to be murder.

Since the accused was afflicted with heart disease, which disease was likely to cause death at almost any moment, whether the person so afflicted was frightened or not.

The early rule laid down by the older authorities which is found in 21 Am. & Eng. Ency. 97, as to whether the charge of criminal homicide can be predicated upon a death caused by nervous irritation or shock was, that, death to be criminal must result from "corporal injury." That is physical death can only be caused by physical injury.

Exactly what injuries were regarded by the older authorities as comprehended by the term "corporeal injury" is not clear, but it is certain that an injury to the nervous system from griet, terror, or other mental disturbances was not included.

The courts have, in some later cases shown a tendency to break away from this rule, where substantial justice required it. It will be observed, however, that in all these cases the death has been caused by shock of terror produced by an assault. So that the law is still regarded as unsettled on this question. We have been able to find a Quebec case in 21 Am. & Eng. Ency. 97, in which the accused rushed up to the deceased

with a knife in his hand; the deceased was afflicted with heart disease and on seeing the accused approaching him with his arm raised and knife in his hand, and threatening to kill, became so frightened that he died.

The accused was convicted in this case.

It will be observed, however, that in this case there was an assault accompanying the fright, while in the present case there was no assault and it cannot be said that the fright was the efficient cause of the death of the deceased.

In the cases cited by the counsel for the plaintiff the fright is accompanied by an assault, as are all the later decisions which decide contrary to the common law rule.

It seems that the accused in this case, should be held for the death of the deceased, For if one actually causes the death of another the precise means which he employs are immaterial excepting that they may serve to show the intent.

The only inquiry is whether there was such a relation between the act of the accused and the death of the deceased as to prove beyond a reasonable doubt that such act was the efficient cause of death.

As it is impossible to prove in this case, that the act of the accused was the efficient cause of the death of the deceased, and as we are unable to find any authorities which holds "That a person causing the death of one who is afflicted with heart disease, by fright alone, is guilty of murder," we must decide in accordance with the common law rule that there can be no conviction of the accused.

## OPINION OF SUPREME COURT.

Vannerman intended to kill X. He believed that he could kill him by the use of a certain means. He used this means, and the desired and purposed result happened. The learned court below has found itself unable to permit a conviction of murder.

It has concluded that an intended and malicious killing is free from criminal taint, unless certain implements, or means are employed. If a gun, or knife, or bludgeon inflicts a visible corporeal wound, the effect of which is death, homicide may be committed, but if the first effect of the agent's act is psychical, and the death is mediated through it, if the first effect is grief, or terror, and this emotion is immediately followed by a fatal lesion in the interior of the body, a lesion of the heart, brain, or other capital organ, and that lesion produces the death, the agent is legally guiltless.

Color for this view is found in some old authorities. East, in his Pleas of the Crown, C. 5, sec. 13, says "working upon the fancy of another and treating him harshly or unkindly by which he dies of grief or fear, is not such a killing as the law takes notice of." Cf, also, Hale, P. C. 425-429.

There have been convictions however, in violation of the principle thus laid down. A prisoner was guilty of manslaughter, whose conduct towards his wife caused her death from shock to her nervous system. Regina v. Murton, 3 F. & F. 492. In Regina v. Towers, 12 Cox Cr. C. 530, the defendant struck a twelve year-old girl who was holding a small

child in her arms. The child became frightened, went into convulsions, lingered about six weeks and died. The court held the facts sufficient to constitute manslaughter.

Denman J. remarked that mere intimidation, causing a person to die from fright by working upon his fancy, was not murder, but if A frightens B by threatening him and making him believe that his life is in danger, and he backs away from him and tumbles over a precipice, and dies, a murder will have been committed.

In Regina v. Dugal 4 Quebec 492. the prisoner was held guilty of manslaughter, who with violent words and menaces, had brandished a table knife over his father; and whose father becoming greatly agitated and frightened, died in 20 minutes from syncope.

Sir James Stephen, in a note to Art. 221, Dig. C. Law, commenting on the old rule remarks: "suppose a man was intentionally killed by being kept awake until the nervous irritation of sleeplessness killed him, might not this be murder?" "Suppose a man kills a sick man intentionally by making a loud noise which awakes him, when sleep gives him a chance of life, or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear 'your wife is dead!' intending to kill and killing him, why are not these acts murder?"

In Ex parte Heigho, (Idaho) 110 Pac. 1029, two men with a gun came to a house; when the proprietor came to the door, they struck him. His mother-in-law was so excited that she died in 30 minutes from the first appearance of the men at the house. The court in an able opinion, from which we have obtained most of the authorities cited by us, held, on *habeas corpus*, that they could properly be convicted of manslanghter.

The writer in 21 Am. & Eng. Encyc. 98, observes "Yet in principle, there is no reason why a death from nervous irritation or shock, should not be as criminal as any other. It certainly entails greater difficulty in the matter of proof but this is purely a question of fact, and if the prosecution is able to establish its case by evidence satisfactory to the jury, there seems to be no sufficient reason why the law should forbid conviction."

Wharton, Homicide, p. 26, 27, 28; after stating the old law that, to "justify a conviction for homicide, the cause of death must have been corporal, not nervous or sentimental" and that "death, caused by grief or terror in the absence of any convulsive action or physical lesion is not murder," also adds "A difficult case is suggested in the testimony taken in England in 1874 before the committee on the homicide bill. B, a sick man is in such a state of nervous prostration that any sudden shock is likely to prove fatal to him. A knowing B's condition, purposely bursts into B's chamber with such a noise and in such a way as to give B a fatal shock and B dies in consequence. In such a case we may hold, malice being shown in A, that A is guilty of murder."

In the case before us, the facts are conceded, that the defendant intended to kill X, that he frightened him, as a means, that the means was successful, X dying.

Why insist on discovering a specific lesion of the body prior to death? Death is itself a lesion, the most comprehensive and dreadful of all

lesions. From it we know that some vital function has been stopped, and stopped, probably, because of rupture of some organ. Whether emotions act upon the heart, brain, lungs, kidneys or not, the nervous and brain conditions which precede or accompany them do so act. When it is known that that which causes fright or excitement may also cause syncope of the heart, or the bursting of an artery, and when it is known that the defendant has selected the fright-producing agency as the means of producing death, by such syncope or apoplexy, it would be absurd to say that he has not been guilty of the crime of murder.