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CRIMES AND CIVIL INJURIES

*W. H. HITCHLER

More than one hundred and fifty years ago Lord Mansfield said, "There is no distinction better known than the distinction between civil and criminal law."¹ This statement indicates the attitude of English and American lawyers toward the distinction between crimes and civil injuries. They have assumed that the distinction is clear and well-known, but very few of them have attempted to explain what it is. Consequently, at present, though every lawyer feels that there are obvious differences, none can state in exact terms what they are.

The distinction is in fact not an easy one to make, either in theory or in practice. Attempts to state it have led to much inconclusive discussion.² "In juristic doctrine endless technical distinctions have been drawn without arriving at anything which is a real difference, and even in their practical legal effects it is not always easy to disentangle these various kinds of wrong, one from another."³

This is not surprising, if we remember how recently in the history of the law there emerged any conception of a distinction between crimes and civil injuries.⁴ In their origin crimes and civil injuries were almost indissolubly intermingled, and it was only by slow stages that a distinction between them was made.⁵ The history of the Roman law shows a gradual and imperfect emergence of public discipline out of private retribution, and this is somewhat true of the criminal law everywhere,⁶ although in some stages of the history of the criminal law of England, exactly the reverse process seems to have taken place.⁷

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¹Atcheson v. Everett, 1 Cowp. 391.

²Witness this article.

³Allen, *Legal Duties*, p. 221.

⁴Kenny, *Criminal Law*, 14th ed., p. 21; Keeton, *Jurisprudence*, p. 191; Holland, *Jurisprudence*, p. 357; Salmond, *Jurisprudence*, 7th ed., p. 120.

⁵Potter, *English Law*, p. 294; Winfield, *The Law of Tort*, p. 190; Miller, *Criminal Law*, p. 17. But Potter remarks of the English Law, "It is consistent with the conservatism of the mediaeval mind that a separation of wrongs into tort and crime should be coincident with the evolution of the idea of a state," p. 296.

⁶Maine says, "The penal law of ancient communities is not the law of crimes; it is the law of wrongs, or, to use the English technical word, of torts."

⁷Keeton, *Jurisprudence*, p. 191; Jenks, *The Book of English Law*, p. 142; Kenny, *Criminal Law*, 14th ed. p. 22; Hibbert, *Jurisprudence*, p. 188.

In England, in the first age of royal justice, the general law of the land which governed the individual in his daily doings is what we should at present call criminal law. The groups of rights and wrongs which now constitute torts, contracts, and crimes had their origin "not in criminal law, for that is to anticipate events, but in a system of rules which nowadays we should consider essentially criminal."⁸

It seems, therefore, that in the incalculable actions and reactions of history crime has sometimes arisen out of tort, and tort has sometimes arisen out of crime. But whichever of these two processes has taken place, the connection between the two forms of wrong is perpetual and inseverable. "But there is a difference between them, and we must try to discover it."⁹

INHERENT QUALITY

There are authorities which assert that the distinction between a crime and a civil injury is one of inherent quality or tendency. Immorality and injury to the public, it is asserted, are the distinctive characteristics of crime. The fallibility of these tests has been previously demonstrated.¹⁰ It is sufficient to add as to the former, that there are many acts which are crimes which have no ethical significance, and that many civil injuries are morally most reprehensible. It is undoubtedly true, however, that throughout the whole history of our law the element of intrinsic wrongfulness has had a great influence in determining criminality,¹¹ and that the idea of moral wickedness is more closely allied with that of crime than it is with contract or tort, for the reason, among others, that in the latter cases the sanctions of the law are more frequently inflicted for external conduct which is not the result of any blameable state of mind.¹²

THE INJURY INFLICTED

It is frequently asserted that crimes are public wrongs which injure the community, and civil injuries are private wrongs which injure individuals only.

⁸Allen, *Legal Duties*, p. 225. "When we look back to the first age of royal justice, we see it doing little else than punishing crime and giving specific relief." Pollock & Maitland, vol. 2, p. 523.

⁹Allen, *Legal Duties*, p. 226; Parsons, *Crime and the Criminal*, p. 139; Potter, *English Law*, p. 295. "At the outset of the common law * * * both in theory and practice there was a perception of the distinction between civil and criminal proceedings, but there was no sharply cut division between them. The two were a viscous intermixture." Winfield, *The Law of Tort*, p. 190.

¹⁰38 *Dickinson Law Review*, p. 225.

¹¹Allen, *Legal Duties*, p. 224.

¹²Kenny, *Criminal Law*, 14th. ed., p. 38. Crimes which involve no moral wrongfulness are designated as *mala prohibita*. Their existence distinguishes the legal from the popular conception of the term crime, and renders more difficult any consistent and useful definitions of crime. Stephen, *History of Criminal Law*, vol. 1, p. 1.

The distinction between crimes and civil injuries is thus identified by them with that between public and private wrongs.¹³

The inaccuracy of this distinction, which may be called the Blackstonean fallacy, but which is of importance because of the wide currency¹⁴ which it has obtained, has been previously discussed.¹⁵ In considering this, it is necessary to bear in mind the distinction between the direct and immediate tendency of an act and its indirect and ultimate tendency. Nothing can injure society, the public, or the state, without ultimately injuring a greater or less number of individuals, and, conversely, an injury to an individual is not often made a civil injury unless it is felt to have a tendency ultimately to injure society.¹⁶ The alleged distinction, therefore, does not have reference to the indirect or ultimate tendency of acts, but to their direct and immediate tendency.¹⁷ But it is quite obvious that it is not every crime that directly injures the public or state, as e. g., stealing or battery, although some, such as treason and nuisance, may.¹⁸

The distinction is, perhaps, not one of kind but of emphasis. Crimes are acts which are made wrongful by the state primarily for the protection of the community as a whole, although this may result secondarily in the protection of the individual. Civil injuries, on the other hand, regard primarily the rights of the person injured, although this may result ultimately in a happier, more prosperous, and better ordered community.¹⁹

It is undoubtedly true that throughout the whole jurisprudence of crime the "public" aspect of crime—the belief that crime is an offence not merely against one but against all—has had a great influence in determining criminality. During the formative period of the common law this aspect of crime was constantly adverted to, and this idea has not entirely disappeared. It is still a general principle of the common law that an act calculated to produce public mischief is a crime; and legislatures sometimes pretend, at least, to act upon this principle.²⁰ There are many reasons, economic, political, cultural,

¹³Blackstone, vol. 4, p. 5; Allen, *Legal Duties*, pp. 233, 234.

¹⁴Kenny, *Criminal Law*, 14th. ed., p. 5.

¹⁵38 *Dickinson Law Review*, p. 225. All public wrongs are not crimes and all crimes are not public wrongs. Salmond, *Jurisprudence*, 7th. ed., p. 118.

¹⁶31 *Yale Law Review*, p. 241. All wrongful conduct injures the state indirectly and ultimately since the welfare of the state is made up of a sum total of the welfare of the individual members thereof. Hibbert, *Jurisprudence*, p. 188.

¹⁷"Crime is crime because it consists in wrongdoing which directly threatens society." Allen, *Legal Duties*, p. 233.

¹⁸Hibbert, *Jurisprudence*, p. 188.

¹⁹Potter, *English Law*, p. 295. Crimes in the Roman Law were "delicta publica," but this was not because of their tendency to injure the public. An English court speaks of a certain crime as being "private in particular yet public in its consequences." *Reg. v. Arbell*, 6 *Mod.* 42.

²⁰31 *Yale Law Review* 241; 38 *Dickinson Law Review*, p. 226. "There are many cases where an act which is not criminal in private becomes penal by the publicity which attends its perpetration." *Anderson v. Com.*, 5 *Rand.* 627.

and hygienic, of varying degrees of importance, which may make an act socially undesirable and render it socially expedient to make such an act criminal. The idea, often ill-conceived and mistaken, that an act is intrinsically wrongful or socially inexpedient has prompted so many of the prohibitions of the criminal law that immorality and public injury cannot be disregarded as distinguishing characteristics of crime, although such qualities are sometimes highly artificial and not self evident.²¹

THE DUTY VIOLATED

Some authorities assert that the distinction between crimes and civil injuries depends upon the character of the duty which is violated. Applying this distinction, it is held that a breach of an absolute duty is generally a crime, and the remedy is punishment of the wrongdoer, not compensation to the injured party; and a breach of a relative duty is always a civil injury, and the remedy is compensation or restitution to the injured party.

A duty means liability to a legal sanction, i. e., some evil to be suffered in consequence of infringing a rule of law. A person who will incur a legal sanction if he acts, is under a legal duty not to act. A duty is owed to the person who, according to law, may enforce the legal remedy for its breach. This person is the only one who may determine whether, in case of breach, the sanction shall or shall not be exacted. By him alone the sanction is exigible or remissible. Absolute duties are owed only to the state which imposes them. Relative duties are owed to persons other than the state which imposes them, and correlate with rights vested in the person to whom they are owed.

The distinction between absolute and relative duties does not depend on the purpose for which such duties are imposed but upon the different persons to whom each is owed. Relative duties, of course, particularly and immediately regard the welfare of the person in whom is vested the correlative right; but many absolute duties also regard particularly the rights of individual persons, as, e. g., the duty not to assault a person or to steal his property; and all duties, whether absolute or relative, regard ultimately the welfare of the community at large, as they provide for the peaceful pursuit by men of their vocations, and for security of life and property.

All crimes are breaches of absolute duties, and breaches of absolute duties are almost always crimes; but the latter is not universally true, for the breach of a contract with the state is merely a civil injury for which the remedy is the same as that for breach of contract with a private person. The fact that an act violates a duty to the state and that only the state can enforce or remit the sanction does not make the act a crime unless the sanction is punitive.

The distinction under discussion, therefore, becomes accurate only if a crime is defined as the breach of an absolute duty, the sanction of which is

²¹Allen, *Legal Duties*, p. 237.

punishment, exigible or remissible at the discretion of the state, acting according to law; and a civil injury is defined as the breach of a relative duty, the sanction of which is compensation or restitution, exigible or remissible at the discretion of the person whose right has been infringed.

THE POWER OF REMISSION

The power of remission, which depends upon the incidence of the duty which is violated, has been asserted to be the "real and salient difference" between crimes and civil injuries.²² "It has been suggested by an eminent authority²³ that the real distinction between criminal and civil offences is that, in the case of the former, the Crown has the power to remit the penalties, while it has no power to waive the compensation due for the latter.²⁴ This is true as a general rule, but there are important exceptions, and, in any event, it does not aid us very much in our search for a true and useful distinction between crimes and civil injuries.

As a general rule, crimes are wrongs whose sanction is remissible by the state and not by any private individual, and civil injuries are wrongs, whose sanction is remissible by the person injured and not by the state. But there are crimes whose sanctions are remissible by private individuals,²⁵ and in some cases the state has the power of remitting a civil sanction.²⁶

The distinction, even if it were an exact one, would not be very helpful, as it leads simply to a *circulus inextricabilis*. To assert that a crime is a wrong whose sanction the state alone can remit gives rise to the question: What sanctions can the state remit?, and the answer is criminal sanctions.²⁷

THE REMEDY

Eminent authorities assert that the "only real distinction" between crimes and civil injuries is not the nature of the act which is committed or the character of the injury inflicted or the kind of duty violated, but the nature of the remedy applied. "A wrong regarded as the subject matter of civil proceedings is called a civil wrong; one regarded as the subject matter of criminal proceedings is termed a criminal wrong or crime."²⁸

"The only certain lines of distinction are to be found in the nature of remedy given and the procedure to enforce the remedy. If the remedy given

²²Kenny, *Criminal Law*, 14th. ed., p. 14.

²³Austin, *Jurisprudence*, Lecture 27.

²⁴Jenks, *The Book of English Law*, p. 192.

²⁵16 C. J. 92.

²⁶Kenny, *Criminal Law*, 14th. ed., p. 16.

²⁷Winfield, *The Law of Tort*, p. 197. Read also Allen, *Legal Duties*, p. 227.

²⁸Salmond, *Jurisprudence*, 7th ed., p. 117. "The supposed difference in nature between crimes and torts is a difference in emphasis or point of view on one hand and procedure on the other." 36 *Yale Law Journal*, p. 836. See 1 C. J. 1012.

is compensation, damages, or a penalty imposed by a civil action, the wrong so redressed is a civil wrong. If the remedy given is punishment of the accused which is enforced by a prosecution at the suit of the crown, the wrong so redressed is criminal in its nature."²⁹

This distinction involves both the form and the purpose of the procedure. The procedure must be in form a prosecution and its purpose must be the imposition of punishment. Procedure which is a prosecution in form is sometimes prescribed for the redress of civil injuries, and punishment is sometimes imposed as an incident of civil proceedings.³⁰

Other authorities assert that though procedure is certainly a genuine difference between crimes and civil injuries, it is not the sole or even the principal difference, and that the reasoning which makes it such is tantalizing. "The difference between crimes and civil injuries is more than one of procedure; it depends upon the nature of the duty infringed, on the punitive character of the sanction, and on the fact that the sanction is enforceable and remissible only at the discretion of the sovereign acting according to law, also on the *mens rea*."³¹

It is at least obvious that a distinction based, not upon the intrinsic nature of the acts distinguished nor the elements which compose them, but, upon the legal consequences of committing such acts, gives us no indication why certain types of misconduct are made criminal while other types are made only civil injuries.

MENS REA

The requirement of *mens rea* as an element of responsibility has been asserted to be the test by which to distinguish crimes from civil injuries.³² This doctrine is based, in part at least, upon the assumption that in the early days there was an entire absence of the notion of wrongful intention in the

²⁹Holdsworth, *History of English Law*, vol. 8, p. 306; Kenny, *Criminal Law*, 14th ed., p. 11; Stephens, *Commentaries*, vol. 4, p. 4. "Even this test sometimes fails to establish a clear line of difference." Holdsworth, *supra*. It has been said that this distinction is a consequence of the fact that crimes are acts which injure the public—acts from which the state feels the menace of injury and which it desires to prevent, and punishment may be the only adequate measure of prevention, Stephens, vol. 4, p. 5. See 1 C. J. 1012.

³⁰*State v. Manchester Railroad*, 52 N. H. 528; 38 *Dickinson Law Review*, p. 217; 1 C. J. 1012. The ultimate purpose of enforcing all legal liability, civil or criminal, is the prevention of wrongs through deterrence. There is a manifest difference, however, between the immediate purpose of the law in dealing with the two kinds of wrongs. *Derby Corp. v. Derbyshire C. C.* (1897) A. C. 550.

³¹Hibbert, *Jurisprudence*, p. 190. Any description of crime which centers either in procedure or the fact of punishment amounts only to a formal and not to a material definition. Allen, *Legal Duties*, p. 223. Punishment as opposed to compensation is the basis of the origin of the distinction but there are other factors. Potter, *English Law*, p. 303.

³²Holdsworth, *History of English Law*, vol. 3, p. 374; Jenks, *Book of English Law*, p. 192. But see Holmes, *The Common Law*, p. 49.

law of tort, and it has therefore not been universally accepted.³³

At the present time the sanctions of the law are undoubtedly more frequently inflicted for external conduct which is not the result of any blameable state of mind in civil than in criminal cases, and torts of absolute liability are not usually also crimes.³⁴ But there are crimes of absolute liability, and the tortious character of many acts depends upon the existence of a wrongful intention.³⁵

ACTS WHICH ARE BOTH

Since the distinction between crimes and civil injuries does not consist primarily of any intrinsic difference in the nature of the acts themselves, but in the legal proceedings to which they give rise, it follows that the classifications are not mutually exclusive, and that the same act may be both a crime and a civil injury^{35*} Blackstone³⁶ says that every crime is also a civil injury. In the case of most crimes this is true, but there are acts which are crimes and which are not civil injuries because :

1. They affect the right of the state or public alone and violate no definite person's right,³⁷ as, e. g., treason; or
2. Though aimed at individuals they are checked before any harm is done, as, e. g., forgery,³⁸ or
3. They affect injuriously only the criminal himself, as, e. g., in some jurisdictions, suicide;³⁹ or
4. A public policy of some sort renders it inexpedient to allow a civil action for criminal acts which do injury to individuals, as, e. g., perjury.⁴⁰

Whether an act which is a crime is also a civil injury may usually be determined by inquiring whether the act causes damage to any definite person.⁴¹ There is, however, no corresponding test by which to determine whether an

³³Potter, English Law, p. 309, 315.

³⁴Kenny, Criminal Law, 14th. ed., p. 38.

³⁵Allen, Legal Duties, p. 236, 239.

^{35*}Foster v. Com., 8 W. & S. 77; Rump v. Com., 30 Pa. 475.

³⁶Vol. 4, p. 6.

³⁷"Most duties not to commit crimes are defined by actual definitional consequences, and these consequences are usually such as, if they happen, will violate some person's right, so that crimes are generally violations of private right." Terry, Anglo-American Law, sec. 524. "There are many kinds of acts which do not injure any specific person at all, or at all events injure all persons equally, and for these there are no private remedies for the excellent reason that they are not private wrongs." Allen, Legal Duties, p. 234.

³⁸26 C. J. p. 907.

³⁹60 C. J. p. 995.

⁴⁰48 C. J. p. 819.

⁴¹Geldort, Essential Elements of English Law, p. 223: "Nearly all crimes to person or property are also torts." Allen, Legal Duties, p. 235.

act which is a civil injury is also a crime.⁴² It is only possible to make the rough historical generalization that civil injuries have been erected into crimes whenever the law making power has come to regard the mere civil remedy as inadequate because of the great immorality or evil example of the acts, or their dangerous tendencies, or far-reaching consequences, or of the temptation to commit them, or the likelihood of their being committed by persons too poor to pay damages.⁴³

The same act may constitute both a crime and a civil injury but the crime and civil injury may have different names, as, e. g., trespass and larceny.⁴⁴ The same name may be used to describe both a crime and a tort, of which the essential elements are not the same, as, e. g., seduction.⁴⁵

MERGER

The civil remedy for certain crimes which caused injury to definite persons was considered by the common law to be destroyed or suspended. Civil remedies for homicide were "merged" in the criminal offense.⁴⁶ "In a civil court," said Lord Ellenborough, "the death of a human being cannot be complained of as an injury."⁴⁷ This thoroughly irrational rule, which can only be accepted as a fact without being justified as a principle, had two perfectly distinct applications: (1) The representative of a deceased victim of a tort which had caused the victim's death could not sue in a representative capacity; (2) A plaintiff could not sue a defendant for a wrong committed by the defendant to the plaintiff when that wrong consisted of causing the death of a third person in whose life the plaintiff had an interest.

The first rule was simply an application of the maxim *actio personalis moritur cum persona*. The veil of obscurity covers the origin⁴⁸ of this maxim. Its first appearance in its modern form is in Coke's report of *Pinchon's Case*⁴⁹ in 1609, and it is quite possible that Coke, who was a great inventor of Latin maxims, gave it its modern shape. But the idea that personal actions died with the person was well known long before this and had been confined principally to actions in tort.⁵⁰

The maxim, which applied to the liability of a representative to be sued

⁴²Kenny, *Criminal Law*, 14th. ed., p. 21 "Tort is nearly always criminal as well but not invariably. A great many torts are also crimes." Allen, *Legal Duties*, pp. 221, 236. "A civil injury is not as a rule a crime." Hibbert, *Jurisprudence*, p. 180.

⁴³"The reason why the sovereign declares certain wrongs crimes is that he deems a civil sanction insufficient as a preventive." Hibbert, *Jurisprudence*, p. 186.

⁴⁴Miller, *Criminal Law*, p. 349.

⁴⁵*Euhor v. Kistler*, 14 Pa. 282.

⁴⁶17 C. J. 1181.

⁴⁷*Baker v. Bolton*, 1 Camp. 493.

⁴⁸Goudy, *Essays in Legal History*, p. 216.

⁴⁹Coke's Rep, 87a.

⁵⁰Holdsworth, *History of English Law*, vol. 3, p. 578.

as well as to his right to sue, has been so modified by statutes that the exceptions have, in a large measure, eaten up the rule. Perhaps because the absence of legal liability was less onerous in practice than the absence of a right to sue, legislatures have usually intervened to give representatives rights of action at an earlier date than they have intervened to place them under legal liability.⁵¹

In some jurisdictions statutes provide that where a wrongful act causes the death of the victim the cause of action shall survive the death, and provide for the recovery of damages caused by the death itself.⁵² A Pennsylvania statute merely provides that "no action hereafter brought to recover damages for injuries to the person * * * shall abate by reason of the death of the plaintiff; but the personal representatives may be substituted as plaintiffs and prosecute the suit to final judgment and satisfaction."⁵³ "This is predicated not only of a previously existing right of action in the injured party, but, also that he availed himself of it by bringing suit in his lifetime; and its purpose was to obviate the effect of the general maxim, *Actio personalis moritur cum persona*."⁵⁴

The recovery under this statute is for the personal injury and "it is a mistake to suppose that the recovery is for the death," but the damages include "the value of the life,"⁵⁵ which means not its value "to others" but "the value of the advantages of which the injured party was deprived because of diminution or loss of earning power."⁵⁶

The second application of the principle under discussion obviously has nothing to do with the *actio personalis*, etc., as both plaintiff and defendant are still alive. The death is simply an element in the cause of action. The origin of this application is probably to be found in the rule that if a cause of action in tort disclosed a felony the right of action in tort was affected.⁵⁷ It would seem to follow, therefore, that the right of action for death caused by a felony should have been suspended and not destroyed, and that there should be a right to sue if the tortious act causing death did not amount to a felony. But the logic of the situation was disregarded and in all cases where the tort resulted in death a right of action was denied.

This rule was obviously unjust, and, because based upon a misreading of legal history, technically unsound. It has been changed by statute in a majority of jurisdictions,⁵⁸ including Pennsylvania.⁵⁹ Statutes of this type

⁵¹Holdsworth, *History of English Law*, vol. 3, p. 584.

⁵²17 C. J. 1186.

⁵³Act of April 15, 1851, P. L. 674.

⁵⁴*Birch v. Railway*, 165 Pa. 339.

⁵⁵*Maher v. Phila. Traction Co.*, 181 Pa. 391.

⁵⁶*McCafferty v. Railroad*, 193 Pa. 339.

⁵⁷Holdsworth, *History English Law*, vol. 3, p. 334.

⁵⁸17 C. J. 1184.

⁵⁹Act of April 15, 1851, P. L. 669.

create a new cause of action, and do not provide merely for the survival of a right of action previously possessed by the deceased;⁶⁰ but this new cause of action is, it seems, not entirely independent of a cause of action of the deceased, because if his cause of action is barred by a recovery⁶¹ or a release,⁶² or if he could not have maintained an action had death not ensued, the action for his death cannot be maintained.⁶³

SUSPENSION OF REMEDY

The question whether at common law the civil action for an act which constituted both a civil wrong and a felony was "merged in the felony," or suspended until the felon had been prosecuted, or was unaffected by the felonious character of the tortious act is involved in some doubt.⁶⁴

As early as 1607⁶⁵ it was expressly stated that the right of action was completely lost, and there was considerable early authority in support of this doctrine.⁶⁶ But beginning in the first quarter of the seventeenth century, there is a series of cases to the effect that the fact that a civil injury amounted to a felony did not destroy, but merely suspended the right of action.⁶⁷ At a time when a felon's property was forfeited upon his conviction so that there would be no effectual civil remedy afterwards, the compendious statement that "the trespass merged in the felony" was substantially, if not technically, true, and whether the cause of action in tort was wholly lost or merely suspended was a purely academic question.

But the question had ceased to be wholly academic in the sixteenth century, and, with the entire abolition of forfeiture, became a very practical one; and it is asserted that it came to be the settled rule that the civil remedy was suspended but not destroyed.⁶⁸

A doubt whether the rule, even in this qualified form, ever existed has been recently expressed,⁶⁹ and there is apparent in quarters of high authority a strong disposition to discredit it as a mere cantilena of the text writers founded on ambiguous or misapprehended cases or upon dicta which were open

⁶⁰*Birch v. Railway*, 165 Pa. 339.

⁶¹*Birch v. Railway*, 165 Pa. 339; *Hill v. Railroad*, 178 Pa. 223.

⁶²*Hill v. Railroad*, 178 Pa. 223.

⁶³*Hughes v. Railroad*, 176 Pa. 254.

⁶⁴Holdsworth, *History of English Law*, vol. 3, p. 331; 1 C. J. 954; 1 Cyc. 681; Pollock and Maitland, *History of English Law*, vol. 2, p. 688; no distinction existed between actions *ex delicto* and actions *ex contractu* nor between suits at law and suits in chancery. 1 Cyc. 683.

⁶⁵*Higgins v. Butcher*, *Yelv.* 89.

⁶⁶Holdsworth, *History of English Law*, vol. 3, p. 332.

⁶⁷Holdsworth, *History of English Law*, vol. 3, p. 333. The various alleged reasons for the rule are discussed in 1 Cyc. 683. The suspension was only until the criminal prosecution could be had and the action might then be maintained whether the prosecution resulted in a conviction or an acquittal. 1 C. J. 955.

⁶⁸Holdsworth, *History of English Law*, vol. 3, p. 33.

⁶⁹1 C. J. 955; *Wells v. Abrahams*, L. R. 7 Q. B. 554; Miller, *Criminal Law*, p. 21.

to the same objection.⁷⁰ "But the defence does certainly exist" in England.⁷¹

In some of the United States the rule that the civil remedy was suspended until the termination of the criminal prosecution was adopted as a part of the common law. Other states refused to adopt it for the reason that it was inapplicable to conditions in America; and at present in a great majority of the states it has been either repudiated by the courts or abrogated by statute.⁷²

The rule that the private cause of action was merged in the felony seems never to have been adopted in Pennsylvania, but it was held that the private action was suspended until the public prosecution for the offense had been duly conducted and ended.⁷³ This was later interpreted to mean that the trial, but not the bringing of the civil action should be suspended until the prosecution had terminated.⁷⁴

A statute now provides; "In all cases of felony heretofore committed, or which may hereafter be committed, it shall and may be lawful for any person injured or aggrieved by such felony, to have and maintain his action against the person or persons guilty of such felony, in like manner as if the offense committed had not been feloniously 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 manner affected thereby."⁷⁵ The common law rule that the civil remedy was merged or suspended was never applied in cases of misdemeanors.⁷⁶

CONCURRENT REDRESS

According to the common law, when an act constituted both a crime and a civil wrong, the punishment for the crime could not be imposed and compensation or reparation for the civil wrong awarded in a single judicial proceeding.⁷⁷ In jurisdictions where the Civil Law is in force punishment is frequently imposed and compensation or reparation awarded in a single proceeding.⁷⁸ This virtually makes the injured person a third party to the proceeding and many peculiar consequences follow.

This practice removes the anomaly and injustice so frequent in the common law system, by which the state's penalty is duly exacted, but the injured

⁷⁰1 Cyc. 681. For limitations and exceptions to the rule, see 1 C. J. 956.

⁷¹Kenny Criminal Law, 14th. ed., p. 97; *Smith v. Selkirk*, (1914) 3 K. B. 98. "Prior to the case of *Smith v. Selkirk* the question had been resolved at different times and by different authorities in three different ways," Miller, Criminal Law, p. 21. "Even in England the rule is not now of much practical importance." 1 C. J. 955. As to the method of taking advantage of the rule, see 1 Cyc. 683, 1 C. J. 955.

⁷²1 C. J. 955; Miller, Criminal Law, p. 21.

⁷³*Hutchison v. Bank*, 41 Pa. 42; *Bank v. Turnley*, 1 Miles, 312.

⁷⁴*Keyser v. Rodgers*, 50 Pa. 275. See 1 Cyc. 686.

⁷⁵Act of March 31, 1860, sec. 71 P. L. 447.

⁷⁶*Com. v. Dickerson*, 7 W. N. C. 433.

⁷⁷See Train, *The Prisoner at the Bar*, p. 129; 16 C. J. 1379.

⁷⁸See Title V, Penal Code of the Phillipine Islands; 16 C. J. 1380.

person, for whose protection the penalty is supposed to have been created, is left without redress.

The superiority of the Civil Law practice, which plays a large part in all continental codes, is so manifest that it has been adopted to a limited extent by statute in both England⁷⁹ and the United States.⁸⁰

In Pennsylvania a statute provides that upon conviction for robbery, burglary, or larceny of property, or for otherwise unlawfully and fraudulently obtaining the same, or for receiving property, knowing it to have been stolen, the defendant, in addition to the prescribed punishment, shall be ordered to restore to the owner the property taken or to pay the value of the same, or so much thereof as may not be restored; and that on all convictions for forgery, uttering, cheating, or false pretenses, a similar order for restitution or compensation shall be made.⁸¹ The language of this statute is very broad, "requiring in almost every criminal offense including in its perpetration the obtaining of money or other valuable thing, in addition to the prescribed punishment, that the defendant shall be adjudged to restore to the owner such money or property or to pay him the value." But the statute is applicable only when property is obtained, and although forgery and burglary are mentioned in the statute, it is, of course, possible to commit either of these crimes without obtaining any property.⁸²

A statute also provides that upon a conviction for forcible entry or forcible detainer, the defendant shall be sentenced to make restitution of the lands and tenements entered or detained.⁸³

The Act of March 31, 1860, section nine, provides that if the party injured or damaged by certain misdemeanors shall acknowledge, before the committing magistrate of the court, if an indictment has been found, that he has received satisfaction for such injury and damage, it shall be lawful for the magistrate in his discretion to discharge the prisoner or for the court in their discretion to order a *nolle prosequi* to be entered. This statute in effect provides for the termination of prosecutions for lesser offenses by the settlement of the civil disputes which are involved in the same transactions.

CIVIL LIABILITY FOR STATUTORY CRIMES

A conflict of authority exists upon the question whether, when conduct which is harmful to an individual, but which is lawful, is made criminal by

⁷⁹Kenny, *Criminal Law*, 14th ed., p. 95; Winfield, *The Law of Tort*, p. 201; 16 C. J. 1379.

⁸⁰16 C. J. 1379. In some states a criminal proceeding is often used for the purpose of securing restitution to the injured party by suspending the execution of sentence upon the condition that the defendant make some compensation to the injured party. *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011. A federal statute gives the courts power to require persons released on probation to make reparation to the injured person, U. S. Code Title 18, Sec. 724.

⁸¹Act of March 31, 1860, Sec. 179, P. L. 382.

⁸²*Huntzinger v. Com.*, 97 Pa. 336.

⁸³Act of March 31, 1860, Sec. 21, 22, P. L. 382.

statute, it is by implication made a civil injury redressible at the suit of the individual whom it injures. The question "often comes up in one form or another, and it is desirable to recognize as exactly as possible the principles involved."⁸⁴ Attempts to answer the question have resulted in divergent rules.⁸⁵

It has been stated that the "true rule" or "better doctrine" is that it is a matter of legislative intention, and that the violation of a criminal statute or ordinance will give rise to a civil cause of action where the person asserting the right is one of the class for whose benefit the regulation was enacted and where his particular interest which was injured was intended to be protected against the particular risk or hazard which proximately caused the injury."⁸⁶

The rule in Pennsylvania remains an unsettled matter. In *Mack v. Wright*⁸⁷ the court declared that "the presumption is that where a statute imposes a duty where none existed before, the remedy provided therein for the breach of the duty is exclusive." It was subsequently asserted that "the rule in *Mack v. Wright* is not without exception" and that "if a plain duty is imposed for the benefit of individuals and the penalty is obviously inadequate to compel performance, the implication will be strong, if not conclusive, that the remedy was meant to be merely cumulative to such remedy as the common law gives when a duty to an individual is neglected."⁸⁸ "This case," it has been said, "settled the law in Pennsylvania."⁸⁹ But a later case declares, "Perhaps our cases on this point are not wholly reconcilable at least if full weight is given to the dicta therein."⁹⁰

EFFECT OF JUDGMENTS

A judgment of conviction in a criminal case does not establish civil liability in a subsequent civil case growing out of the same transaction, nor is a judgment of acquittal a bar to a civil action against the same defendant; and neither judgment is admissible as evidence in a subsequent civil case to establish or disprove the cause of action.⁹¹ Such judgments "in subsequent civil proceedings founded on the same facts" are not "proof of anything except the mere fact of their rendition."⁹²

A judgment for the plaintiff in a civil case does not establish the criminal responsibility of the defendant for matters rising out of the same trans-

⁸⁴27 Harvard Law Review, p. 317.

⁸⁵1 C. J. 957; 1 Cyc. 679; 46 Harvard Law Review, 453; 27 Illinois Law Review, 318.

⁸⁶11 Boston University Law Review, p. 227.

⁸⁷180 Pa. 472.

⁸⁸*Westervelt v. Dives*, 231 Pa. 472.

⁸⁹*Danner v. Wells*, 248 Pa. 105.

⁹⁰*Com. v. Wilkins*, 271 Pa. 523.

⁹¹34 C. J. 970; *Wilson v. Wilson*, 100 Pa. Superior Ct. 451; *Harger v. Thomas*, 44 Pa. 128.

⁹²*Wilson v. Wilson*, 100 Pa. Superior Ct. 451.

action, nor is it a bar to a subsequent criminal prosecution of the defendant; and a judgment for the defendant in a civil action is not a bar to a subsequent criminal prosecution;⁹³ and neither judgment is admissible as evidence to prove or disprove the facts in a subsequent criminal case.⁹⁴ The pending of a civil action cannot be pleaded in abatement or in bar of a criminal prosecution.⁹⁵

EVIDENCE

Evidence given in a judicial proceeding is, under certain circumstances, admissible in a subsequent judicial proceeding, provided there is the requisite identity of parties and issues in the two proceedings. Where a person is prosecuted criminally and sued civilly for the same act there is not the requisite identity for the application of this rule, and the evidence given in one proceeding is not admissible in the other.⁹⁶

⁹³34 C. J. 972

⁹⁴"Judgments in criminal cases where the state is the prosecutor are generally held inadmissible to establish the facts of a civil case and vice versa." *Wingrove v. Central Traction Co.*, 237 Pa. 549. 16 C. J. 97.

⁹⁵*Com. v. Hurd*, 177 Pa. 481; *Foster v. Com.*, 8 W. & S. 77.

⁹⁶In 22 C. J. 431 it is said that the evidence is admissible. *McKelvey* says the matter is not clearly settled, *Evidence*, p. 345. *Wigmore* says the evidence ought to be admitted. The Pennsylvania court has held that the evidence is not admissible. *Harger v. Thomas*, 44 Pa. 128; *Marcinkiewicz v. Kutawich*, 87 Pa. Superior Ct. 60.