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## The Criminal Aspect of Suicide

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testamentary transfers by appropriate legislation.

It is only by discarding the tentative trust theory and substituting enabling legislation that an honest, clear approach to the problem of trust deposits can be assured.

Pittsburgh, Pa.

Ella Graubert.

(Member of Penna. Bar)

## THE CRIMINAL ASPECT OF SUICIDE

Suicide was murder at common law.<sup>1</sup> The crime required the mental element as well as the physical act.<sup>2</sup> It was punished by ignominious burial in the highway with a stake driven through the body and forfeiture of the perpetrator's goods and chattels to the Crown.<sup>3</sup> A temporary pardon of forfei-

<sup>1</sup>Hales v. Petit, 1 Plowd. 253, 260, (1565); this interesting case caused Shakespeare to give it his caustic comment in "Hamlet," Act V, Scene I, see Nat Schmulowitz, "Suicidal Sophistry", 68 United States Law Review 413; 1 Hale P. C., 411-419; 1 Hawk. P. C., c. 27, 102-104; 2 Hawk. P. C., c. 37, 547; Sir James Fitzjames Stephen, "History of the Criminal Law of England," III, 104; William E. Mikell, "Is Suicide Murder?", 3 Columbia Law Review 393. Reg. v. Burgess, L. & C. 258, is authority for saying that there is no such offense as self-manslaughter.

<sup>2</sup>It might also be accidentally according to Hale and Hawkins, as where he who maliciously attempts to kill another and in pursuance of such attempt unwillingly kills himself. 1 Hale P. C. 412-413; 1 Hawk. P. C., c. 9; the perpetrator must be sane and old enough to entertain the requisite mental element. Reg. v. Moore, 3 C. & K. 319; Reg. v. Doody, 6 Cox C. C. 463; 4 Blackstone 189; Rudolph v. U. S., 36 App. D. C. 379, 385; Conn. Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 97; Lytle v. State, 31 Ohio 196; McMahon v. State, 168 Ala. 70, 53 So. 89; Rex. v. Donovan, 4 Cox C. C. 429.

<sup>3</sup>Hales v. Petit, 1 Plowd. 253, 261. "In Bracton's time, a person who committed suicide in order to avoid conviction for a crime, forfeited his lands, other suicides forfeited their goods only." This distinction had been dropped by the sixteenth century, Sir James Fitzjames Stephen, "History of the Criminal Law of England", III, 105; Pollock and Maitland, "History of English Law", II, 488; Com. v. Mink, 123 Mass. 422; Com. v. Wright, 26 C. C. (Pa.) 666, 667. As to what the *felo de se* forfeited at common law, it seems clear that he forfeited all chattels real or personal which he had in his own right; and also all chattels real whereof he was possessed, either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession, to which he was entitled jointly with another, or any account, except that of merchandise. But it is said that he forfeited a moiety only of such joint chattels as might be severed, and nothing at all of what he was possessed as executor or administrator. 1 Hawk. P. C., c. 27, s. 7. The blood of a *felo de se* was not corrupted; nor his lands of inheritance forfeited, nor his wife barred of her dower, 1 Hawk. P. C., c. 27, s. 8.; 1 Plowd. 253, 262; 1 Hale P. C. 413. The will of *felo de se* therefore became void as to his personal property, but not as to his real estate. 1 Plowd. 253, 262. No part of the personal estate of a *felo de se* vested in the king before the self-murder was found by some inquisition, and consequently the forfeiture thereof was saved by a pardon of the offense before such find-

tures was granted at the time of the Restoration of Charles II.<sup>4</sup> Today this punishment no longer remains. In the United States, forfeiture of goods for suicide and regulation of burial were early abolished or have long fallen into disuse,<sup>5</sup> while in England these vicarious penalties have been removed by statute.<sup>6</sup> The act of suicide, however, remains a crime in England and in some states by the common law.<sup>7</sup> Suicide loses its status as a crime only

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ing, 5 Co. Rep. 110, 3 Inst. 54, 1 Saund. 362, 1 Sid. 150, 162. If there was no such pardon, the whole was forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles were voided, 1 Plowd. 253, 263-264; 1 Hale P. C. 29; 5 Co. Rep. 110; Finch L. 216; Chitty's note in Sharswood's 4 Blackstone 190.

<sup>4</sup>In interpreting the Statute of Pardons, 12 Car. II, ch. 11, which granted a general pardon to all persons guilty of any felony except murder it was held that suicide was not murder within the purview of the statute, *Rex. v. Ward*, 1 Lev. 8; *Rex. v. Warner*, 1 Keb. 66; *Rex. v. Ward*, 1 Keb. 548; *Lock v. Etherington*, 1 Keb. 695.

<sup>5</sup>Forfeiture for suicide was abolished in Pennsylvania by William Penn, Proprietary and Governor, in his charter of 1701; this was subsequently continued in the Constitutions of 1790, 1838, and 1874, Art. 1, Sec. 19; *Burnett v. People*, 204 Ill. 208, 68 N. E. 505. A dishonorable burial was accorded suicides in colonial Massachusetts for by statute in 1660 every self-murderer was denied the privilege of being buried in the common burying-place of Christians, but was to be buried in some common highway and a cartload of stones laid upon the grave, "as a brand of infamy, and as a warning to others to beware of the like damnable practices." "That statute, though fallen into disuse, continued in force until many years after the adoption of the Constitution of the Commonwealth," *Com. v. Mink*, 123 Mass. 422, 426, per Gray, C. J. This statute was repealed in 1823, *May v. Pennell*, 101 Me. 516, 64 At. 885, 7 L. R. A. (N. S.) 286.

<sup>6</sup>33 & 34 Vict., c. 23, (1870). It is said that the effort made by the common law to deter men from committing suicide by threatening degradations to be inflicted on the suicide's corpse and the forfeiture of his goods met with some measure of success. The first by a natural, if unreasoning, association of ideas was often a potent deterrent and the second, a vicarious punishment falling wholly upon his surviving family, was likely to appeal strongly to his sense of affection. Burial lost its gruesome aspect in 1824 and was replaced by burial between 9 and 12 o'clock at night without service. Confiscation of goods was abolished in the general abolition of forfeitures for felony in 1870. In 1882 every penalty save denial of interment in full Anglican form was removed. Long before abolition of common law penalties the popular disapprobation of them had gone far in reducing the number of cases in which they were inflicted. Coroner's juries availed themselves of the slightest grounds for pronouncing the act of suicide to have been done during a fit of insanity. If the evidence disclosed any source of anxiety which might have been a motive for the act, this anxiety was declared to have unsettled his mind; if no motive could be found, then the apparent causelessness of the act was declared itself to be proof of insanity. This practice of "pious perjury" as it is called by Blackstone became so inveterate that it survived the abolition of the penalties which were its cause and excuse, and in England jurors are in the habit of pronouncing on utterly inadequate grounds a verdict of insanity, forgetting that such a verdict may throw upon the family of the deceased an undeserved stigma gravely affecting their matrimonial, social, or commercial prospects. Men are quick to imagine the physical and mental influence of heredity.

<sup>7</sup>*Rex v. Russell*, 1 Moody 356, (1832); *Rex v. Mann*, 2 K. B. 107, (1914); *Rex v. Hopwood*, 8 Cr. App. R. 140; *McMahon v. State*, 168 Ala. 70, 53 So. 89; *State v. Levelle*, 34 S. C. 120, 13 S. E. 319; *Com. v. Bowen*, 13 Mass. 356; *Com. v. Mink*, 123 Mass. 429; *State v. Carney*, 69 N. J. L. 478, 55 At. 44.

when the common law rule is expressly or impliedly repealed by statute or constitutional provision.<sup>8</sup> The act of suicide ranges in the various jurisdictions of the United States from a felony to no offense.<sup>9</sup>

In a civil suit in Pennsylvania a lower court said, "In the legal acceptance of the term (suicide) it is self-murder, the felonious taking of one's life."<sup>10</sup> The Supreme Court affirmed this case in every detail,<sup>11</sup> thus adopting the common law rule as to suicide. With this Supreme Court opinion before him, another lower court judge in the only criminal case directly dealing with suicide said, "Calling suicide self-murder is a curt way of justifying an indictment and trial of an unfortunate person who has not the fortitude to bear any more of the ills of this life. His act may be a sin, but it is not a crime; it is the result of disease. He should be taken to a hospital and not sent to a prison."<sup>12</sup> Saying that he who attempts suicide should be sent to a hospital is but the modern way of stating a finding of insanity in the case of a suicide, which situation was lamented by Blackstone<sup>13</sup> and Hawkins<sup>14</sup> two centuries ago.

<sup>8</sup>Reg. v. Doody, 6 Cox C. C. 463; Com. v. Dennis, 105 Mass. 162; Com. v. Mink, 123 Mass. 428. Com. v. Wright, 26 C. C. (Pa.) 666 says that since the Constitution of 1790, which took away the forfeiture of suicide's goods, there has been no punishment for suicide, and therefore suicide is not a crime. Burnett v. People, 204 Ill. 208, evades this point by saying, "In the view we entertain of the case at bar it is not necessary that suicide be held to be a crime;" although the court favors the view of Com. v. Mink, and Blackburn v. State, 23 Ohio 146, both of which are based on the repeal of suicide as a crime by statutory implication. May v. Pennell, 101 Me. 516, 64 At. 885, 7 L. R. A. (N. S.) 286, says that by repeal of the Massachusetts statute providing for an ignominious burial of suicides "the common law of England upon this subject was thus modified in Massachusetts and suicide ceased to be a punishable offense. The ground work for the English doctrine that an attempt to commit it was a misdemeanor was thus removed. If it was a misdemeanor by the common law of England, it ceased to be such under the laws of Massachusetts, and has never been recognized as a part of the common law of Maine. . . . The constructions of their (Massachusetts) statutes . . . are in substance and effect precisely like own own." Penal Code of Texas, Art. 3.

<sup>9</sup>Felony—State v. Levelle, 34 S. C. 120, 13 S. E. 319; Com. v. Hicks, 118 Ky. 637, 82 S. W. 265; State v. Carney, 69 N. J. L. 478, 55 At. 44; unlawful and *malum in se*—Com. v. Mink, 123 Mass. 422; no offense—Grace v. State, 44 Tex. Cr. 193, 69 S. W. 529; Sanders v. State, 54 Tex. Cr. 101, 112 S. W. 68; State v. Campbell, 251 N. W. 717, Iowa, 1933.

<sup>10</sup>Conn. Mut. Life Ins. Co. v. Groom, 86 Pa. 92, 93, (1878).

<sup>11</sup>Ibid., 99.

<sup>12</sup>Com. v. Wright, 26 C. C. (Pa.) 666, 669, (1902), Arnold, P. J.

<sup>13</sup>"The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroner's juries are apt to carry it, viz., that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer." 4 Blackstone 189.

<sup>14</sup>"But here I cannot but take notice of a strange notion, which has unaccountably prevailed of late, that every one who kills himself, must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and to all sense and reason. If this argument be good, self-murder can be no crime for a madman can be guilty of none. But it is wonderful that the repugnancy to nature and reason which is the highest aggravation of this offense, should be thought to make it impossible to be any crime at

It is immaterial whether the act of suicide is criminal so far as the perpetrator is concerned for he is beyond punishment by the courts.<sup>15</sup> The question is important, however, in determining the criminality of those who are present, aiding, and abetting; those who hire, procure, and assist; those who attempt to commit suicides; those who conspire to the commission of a suicide; those who solicit suicide; the duty to prevent suicide; and determining the position of suicide in the field of constructive crime.

#### PRINCIPAL IN THE SECOND DEGREE

"Principals in the second degree are those who are present, aiding and abetting the commission of a felony."<sup>16</sup> At common law the principal in the second degree to suicide is held guilty of murder.<sup>17</sup> In the courts of the United States, the principal in the second degree is punished according to the status of the act of suicide as a crime, or else the particular offense is regulated

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all which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it? But has a man therefore no use of his reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred and revenge, and such like, are too well known to do in others?" I Hawk. P. C., c. 27, s. 3.

<sup>15</sup>"The law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it; and, as the suicide is guilty of a double offense, one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. . . . But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune; on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king; hoping that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act." 4 Blackstone 189. Statistics indicate that dread of punishment beyond the grave is still a potent and prevalent deterrent from self-destruction. 25 Encyclopedia Americana 806.

<sup>16</sup>Weston v. Com., 111 Pa. 261, 263.

<sup>17</sup>Rex v. Tyson, R. & R. 523, (1823); Reg. v. Allison, 8 C. & P. 418, (1838); Reg. v. Jessop, 16 Cox C. C. 204, (1877); Rex v. Stormonth, 61 P. J. 729, (1897); Rex v. Abbott, 67 P. J. 151, (1903); Rex v. Symonds, 1922 Times Dec. 19, (1922). In Reg. v. Allison is reported a case of the time of James I in which a man and wife agreed to commit suicide together upon the suggestion of the husband. They both partook of poison which he procured, the husband died but the wife recovered. Upon her trial for the murder of her husband she was acquitted solely on the ground that being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty, State v. Jones, 86 S. C. 17, 67 S. E. 160, (1910).

by statute.<sup>18</sup> Thus, some courts adopt the doctrine of the common law;<sup>19</sup> the Texas courts find the abetter guiltless because suicide is no crime in that state;<sup>20</sup> while other courts adopt another theory in order to punish the abetter. These latter courts hold the abetter to be a murderer because he either compelled the victim by threats to do acts which result in the victim's death<sup>21</sup> or he committed murder by means of an innocent human agent.<sup>22</sup>

Similarly, where the defendant inflicted a mortal wound on the victim, and the latter then slashed his throat with the intent to commit suicide, the act of the deceased was not an efficient intervening cause but merely a contributing cause and defendant was found guilty of manslaughter.<sup>23</sup> If a person being attacked shall, from apprehension of immediate violence, which is well grounded and justified by the circumstances,<sup>24</sup> throw himself in an attempt to escape into a river and be drowned, the person attacking him is guilty of murder; the death being the guilty act of him who compelled the deceased to take the step.<sup>25</sup>

The question as to whether or not a person inciting suicide is a principal or an abetter is usually made to depend on whether or not he is present, bringing persuasion to bear upon the other at the time the fatal deed is done.<sup>26</sup> Thus one who furnishes poison to a guilty agent or accomplice to be administered by him, who administers it accordingly, is an accessory before the fact to the murder; but if he stands by and counsels or encourages the act of administering it, he is a principal in the second degree. In such a case, if the deceased took the poison in the presence of the giver, but not in that of the person who first procured it, and died, the procurer is the accessory before the fact and the giver is the principal in the murder.<sup>27</sup> A rule which seems to cover the whole ground is that of *Burnett v. People*:<sup>28</sup> that an act of the principal, or another, done pursuant to the will of the accessory, is the act of the accessory.

<sup>18</sup>*State v. Ludwig*, 70 Mo. 412, (1879). By statute in Missouri, every person who "deliberately assists" another in the commission of self-murder is declared guilty of manslaughter in the first degree. *State v. Webb*, 216 Mo. 378, 115 S. W. 998.

<sup>19</sup>*Com. v. Bowen*, 13 Mass. 356, (1816). This case was decided when suicide was still punished for forfeiture of goods and ignominious burial.

<sup>20</sup>*Grace v. State*, 44 Tex. Cr. 193, 69 S. W. 529, (1902); *Sanders v. State*, 54 Tex. Cr. 101, 112 S. W. 68, (1908). The position of the Texas courts is practically neutralized by the fact that the specific act of inciting or abetting suicide is made punishable by statutory enactment. 66 L. R. A. 307.

<sup>21</sup>*Adams v. People*, 109 Ill. 444—jump from train; *Blackburn v. State*, 23 Ohio 146—swallow poison; *State v. Shelledy*, 8 Iowa 477—drown.

<sup>22</sup>*Burnett v. People*, 204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304.

<sup>23</sup>*People v. Lewis*, 124 Cal. 551, (1889).

<sup>24</sup>*State v. Shelledy*, 8 Iowa 477.

<sup>25</sup>*Reg. v. Pitts*, C. & M. 284.

<sup>26</sup>66 L. R. A. 305.

<sup>27</sup>*Vaux and Ridley's Case*, Kel. C. C. 52.

<sup>28</sup>204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304.

## ACCESSORY BEFORE THE FACT

The accessory before the fact is "one who, though absent at the commission of the felony, procures, counsels, or commands another to commit said felony subsequently perpetrated, in consequence of such procuring, counsel or command."<sup>29</sup> At common law the accessory before the fact to a suicide could not be tried because of the common law rule that the principal in the first degree must be first tried and convicted, and since the principal in the first degree was beyond human trial the accessory before the fact was allowed to go unpunished.<sup>30</sup> This defect in the law has been remedied by statute and now accessories are tried and held liable to the same punishment as principals even though the principal has not been taken, tried and punished.<sup>31</sup> Since this statute, accessories before the fact to suicide have not gone unpunished in those forums where the common law is followed.<sup>32</sup> A legal solecism arises, however, in these courts which hold that suicide is not a crime, and in these states those persons who procure suicide are guilty of no crime.<sup>33</sup>

There is no sound practical reason why the procurer of suicide should go unpunished. Dean William Trickett advanced the theory that although one who procures, persuades, aids, and abets another to commit suicide, but is absent at the time of the act, can be shown to be an accessory before the fact, and that by the Act of March 31, 1860, Sec. 44, an accessory may be indicted and tried as a principal, yet in order to have an accessory and a principal there must be a crime; since *Com. v. Wright*<sup>34</sup> holds suicide is not a crime, it is futile to prove an accessory or a second degree principal to suicide. Hence to escape this result Dean Trickett holds the act to be the commission of murder through an innocent human agent, that agent being the victim himself.<sup>35</sup> Dean Trickett's view has been upheld in *People v. Roberts*.<sup>36</sup>

In order to convict the abetter as an accessory before the fact he must procure the means to commit the act with the intent that it be taken by the

<sup>29</sup>William Trickett, 2 Criminal Law in Pennsylvania 757.

<sup>30</sup>*Rex v. Russell*, 1 Moody 356, (1832); *Reg. v. Leddington*, 9 C. & P. 79, (1839).

<sup>31</sup>24 & 25 Vict., c. 23, c. 94; Act of March 31, 1860, P. L. 427, Sec. 44, (Pa.); and similar statutes have been adopted in practically all states.

<sup>32</sup>*Reg. v. Gaylor*, 1 D. & B. 288; *McMahon v. State*, 168 Ala. 70, 53 So. 89. *Burnett v. People*, 204 Ill. 208, 68 N. E. 505, 66 L. R. A. 304; and *State v. Lindsey*, 19 Nev. 47, 5 Pac. 822, find that that malice in the accessory is an essential element to convict him of murder.

<sup>33</sup>*Grace v. State*, 44 Tex. Cr. 193, 69 S. W. 529; *Sanders v. State*, 54 Tex. Cr. 101, 112 S. W. 68.

<sup>34</sup>26 C. C. (Pa.) 666.

<sup>35</sup>13 Forum (Dickinson School of Law) No. 4, 124, "A may induce or aid B to do an act which, conceived as B's act, is innocent—in the sense that the law does not punish it—but which may be regarded also as A's act, and in this wise is criminal."

<sup>36</sup>211 Mich. 187, 178 N. W. 690, 13 A. L. R. 1253, (1920)—the court avoided the question of accessory before the fact and the defendant was found guilty of murder by poisoning because he mixed the poison and placed it within reach so that his invalid wife could drink it.

deceased;<sup>37</sup> but if the abetter merely procures the means, whereby the act is committed, without the intent that it be taken by the deceased, then he is not guilty of murder either as principal or accessory.<sup>38</sup>

By these statutes which make the accessory before the fact subject to trial and punishment as if a principal, the further question arises of which procurers come within the comprehension of the statutes. In construing the Act of 11 & 12 Vict. providing for punishment of accessories before the fact as principals it has been held that one who counsels or advises another to commit suicide may be punished for that offense.<sup>39</sup> Bishop says that statutes making an accessory before the fact a principal should subject one who instigates suicide to punishment.<sup>40</sup> The same view was taken in *Com. v. Hicks*.<sup>41</sup> on the theory that the object of the statute was to make the punishment of the accessory entirely independent of the conviction or punishment of the principal and that the case was the same as if A who had killed B at C's instance should kill himself immediately thereafter. But in *Rex v. Russell*<sup>42</sup> it was held that the statute 7 Geo. IV providing for the trial of accessories although the principal "had not been tried and convicted" was to be construed as extending to those persons only who were before the statute triable either with or after the principal, not to make those triable who before could never have been tried. Dean Trickett says it "operates only where a person is an accessory. But there can be no accessory at common law unless there is a different principal felony", consequently Dean Trickett decided that the instigator was the principal.<sup>43</sup> In New York the problem is definitely settled by statute.<sup>44</sup> There the accessory before the fact is held guilty of manslaughter.<sup>45</sup>

A person who, considered as either a principal or an accessory before the fact, aids or actively encourages another to commit suicide certainly should be subjected to the same punishment as a murderer.<sup>46</sup> "It is certainly a serious defect in the law if a person who wishes to get rid of another can with impunity encourage and assist him to make way with himself."<sup>47</sup>

#### ATTEMPT

The attempt to commit suicide is at common law an attempt to commit a felony and therefore indictable as a misdemeanor.<sup>48</sup> Whether the attempt to

<sup>37</sup>*Rex v. Russell*, 1 Moody 356.

<sup>38</sup>*Reg. v. Fretwell*, L. & C. 161, (1862).

<sup>39</sup>*Reg. v. Gaylor*, O. & B. 288.

<sup>40</sup>Bishop's 2 Criminal Law 683. The same doctrine is announced in 21 American and English Encyclopedia of Law, 2d. ed., 93.

<sup>41</sup>118 Ky. 637, 82 S. W. 265.

<sup>42</sup>1 Moody 356.

<sup>43</sup>13 Forum (Dickinson School of Law) No. 4, 124.

<sup>44</sup>Sec. 175 Penal Code of New York, (1881).

<sup>45</sup>*People v. Kent*, 41 Misc. (N. Y.) 191.

<sup>46</sup>Bishop's 2 Criminal Law 683.

<sup>47</sup>Wilbur Larremore, "Suicide and the Law," 17 Harvard Law Review 331, 338.

<sup>48</sup>*Reg. v. Moore*, 3 C. & K. 319, (1852); *Reg. v. Doody*, 6 Cox C. C. 463, (1854).

commit suicide is today an indictable offense is a question on which the courts are flatly divided. In England<sup>40</sup> and New Jersey<sup>50</sup> it has been held, following the common law, that the attempt to commit suicide is a crime. In Pennsylvania,<sup>51</sup> Maine,<sup>52</sup> and Massachusetts<sup>53</sup> it has been held that the attempt to commit suicide is not a crime. In New York, North Dakota, and South Dakota the attempt at suicide was made a felony by statute.<sup>54</sup> The attempt at suicide is no longer a crime in New York.<sup>55</sup> The New Jersey courts have adopted the correct view. In *State v. Carney*<sup>56</sup> it was decided that "as there is no independent enactment making attempt at suicide a crime, that whether it is a crime in this state will depend upon whether or not it was a crime at common law." The court then cites *Reg. v. Doody* and *Reg. v. Burgess* and says that even though these English cases were decided after the Revolution the cases hold that it always has been the common law of England that one guilty of suicide was *felo de se*, and therefore by the common law of New Jersey an attempt to commit suicide is a crime.

The Massachusetts courts in *Com. v. Dennis* and *Com. v. Mink* clearly state that attempts at suicide were criminal at common law. The earlier case held that attempts were not criminal in Massachusetts because the common law offense had been repealed by implication by a statute. This statute declares that criminal attempts shall be punished according to the punishment for the completed offense, and since the completed offense is beyond terrestrial punishment the attempt is not punished.<sup>57</sup> Eight years later in *Com. v. Mink*, Gray, C. J., said, "Suicide is not technically a felony in Massachusetts because of a statute, but being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal."<sup>58</sup>

By following the *Dennis* case, the Maine court came to the conclusion that an attempt to commit suicide is not an indictable offense because it ceased to be such under the law of Massachusetts, and has never been recognized as a part of the common law of Maine. The Maine statute in this respect is the same as the Massachusetts statute.<sup>58</sup>

<sup>40</sup>*Reg. v. Doody*, 6 Cox C. C. 463; *Reg. v. Burgess*, 9 Cox C. C. 247, (1862); *Rex v. Mann*, 2 K. B. 107, (1914); an attempt to commit suicide is a common law misdemeanor punishable by fine or imprisonment with or without hard labor.

<sup>50</sup>*State v. Carney*, 69 N. J. L. 478, 55 At. 44.

<sup>51</sup>*Com. v. Wright*, 26 C. C. (Pa.) 666.

<sup>52</sup>*May v. Pennell*, 101 Me. 516, 64 At. 885, 7 L. R. A. (N. S.) 286.

<sup>53</sup>*Com. v. Dennis*, 105 Mass. 162.

<sup>54</sup>Sec. 178 of the Penal Code of New York, (1881), "every person guilty of attempting suicide is guilty of a felony, punishable by imprisonment in a state prison not exceeding two years or by a fine not exceeding \$1,000."

<sup>55</sup>This is true since 1919. 25 *Journal of Criminal Law and Criminology* 125.

<sup>56</sup>69 N. J. L. 478, 55 At. 44.

<sup>57</sup>*Com. v. Dennis*, 105 Mass. 162.

<sup>58</sup>123 Mass. 422.

<sup>59</sup>7 L. R. A. (N. S.) 286 (Note). By interpretation of the Hawaiian Penal Code, the attempt at suicide is not an indictable offense, *King v. Ashee*, 2 Am. L. R. 794, (1868).

The only Pennsylvania case dealing with the attempt to commit suicide is a lower court case, *Com. v. Wright*,<sup>60</sup> which declares that it cannot be a crime to commit an act which, if it is accomplished, is not a crime.<sup>61</sup> The court says the Act of 1860<sup>62</sup> which punishes the attempt to commit murder "plainly means an attempt by any one person upon any other person and not upon himself for the reason that it is not murder for a person to commit suicide, for as said by Chief Baron Pollock (referring to *Reg. v. Burgess*) there is no such offense as self-manslaughter, and there is a vast difference between inflicting a wound on one's self with that intent." The court here overlooks the common law definition of homicide which, stated by Blackstone<sup>63</sup> is: "Felonious homicide is an act of a very different character from the the former (referring to excusable homicide), being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man." Dean William Trickett says, "Homicide is the criminally causing the death of a human being."<sup>64</sup>

From the standpoint of legal reasoning, the courts should hold that attempt at suicide is an indictable criminal offense. In fact, the courts could say that the attempt at suicide is a separate, distinct, substantive crime. It is comparable to the crime of burglary which is the doing of certain enumerated physical acts with the intent to commit a felony. Attempt at suicide is the doing of at least one physical act with the intent to commit a felony—the felony being self-murder.

The argument that in the United States suicide is not a crime because it cannot be punished is readily answered; for this reasoning makes the existence of a crime depend on the punishment whereas the punishment depends on the existence of the crime.<sup>65</sup> The fallacy of this reasoning is further shown by Fort, J., in *State v. Carney*,<sup>66</sup> who said, "Suicide is none the less criminal because no punishment can be inflicted. It may not be indictable because the dead cannot be indicted. If one kills another and then kills himself is he any the less a murderer because he cannot be punished?" The answer to Fort's argument is found in *Com. v. Wright*, that a punishment of forfeiture and ignominious burial formerly was provided whereas this punishment has now been finally abrogated. There is a distinction between failure to provide

<sup>60</sup>26 C. C. (Pa.) 666.

<sup>61</sup>"In Pennsylvania we have never inflicted the ecclesiastical punishment for the spiritual offense involved in suicide, and the punishment for the temporal offense was expressly abolished by the Constitution of 1790, re-adopted in 1838 and 1874, which declares that 'the estates of such persons as shall destroy their own lives, shall descend or vest as in the cases of natural death,' and, therefore, as there is no punishment there is no crime." *Com. v. Wright*, 26 C. C. (Pa.) 666, 667, 668.

<sup>62</sup>Act of March 31, 1860, P. L. 403, Sec. 82.

<sup>63</sup>4 Blackstone 188.

<sup>64</sup>William Trickett, 2 Law of Crimes in Pennsylvania 766.

<sup>65</sup>William L. Clark, Jr., "Handbook of Criminal Law," William E. Mikell, ed., 216, (1915).

<sup>66</sup>9 N. J. L. 478, 55 At. 44.

punishment for any case and inability to inflict punishment in a particular case.

It is important today to determine what disposition should be made of attempts at suicide, regardless of the holding as to whether or not suicide itself is a crime. There is a grave doubt whether punishment should be imposed on the man who, of his volition, tries to take his own life. If the attempt is made an indictable offense this undesirable situation arises: that the perpetrator will strive more earnestly to make the attempt successful.<sup>67</sup> This is true in every case, however, in which an offensive act is made criminal: that the wilful perpetrator will try to complete his act in such a manner that he will not be apprehended and punished. The unnatural desire to take one's own life is usually caused in American cases by despondency.<sup>68</sup> This is a temporary condition which will gradually wear away leaving the former sufferer with a normal love of life. In European cases the chief cause is mental disorder.<sup>69</sup>

In states where an attempt to commit suicide is a criminal offense, and where more severe penalties are imposed on criminals for successive offenses, it would be interesting to inquire whether a second attempt would subject the offender to life imprisonment, and whether a third attempt would subject the habitual offender to capital punishment. If such would be the result, it would follow that three unsuccessful attempts at suicide would require the state to complete the unsuccessful job started by the attempted suicide.

Public opinion generally has seemed to reach the stage that it no longer recognizes suicide as a crime and therefore there are scarcely any criminal proceedings against those who attempt suicide. Even in England the practice persists of the coroner's jury pronouncing that the act was the result of insanity, thus allowing the perpetrator a full Christian burial.<sup>70</sup> The family is spared the greater of two evils, for the perpetrator is said to die insane instead of *felo de se*. Consequently when the completed act is not popularly countenanced as an act of criminal nature, the argument succeeds that the unsuccessful attempt should not be criminally punished. Even in those states where it is reasonably held that the attempt is criminal, prosecutions against those persons who do attempt suicide are not promoted, for there is only one reported case in each of these jurisdictions. In New York, where the attempt was a felony by statute for thirty-eight years, it was said that policemen frequently were seen waiting at hospitals to arrest persons who had attempted suicide. On the other hand, in North and South Dakota where the attempt has been made a felony by statutory enactment, cases coming within the statute are not prosecuted.<sup>71</sup>

In order to compromise the two conflicting views as to whether or not the

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<sup>67</sup>Com. v. Dennis, 105 Mass. 162; Com. v. Wright, 26 C. C. (Pa.) 666.

<sup>68</sup>25 Encyclopedia Americana 806, (1920).

<sup>69</sup>Morcelli, "Suicide," 278.

<sup>70</sup>25 Encyclopedia Americana 807.

<sup>71</sup>Com. v. Wright, 26 C. C. (Pa.) 666; May v. Pennell, 101 Me. 516, 64 At. 885, 7 L. R. A. (N. S.) 286.

attempt at suicide is criminal, it is possible to go back of the act to the motive. There are two opposite motives which prompt suicide: noble and base. It is the noble motive which prompted some of the old saints to commit suicide in order to protect their chastity,<sup>72</sup> while it is the base motive which encourages the coward who has suffered financial losses or unrequited love to desert his survivors and force his family into the world without attempting to provide for them. Thus, as in the common law crimes of burglary and forgery where corrupt motive is an indispensable element of the crime, so too in suicide, if bad motive is made an essential element of the crime this would allow the courts to punish the dastardly attempts and let go unpenalized the justified attempts.

It is submitted that the better of these two views is that attempt at suicide should be criminally punished, and it is immaterial what motive, whether good or bad, instigated the attempt to take a human life.<sup>73</sup>

#### CONSPIRACY

"A conspiracy," says McClain,<sup>74</sup> "is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means." Suicide may or may not be one of those acts or effects, which, though not criminalized nor penalized, nor even considered as unlawful, are looked on with certain disfavor and regret by the law's ministers. Nevertheless, the conspiracy to commit some of these acts is criminally punished.<sup>75</sup> There is little doubt that the conspiracy to commit suicide should be one of these separate substantive crimes.

In the only case discussing conspiracy to commit suicide,<sup>76</sup> it was held that where two persons enter upon a suicide pact, "defendant abandoned his purpose of committing suicide, and endeavored to persuade the deceased to also abandon it, that he had done all that the law could exact of him" because the defendant has "the right to repent of his ill-considered promise to commit suicide with the deceased."

#### SOLICITATION

It is an indictable offense at common law to solicit another to commit any crime amounting to a felony, although the solicitation is of no effect and the

<sup>72</sup>Kilbur Larremore, "Suicide and the Law," 17 Harvard Law Review, 331, 332

<sup>73</sup>See dicta in *State v. Ehlers*, 98 N. J. L. 236, 119 At. 15, (1922), White, J., to the effect that the attempt is punished "because the state has a deep interest and concern in the preservation of the life of each of its citizens, and (except in cases of self-defense) does not either commit or permit to any individual, no matter how kindly the motive, either the right or the privilege of destroying such a life, except in punishment for a crime and in the manner prescribed by law."

<sup>74</sup>McClain's 2 Criminal Law 157.

<sup>75</sup>William Trickett, 1 Law of Crimes in Pennsylvania 391.

<sup>76</sup>*State v. Webb*, 216 Mo. 378, 115 S. W. 998, 20 L. R. A. (N. S.) 1142, (1909).

crime is not in fact committed.<sup>77</sup> Thus solicitation to commit suicide was a crime at common law because suicide was considered a felony.<sup>78</sup> One who solicits another to commit a felony is guilty of a misdemeanor only, if the felony is not committed.<sup>79</sup> If the felony is committed, he is guilty as accessory before the fact if absent, and as principal in the second degree if present, at the time of its commission.<sup>80</sup> Solicitation to commit suicide should be punished criminally. This can be accomplished by following the common law rule, or by finding the solicitor guilty of seeking the killing of a human being by means of the innocent human agent theory.

#### DUTY TO PREVENT SUICIDE

The question whether a duty exists to prevent the commission or attempt of suicide arises in interesting situations. It was held at common law that everyone has the same right and duty to interpose and save a life from being so unlawfully and criminally taken that he would have to defeat an attempt to take unlawfully the life of a third person.<sup>81</sup> Today no conviction could be had if one man refuses to prevent another from taking his own life. It is a moral duty and not a legal one.<sup>82</sup> A legal duty exists today only in cases of close relationship, as parent-child,<sup>83</sup> husband-wife,<sup>84</sup> master-seaman,<sup>85</sup> niece-aunt,<sup>86</sup> grandparent-grandchild.<sup>87</sup>

In a recent English case<sup>88</sup> the defendant was charged with sitting by and watching his wife drown their two children and then drown herself. The trial jury found the defendant guilty of manslaughter of both children and the wife. On appeal it was found that the relationship of husband and wife and that of parent and child placed the defendant under a positive duty to interfere and his failure to do so was tantamount to encouragement. He was therefore held an accessory before the fact and guilty of murder in the second degree. The appellate court was justified in finding the relationship of husband and wife placed the defendant under a positive duty to interfere and his failure to

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<sup>77</sup>16 Corpus Juris 117.

<sup>78</sup>1 East P. C. 219; *Rex v. Russell*, 1 Moody 356; *Rex v. Clerk*, 7 Mod. 16; *Hales v. Petit*, 1 Plowd. 253, 260, 261; *Rex v. Ward*, 1 Lev. 8.

<sup>79</sup>*Com. v. Randolph*, 146 Pa. 83.

<sup>80</sup>*Bigley v. Com.*, 22 Ky. 1546, 60 S. W. 847.

<sup>81</sup>*Marlin v. Ayliffe*, Cro. Jac. 134, (1685); 2 Rol. Ab. 559; 1 Hawk. P. C., c. 60 s. 23.

<sup>82</sup>9 Forum (Dickinson School of Law) 222, 223; *People v. Beardsley*, 150 Mich. 206, 113 N. W. 1128, 13 L. R. A. (N. S.) 1020, 121 Am. St. Rep. 617, 13 Ann. Cas. 39.

<sup>83</sup>*State v. Behen*, 72 Iowa 533, 34 N. W. 319; *Rex v. Russell*, Vict. L. R. 59; *Gibson v. Com.*, 106 Ky. 360, 50 S. W. 532, 90 Am. St. Rep. 230.

<sup>84</sup>*Rex v. Russell*, Vict. L. R. 59; *Territory v. Manton*, 8 Mont. 95, 19 Pac. 387; *State v. Smith*, 65 Me. 257.

<sup>85</sup>*U. S. v. Knowles*, 4 Sawy. (U. S.) 517, Fed. Cas. No. 15, 540.

<sup>86</sup>*Reg. v. Instan*, 17 Cox C. C. 602

<sup>87</sup>*Reg. v. Nicholls*, 13 Cox C. C. 75.

<sup>88</sup>*Rex v. Russell*, Vict. L. R. 59, (1933).

do so was equivalent to encouragement. This being true, and the element of malice existing, the defendant was guilty of murder as a principal in the second degree. In no wise is the court justified in holding the defendant an accessory before the fact, because the chief distinction between a principal in the second degree and an accessory before the fact is "presence" at the time of the act.<sup>89</sup>

#### SUICIDE IN THE FIELD OF CONSTRUCTIVE CRIME

In the field of constructive crime, suicide is considered criminal. At common law where a man was trying to commit suicide and accidentally killed one who was attempting to restrain him, he was held to be guilty of murder.<sup>90</sup> This doctrine has been affirmed in South Carolina<sup>91</sup> and Nevada.<sup>92</sup> In Massachusetts it was held to be manslaughter and it was intimated that the conviction might perhaps have been of murder.<sup>93</sup> In an Iowa case<sup>94</sup> similar to *Com. v. Mink* the trial court was reversed on appeal and it was held that since all crimes are statutory in Iowa and there is no statute making suicide or attempt at suicide criminal, therefore the defendant was not engaged in an unlawful act and his killing was not murder. This case is weakened by the court's dictum which says, "Whether the attempt to commit suicide is a public offense as a matter of fact has nothing to do with the offense of murder. Murder is defined by statute. . . . The killing of another human being by one while he is attempting to commit suicide may amount to murder in the first degree, as defined by section 12911 of the Code. But there would be no murder in either the first or second degree if one, while committing a public offense (except those offenses named in section 12911 of the Code), kills another, unless there is malice aforethought and the other elements necessary to constitute murder." This statement opens the way to convict the defendant of some degree of criminal homicide less than murder as defined by statute.<sup>95</sup> The distinction between the *Mink* case and the *Campbell* case is that in the former the court, admitting that the attempt to commit suicide was not an indictable offense, held it to be wrongful and criminal as *malum in se*; while in the latter case, the court refused this reasoning, holding that it was not enough for the offense to be unlawful as *malum in se* but unless the statute

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<sup>89</sup>Clark and Marshall "Crimes," 3d. ed., 199.

<sup>90</sup>Reg. v. Franklin, 15 Cox C. C. 153; Rex v. Hopwood, 8 Cr. App. R. 140.

<sup>91</sup>State v. Levelle, 34 S. C. 120, 13 S. E. 319, (1891).

<sup>92</sup>State v. Lindsey, 19 Nev. 47, 5 Pac. 822.

<sup>93</sup>Com. v. Mink, 123 Mass. 422.

<sup>94</sup>State v. Campbell, 251 N. W. 717, (Iowa), Albert, C. J., (1933).

<sup>95</sup>Douglas Aikenhead Stroud, "Mens Rea, or Imputability Under the Law of England," 169, (1914), "There may be constructive murder in the course of a felony, or constructive manslaughter in the course of any other gravely unlawful act, without any homicidal intent whatever, and in the absence of any culpable disregard for human life."

made it so it was not unlawful, following *Darrow v. Family Fund Society*.<sup>96</sup> *Com. v. Mink* is attacked by Francis J. Lippitt in his "Criminal Law as Administered in Massachusetts,"<sup>97</sup> and William E. Mikell, "Is Suicide Murder?"<sup>98</sup> Here again the two conflicting views as to whether or not the attempt at suicide is criminal are evidenced. The most recent pronouncement<sup>99</sup> is *contra* to the previous cases and in effect says that a man is entitled to take his own life regardless of how disastrous to society the results may be.<sup>100</sup>

At common law another phase of suicide in the field of constructive crime presented an interesting question which is now of academic interest only. If a man attempting to kill another, missed his blow and killed himself<sup>101</sup> or intending to shoot at another mortally wounded himself by the bursting of the gun<sup>102</sup> he was *felo de se*; his own death being the consequence of an unlawful malicious act toward another. If A struck B to the ground and B drew a knife and held it up for his own defence, and A in haste falling upon B to kill him, fell upon the knife and was thereby killed, A was *felo de se*;<sup>103</sup> but this has been doubted. In *I Hale P. C. 412*, B is not guilty at all of the death of A, not even *se defendendo*, because he did not strike but only held up the knife, hence A was not a *felo de se* but the act was termed homicide by misadventure. In *Hawkins P. C., c. 27, s. 5*, it seems to be considered that B should be adjudged to kill A *se defendendo*. That this other angle of suicide in the field of constructive crime can be carried to extreme ends is shown by the verdict of *felo de se* returned at a coroner's inquest upon a burglar who was found to have feloniously killed himself without intending to do so, by accidentally falling into the cellar of a house broken into by him.<sup>104</sup> Mr. Stroud says, "One can hardly conceive a better *reductio ad absurdum* of constructive crime than the commission of suicide *lucri causa*, by pure accident"<sup>105</sup>

### CONCLUSIONS

- I. Suicide is a crime at common law. It is still a crime in the United States unless repealed by statute or constitution.
- II. Those persons who procure, aid, or abet the commission of suicide are

<sup>96</sup>116 N. Y. 537, 22 N. E. 1903, (1899).

<sup>97</sup>Francis J. Lippitt, "Criminal Law as Administered in Massachusetts," 234-236, (1879).

<sup>98</sup>William E. Mikell, "Is Suicide Murder?", 3 Columbia Law Review 393.

<sup>99</sup>*State v. Campbell*, 251 N. W. 717, (Iowa), (1933).

<sup>100</sup>See 25 Journal of Criminal Law and Criminology 124, May-June, 1934. This same view is set forth in Dawes, "Crimes," 72.

<sup>101</sup>*I Hale P. C. 412*.

<sup>102</sup>*I Hawk. P. C., c. 27, s. 4*.

<sup>103</sup>Inst. 54; Dalt. c. 144.

<sup>104</sup>Douglas Aikenhead Stroud, "Mens Rea, or Imputability Under the Law of England," 169, (1914).

<sup>105</sup>*Ibid.*

- guilty of murder at common law. This is so in the United States (except in Texas), by :
- A. Murder caused through a guilty human agent, or
  - B. Murder caused through an innocent human agent, or
  - C. Murder caused by compulsion.
- III. The attempt at suicide is a misdemeanor at common law.
- A. This is so in the United States today where the common law is followed.
  - B. Where suicide is not considered a crime, the attempt at suicide is :
    1. Made a crime by statute, or
    2. Is not a crime.
- IV. Conspiracy to commit suicide is a separate crime.
- V. Solicitation to commit suicide is a separate crime.
- VI. There is no legal duty to interfere to prevent the commission of suicide except in cases where one person sustains to another the legal relation of protector.
- VII. Death of another person caused in the attempt to commit suicide is murder.

Richard Wolfrom.

## ELECTION OF REMEDIES IN PENNSYLVANIA

This note is provoked because of the lack of adequate indexing on the subject of Election of Remedies in the Pennsylvania digests. An article in *Corpus Juris* has proven to be of invaluable aid in its preparation, and so it is only fitting that the definition therein contained should be iterated. "Election of remedies has been defined to be the right to choose, or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of."<sup>1</sup>

No definition, unfortunately, can be all-inclusive; at best it can serve merely as a guide. Immediately we are forced to restrict the one above by saying that the term, election of remedies, has been generally limited to a choice by a party between inconsistent remedial rights. A quotation from *Patterson v. Swan*<sup>2</sup> states the proposition thus :

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<sup>1</sup>20 C. J., sec. 1, p. 2.

<sup>2</sup>9 Serg. and R. 16 (1822).