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Criminal Intent, with Special Reference to Liability of Master Criminally, for Willful Acts of His Servants

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T H E S I S .

CRIMINAL INTENT, WITH SPECIAL REFERENCE
TO LIABILITY OF MASTER, CRIMINALLY, FOR
WILLFUL ACTS OF HIS SERVANTS.

BY

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1893.

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INTRODUCTION.

Crime is an offence against the public and since justice has been sought and desired by the people law has been constructed by their representatives that should govern them in their relations to the public at large and it is essential to the civilization of a country that laws should be made and enforced by which the health, peace and happiness of its citizens should be preserved, and whenever an act is done by any of its citizens which transgresses the established law of the country affecting its citizens, it has been called by common usage, crime. Since the penalty attaching for the commission of a crime is the deprivation of a man's liberty, which in this country is man's blessed heritage, it is a matter of great importance in determining whether a crime has been committed or not to look and see what was the condition of the man's mind when the act was done, for, his mind may have been pure and in that case, I maintain, there is no crime, and it is the accused's privilege to have brought to his assistance any doubt that may arise, because it is a fundamental maxim of the law that it is better that the State should stand the chances of an injustice rather than that an innocent man should be punished, and this has

become so thoroughly ingrafted into our jurisprudence that it can never be removed.

In the following pages I shall attempt to follow the directions the courts have taken in the Criminal Jurisprudence of our country, taking only one phase of the **many** interesting points in Criminal Law—Criminal Intent, and I have taken up a particular line with reference to liquor legislation in this country because the liquor business has grown to such immense proportions and and while a lawful, still not an honorable, business has been so hedged about by our Legislatures with restrictions and the popular will of the people is so adverse to its use that the rules of the law have been turned from the paths of right and justice to meet as it seemed the popular will, but be that as laudable as it may, still there are principles of justice, as old as the law itself, which by a mere personal desire cannot be turned aside and while liquor is recognized by the law as a lawful business, when conducted according to certain rules and regulations, those who sell, whatever may be their condition in the social scale of life, **still** are entitled to the right that any citizen however honorable he may be, may claim and it is only by the express will of the people when the business so disastrous to our country is forbidden

by a statute so plain that there can be no mistake, that the common law can be changed and I shall attempt to follow the decisions of the various Courts and to distinguish as far as possible the many conflicting views, for judges look upon the innocence of mens minds with differnt degrees of judicial allowance and I have come to the conclusion after a long investigation that to quote the words of one of the most eminent of writers on Criminal law to-day, Mr. Bishop, "That Criminal Intent is the essence of the crime".

Chap. I .

(Definitions---Distinction between MOTIVE and INTENT---Acts MALUM IN SE contrasted with acts MALUM PROHIBITUM.)

In laying down the broad proposition that there is no crime without Criminal intent I encounter some difference of opinion , in many courts of the country they hold that there may be certain crimes without the intent basing there decisions somewhat upon the particular Statutes, Judge Cooley says that undoubtedly the general rule is that there is no crime without the intent but he qualifies it by saying that this rule is open to many exceptions.

No satisfactory definition can be given of Criminal Intent and I submit not without some hesitation the following. "Evil Intent is a malicious will expressed in a criminal act."

In order to get a clear idea of the subject let us distinguish INTENT from MOTIVE.

Motive is the moving cause or that which induces an act for example,--A being desirous of getting B's gold watch shoots him the motive that induced him to commit the act was the desire to obtain the watch while the INTENT, is the purpose or design with which it is

done , as for example---In the above case the intent was shown in his resolution to kill B .

There may be an intent without a motive as where a man filled with a malicious desire to injure some one kills a man--There he has no reason or cause that made him commit the act but he has the intent or design to do the deed, but in order to have a crime we must have in addition the evil intent, the act, for the simple design to do an unlawful thing so long as it remains a mere intention is not cognizable under the criminal law and the person so harboring an evil intention cannot be punished by any human tribunal, as no human Judge can search the heart otherwise than they are expressed by outward signs, while morally a man whose heart is filled with an evil intent, would no doubt be as guilty as though the intention had been carried into effect and the act had been done .

So while in order to have a crime we must have an intent yet that intent may be drawn from the act itself as where--A kills B the law presumes an evil intent and in order to make the crime it does not have to be shown but the prisoner may overcome this presumption of intent and show that it was done accidentally or in self defence or that he was insane at the time &c.

In many crimes this general intent is presumed but in

others there must be a special intent, and whenever

this exists no crime is complete without showing the particular intent that is required by the statute, as for example---^ statute prohibits under a penalty any one who passes counterfeit money KNOWING that it was counterfeit, A passes counterfeit money , in order to establish the crime specified, you must show that he did it KNOWINGLY thereby showing the special intent, and if knowledge cannot be proved then there is no crime.

these are some of the divisions of the subject of intent but there are two general classes into which all crimes may be divided/one (malum in se) is an act which shocks the moral sense of the community as being against good morals or an act which if allowed to stand would be injurious to the welfare of the people, as a body, and there can be only one sentiment of condemnation. Examples of such acts are seen in murder where the welfare of the public demands that it shall be declared criminal regardless of a Statute to that effect.

But there is another class (malum prohibitum) which do not effect the morals of the community to such a degree as to demand their punishment regardless of law but are only considered criminal when expressly provided

so by Statute, a familiar example is found in the selling of intoxicating liquors, this in itself is not such a business as demands the public condemnation but its effects upon the morals of the community are such that it has been deemed advisable to hedge it about with restrictions and make the selling of liquors except as following the way prescribed by Statute a criminal offense,

In this case above, whether the sale would be malum in se or malum prohibitum would depend to a great degree upon the advancement of the community where the act was done, for a country might be so far advanced that its effects would be considered so disastrous as to render it malum in se and punishable without a Statute while in a country not so far advanced it

would require a Statute to secure the desired end.

In treating of acts malum in se and malum prohibitum the question would naturally arise, suppose an act is done unintentionally while doing an act ~~malum~~ in se what would be the punishment, as for example---A while robbing a house is discovered by its owner B and in the scuffle which ensues B is shot by the accidental discharge of A's pistol-- Is A guilty of murder or manslaughter or is he to be acquitted on the ground of accidental killing?

So with an act which is not malum in se but malum prohibitum, as for example,---A while shooting game out of season accidentally shoots B who was there unknown to A.-- Is A to be punished and if so for what crime?

Coke lays down two propositions which have been quoted many times with approval.

FIRST. Any person while in the commission of a felony accidentally kills another he is guilty of murder

SECOND. A person while in the commission of an act not malum in se but a misdemeanor does an act by which death ensues to another he is not guilty of murder but is guilty of manslaughter.

These divisions were satisfactory at common law, because at that time, every felony involved the forfeiture of the lands or goods of the offender upon a conviction of the offense, and nearly all offenses of that grade were punishable with death with or without the benefit of clergy, so it made but very little difference whether a man was convicted of murder or manslaughter for the penalty would be death in each case, but as criminal law advanced the injustice of the punishment for these two crimes being the same when the circumstances producing them were so unlike became apparent and to-day in the Penal Code of our States they are separate

and distinct, and while the rule laid down by Coke is applied with all its harshness in some jurisdictions yet it is apparent that it must be taken with some limitations, for instance ---A having malice against B seeks after him with the deliberate design of killing him, he finds him and while trying to carry his plans into execution shoots and kills C an innocent bystander No one would contend for a moment that A should not be punished for killing C the same as though he had been the person desired, but let us alter the case somewhat supposing A had got into a heated discussion with B and had come to blows and in the affray which ensued C an innocent bystander was shot by A would this be considered murder?

It would be by Cokes definition because a felony was being committed and an innocent man was killed but if he had killed B. A would have been only guilty of manslaughter, and he certainly would not be held to a more serious offense when an innocent party was killed accidentally, because the death of a third party is certainly not more greivous than the killing of the party taking part in the affray.

The Courts hold that in order to make murder it is not necessary that personal violence be used to the third

person as for example---in Adams .v. People 109 Ill.444
 where the train robbers were on the train and by threats
 intimidated the passengers and one jumped from the train
 while in motion being terrified and was killed the
 Court said that this was murder because the doing of
 a felony produced a certain effect and the offender
 must be held for all acts done under its influence.

In coming to Cokes second rule; That a person in the
 commission of an act not malum in se but a misdemeanor
 does an act by which death ensues to another he is not
 guilty of murder but manslaughter" This must be limited
 to the extent that reasonable caution being used when
 the person was killed will excuse, as when A shoots
 game out of season , a misdemeanor in itself, and being
 reckless and without due caution shoots another he will
 be guilty of manslaughter but if he had used due caution
 in the shooting of the game and a third person had been
 killed then it would have been excusable, the suffi-
 ciency or insufficiency of the caution is the principal
 thing.

In the cases cited there is the general intent to do
 the wrong, a wrong being contemplated it makes no
 difference upon whom the act falls if the intent co-
 operates with the act,

Chap. II.

-----General doctrine of Criminal Intent #-----

Criminal Intent is of the essence of the crime.

While as a general proposition all the text writers and Judges agree that in order to have a crime we must have a Criminal intent attached to the act yet some make so many exceptions and qualifications to the rule that it has to a more or less extent become an unsettled proposition.

At common law it was certainly true that there was no crime without the intent for Blackstone in his Commentaries says " Indeed, to make a complete crime cognizable by human laws there must be both a will and an act-----and as a vicious will, without a vicious act is no civil crime, so , on the other hand ,an unwarrantable act without a vicious will is no crime at all" (a).

A person in order to make a crime must have an evil mind, punishment is not designed for those who, while perhaps doing an unlawful act still has a pure mind, to punish such a one would be contrary to natural justice.

It is like the general rule of law and dictates of material justice that to constitute guilt there must

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(a) Blackstone's Comm. (Chases ED.)page86I

not only be a wrongful act but a criminal intention under our system both must be found by the jury to justify a conviction for crime" (a)

If this was not true any person committing any act no matter whether laboring under a disability or not would be obliged to suffer, but many persons are excepted from punishment, a child for example, under seven years of age shoots a man dead he certainly cannot be punished because the law has thrown about him its protection and it has declared that it will not allow evidence even to be admitted to show the evil intent, because it is conclusively presumed, that he was too young to form the evil intention to do the deed, and yet under some of the Statutes of the different States which prohibits in general terms it would not be considered for a moment that a child under seven years of age could be punished and still the Courts claim that the intent has been eliminated from the crime and a person does the act at his peril, and so it is so with lunatics no matter how heinous was the crime or under what circumstances it was committed yet they cannot be punished because one is not punished because he has done the act

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(a) People .v. Flack 125 N.Y.324.

but because he has done it with an evil intent.

The criminal jurisprudence of this or any other civilized country, so far as I have been able to find, does not record an instance where an idiot or lunatic known to be such has been punished for his crimes because it would be inflicting punishment upon a person morally innocent.

In comparison with those laboring under disabilities and who are protected because their minds are pure we must notice another condition, those acts which are

unlawful but have been done by accident here we have the unlawful act the deed done but must the offender be punished? Certainly not he when the act was done had no evil intentions and we have the bare unlawful act which cannot be punished, so in the case of a deed done in line of duty, an executioner executes another under the mandates of the law here the deed is done but it is considered in law to be justifiable.

CHAP. III.
))))))) CONSTRUCTION OF PENAL STATUTES. _____

In the chapters to follow it seems absolutely necessary to understand how the different Statutes passed under different conditions and by different Legislatures shall be interpreted and so the construction of Penal Statutes will be treated briefly, -Penal- because the subject of Statutory Construction is so vast a one that it would require a study by itself and also because we are considering only the Penal side of the question.

" Penal Statutes are all acts as in terms impose a fine or corporal punishment under sentence in State prosecutions or forfeiture to the State as a punitive consequence of violating laws made for the preservation of the peace and good order of society also all acts which impose by way of punishment any pecuniary mulct or damage beyond compensation for the benefit of the injured party or recoverable by an informer or which for like purpose, impose any special burden or take away or impair any privilege or right/" (a)

The common law is the source of our criminal law as well as our civil jurisprudence and as has been expressed by Coke " To know what the common law was before the making of a Statute whereby it may be seen whether the Statute be introductory of a new law or only affirmative

of the common law is the very lock and key to set open the windows of the Statute".

And when we come to construe a Statute made by the Legislature it should be construed if possible in accordance with the common law and account should be taken of what the law was before the passage of the act for when the written and the unwritten law the same as when two Statutes stand together without conflict up to a certain point there is no repeal, for both Statutes are not conflicting but as soon as a conflict arise then one or the other falls.

A Statute may be shortened or lengthened by the common law or to explain more fully the common law may take away from the Statute, some of its original force, as for example---A Statute is passed in general terms prohibiting a certain thing under a penalty, but if the act was done by a lunatic he cannot be punished because it is a common law principle that that class of offenders are exempted from the penalty of the law, and it thereby shortens the literal of the Statute so a Statute will not generally make an act criminal however broad may be its language unless the offenders intent concurred with his act because the common law declares that the intent is the necessary element of every crime

In the same way a Statute may be added to by the provisions of the common law.

Keeping in mind that resort must be had to the common law to add to or take away from a Statute elements necessary to be added to or taken away from, the first and primary rule in construction is that you must seek the Legislative intent(a), first from the words of the Statute if they can be ascertained and if the words of the Statute convey no satisfactory meaning then you must look to the surrounding circumstances, taking into consideration the existing state of affairs that called for the passage of the law and after a consideration of all these questions, it is for the Court to say what was the intention of the Legislature, bearing in mind that the presumption is against a change of the common law unless the Statute is explicit and clear in that direction.(b), (c)

In ascertaining the legislative intent many questions must be examined for in many instances it makes its language so broad that it brings every thing within it and indeed it is the general plan of our criminal legislation to define or at least to forbid particular acts leaving

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- (a) Smith, v. People 47 N.Y. 336
 (b) People, v. Palmer 109 N.Y. 110
 (c) Potter's Dwarris on Statutes & c p. 185

for example the question of intent to be determined in each by the rules of the common law and in all cases whatever competent age sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality but I do not think that they are ever introduced into any Statute by which any crime is defined (a). Having found the intention with which the Statute was passed this law must be construed strictly for it is a principle of criminal law that a Penal Statute must be construed strictly against the accused and favorably and equitably for him (a) .

the reason why this should be so is obvious for no man can be subjected to the penalty of a Statute unless he is within both the letter and the spirit of the law, this rule does not exist in civil cases because there a persons liberty is not in question as in criminal prosecutions, where the unfortunate is entitled to have the Statute construed strictly as to matters that tend to prosecute him, but liberally as to matters which would tend to release him-

When a Statute declares a certain thing to be criminal you cannot go outside of the Statute for the purpose of

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(a) Myers .v. State I Conn. 502

(b) 40 Alb. Law Journal 250

bringing matters not strictly prescribed by the Statute for example--- In a case where the law forbid the selling of certain articles and an exchange was made and the person was indicted, the Court held, that the word sale in a penal Statute does not include an exchange. (a) and the Courts went even so far at common law as to hold that under a Statute forbidding the stealing of horses that when one HORSE was stolen that the Statute did not cover it and a new Statute was passed to cover that specific case (b) so by a Statute stating that the

stealing of sheep or other cattle should be considered a felony it was held that this expression (or other cattle) was too loose and only applied to sheep and here also another Statute was passed to remedy the difficulty (c) but I cannot say that at the present time so close a construction would be made.

The construction while it must be made strictly yet it cannot be so strict as to override the manifest intent of the Legislature and when the question comes up as to whether the strict construction or the intent should govern, the intent if plain will be considered binding on the Court.

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- (a) Gunter . v . Lecky, 30 Ala. 591
 - (b) I Edward VI. Ch. 12
 - (c) 15 Geo. III. Ch. 34

Chap. IV.

----IGNORANCE OF FACT ---

Many Statutes are passed for the purpose of protecting the public health and the public welfare and the question very often arises when the strict letter of the law has been violated but without any intention on the part of the accused to violate the law and what he has done has been done honestly, whether his honest mistake will discharge him or must he suffer the penalty of the law. Perhaps no better case can be found to illustrate the general doctrine than that of State v. Gardner, 5 Nev. 378

In that case a man was indicted for issuing licenses unlawfully, it came out on the trial that the licenses were undoubtedly issued and the strict letter of the law violated but without any intention to do so and the Court said in deciding that case " That nothing short of the intent to do the forbidden thing will make a man criminal, when such intent is wanting he commits no offence in law, though he does the act completely within all the words of the Statute which prohibits the acts, being silent concerning the intent".

After a consideration of the cases it seems to me that this is the true rule but in the State of Massachusetts we have the opposite view illustrated for under a Statute prohibiting the sale of adulterated milk,

In general words without reference to the intent, it was there held that the intent was immaterial, that it was a Statute intended to promote the public health and good and the selling of milk was done at the vendors peril.

Supposing a case where the vendor selling milk had that milk adulterated by some enemy of his or, put a stronger case, suppose if it be possible that the cow gave milk below the standard, and unbeknown to him he sells that milk, he is arrested and in the course of the trial he tries to introduce evidence of his good faith which is rejected as immaterial, he is convicted and punished.

Under what system of law or justice can this be justified?

He certainly had violated a Statute but under such circumstances that he was entirely ignorant of the fact, he certainly was engaged in a legitimate business, one that benefitted the public, if he is punished the strict letter of the law will be carried out a man known to be innocent by all will suffer for no cause of his and the public will not be benefitted for if he engages in the business again he will run the same risks as before

and if he leaves it as a business too perilous to be engaged in it will be to the detriment of the public

"And when we consider also that it was not deserved but a gratuitous and wicked wrong to one whom everybody deemed to be morally innocent no fit words to characterize it is found in the language". (a)

"IGNORANCE OF FACT EXCUSES" is the maxim of the law.

The first step in the direction taken by the Massachusetts

Courts was taken under a Statute imposing a penalty upon any person who, having a former husband or wife shall marry another person,---except any person whose husband or wifeshall have been continually remaining beyond the sea or shall have voluntarily withdrawn from the other and remained absent for the period of seven yearsthe party marrying again not knowing the other to be living within that time",

Suppose a husband is engaged on some perilous business

and is brought home dead one day and is buried by the widow, two years afterwards she marries again and is indicted for polygamy the Court would not allow that she could prove the death of the absent husband only by showing a seven years absence so she must go to prison while her former husband was known to be buried but

suppose a case in the above that the body had been burned and disfigured yet the identification was pronounced satisfactory by the widow and friends and afterwards it should appear that the body buried was that of

another and the husband had left the country.

The widow marries again in three years and is indicted for polygamy here was evidence of death satisfactory to any Court, the intent of the woman was precisely the same she obeyed the law to the best of her ability and knowledge, cautiously and honestly she proceeded yet this avails her nothing she has violated the Statute and by Massachusetts law she must be punished.

The object of punishment is not so much to punish the criminal himself as to keep others from committing the same act, when this woman is punished neither object is gained, she has not committed a crime morally and no matter how severe the punishment may be it cannot keep others from making the same innocent mistake, a very different one would have existed if negligence could have been proven because a willful disregard of the law is as bad as a willful violation of it and it was said in a case where a young man thought that he had a right to vote and did so when in fact he did not have the right. That the criminal intention being of the essence of the crime if the intent is dependent on a knowledge of particular facts a want of such knowledge, not the result of carelessness or negligence relieves the act of criminality

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 (a) Gordon, V. state 52 Ala. 308

and he was acquitted so in a case where a man after due inquiry as to the age of a person and under a bona fide belief that he was of age allowed him to play billiards and was indicted under a Statute prohibiting minors to play and persons allowing them to do so it was said by the Court that "It is clear to us that if the Defendant after due diligence thought honestly that this young man was not a minor he is not guilty, if he did so think after proper inquiry the element of intent does not exist, the act was done under a mistake of fact, in such a case, there is no guilt and no crime." (a)

It was said many years ago by one of the greatest Jurists in England, that ever sat upon the bench, Lord Mansfield, that in a case of libel that while it was prima facie evidence against him that it was not conclusive (b)

An honest mistake of facts cannot help but exist in any place where the people are energetic, for try as best they may, accidents will happen and perhaps the greatest number of cases arise under the excise laws of the State.

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(a) Stern, V. State 53 Ga. 229 (21 Am. Rep. 266)

(b) Rex, V. Almon 5 Burom 2688

The sale of intoxicating liquors has been regarded as a questionable business and has been regulated by Legislative enactments for many years past and the Legislature in their zeal to overcome so great an evil are liable to go beyond the strict rules of reason and many of the States have passed Statutes absolutely prohibiting in general words the sale of intoxicating liquors except under certain restrictions, and the seller, hedged about by these restrictions, sells liquor honestly and by using all the means in his power to ascertain the truth, illegally, according to the strict letter of the law and it is sought to punish such a one for an honest mistake of facts.

In *Mulread v. State* 7 N.E. 884 under a Statute which prohibited directly or indirectly the sale barter or gift of intoxicating liquors to any person under the age of twenty-one years under a penalty it was held-- that if the seller should sell to a minor under the honest belief that he was not a minor and after due diligence being exercised and no negligence being shown that there was no criminal intent and without this there was no crime.

In the construction of such a Statute as this which prohibited absolutely let us apply briefly some of the rules of construction, we must first look to the intent, it was obviously the intent of the Legislature to stop the sale of liquor to minors it said "Whoever directly or indirectly sells or barters shall be guilty"

it excepts no one, criminal intent is not referred to and as a Statute however broad may be its terms must be construed by the principles of the common law we must infer that the Legislature in laying down this

Statute and in not referring in the Statute to any of the elements necessary to make a certain thing criminal must have intended that the missing elements should be added by the well known principles of the criminal law and viewing it in this light, which I think must be admitted is the reasonable construction, the intent to do the act would be an essential, if the Legislature had desired to change the common law no one will dispute for a moment but what it is in their power to do so but the presumption is that no such change is intended unless the intent of the Legislature to do so is explicit and clear. (a)

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 (a) People. V. Palmer 109 N.Y. 110

There are two opposite viewstaken by the Courts on the construction of these kinds of Statutes ---

one taking the side that the law should be humane and the other that it should be enforced without reference to the hardship it may make; these views are widely divergent and the cases cannot be by any means reconciled --as a good illustrationof the later doctrine I will cite but one case to illustrate it State.V. Essex Club 20 Atlantic 769 holding that under a Statute prohibit- ing in general terms the sale of intoxicating liquors that a conviction can be had irrespective of the guilty intent it was said in that case quoting from Halstead, V. State 4I N.J.Law,that "The question(of intent) appertains to the department of Statutory construction and to introduce intothe requisite of a guilty mind it must appear that such was the intent of the law makers" as has been said above all our Statutes are based upon the commonlaw, and everything the common law gave is left unless it has been taken away expressly by the Statute now in the above case the Legislature was silent on the question of intent and therefore by the strict rules of reasoning the element of intent ought to have been considered an essential.

Chap.V

LIABILITY OF MASTER FOR ACTS OF HIS SERVANT DONE IN
 THE COURSE OF HIS EMPLOYMENT AND IN WILLFUL VIOLATION
OF HIS ORDERS AND INSTRUCTIONS.

Perhaps one of the most interesting questions in the criminal law of to-day is as to the question whether a principal who takes ordinary care in the selection of his servants and hires those who in his best judgment are qualified to carry on his business and after instructing them what to do and what not to do after all this has been done, and the agent in willful violation of his orders does an act contrary to the Statute does he bind his principal criminally.

As was said as to ignorance of fact that the decisions could not be reconciled so here it is the same, the same two ideas being most prominent in the minds of the judges---humanity on the one side---enforcement of the laws on the other--and the Court as it has been impelled by one or the other of these motives have decided the particular case and it must be called a whole an unsettled question.

"A servant as applied to criminal law is an actual bona fide representative of his principal in the particular transaction with his consent or concurrence." (a)
 The rules applicable to liability of principal civilly

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 (a) Barnes .V. State. 19 Conn. 397.

for acts of his agent do not accord with the principles governing the criminal liability (a).

Civilly the principal is liable for the torts of his agents (a) whether the principal knew of the criminal acts of his agent or not or even if the agent had done the act willfully contrary to instructions of principal yet he would not be discharged because the law assumes that considering the nature of the business engaged in that he will not engage incompetent agents to act for him and if he does choose an agent the law regards the act of the agent to be the act of the principal and the principal must respond in damages to the injured party; but in criminal law the reasons upon which this rule of justice rests do not apply with equal force and as a general rule a principal cannot be held criminally for the acts of his agent committed without his knowledge and consent (b) for it will be readily seen that the intent is the necessary element of the crime which cannot exist when the principal is deceived by his agent willfully.

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(a) Hipp. V. State 5 Blackf. 149

(b) Comm. V. Nichols 10 Metcalf 259
State. V. McCance 19 S.W. 648

Many cases have come before the Courts of last resort in the various States. State.V. McCance a late case illustrates the doctrine, here the Def. was indicted under a Statute prohibiting the sale of intoxicating liquors to minors, he proved at the trial that the sale was made by his bar- keeper unbeknown to him and against his strict orders the question came up squarely on the interpretation of the Statute and the Court said "Let it be conceded that the business of selling liquor is not commendable from a moral standpoint, still the Legislature has seen fit to license it and make it a source of revenue to our municipalities. after the dramshop keeper has fully complied with the Statute, in establishing his character as a man of good morals, entered into bonds to keep the peace and not to sell to minors she is licensed to retail liquor and it seems to us in construing this Statute we ought if possible while giving full effect to the intention of the Legislature at the same time to observe those well settled rules and well grounded principles of natural justice that are the basis of all enlightened jurisprudence and

not to break down the safe guards of the Constitution which are for the protection of every person charged with crime". And they held that "the principal was not liable and this must appeal to the justice of every man, for a man by selling liquor contrary to law violates the law and the presumption is against him (a) which can be rebutted by other evidence and then it is a question for the jury to say whether under all the circumstances which existed the principal acted honestly and in good faith for certainly if bad faith existed and the jury believe that his instructions to his agent were made in such a manner so that he desired them to be disobeyed or he was negligent in any way then he would be held liable for any act that his agent might commit in the course of his employment but as reasonable as this may seem still we find many cases holding a contrary doctrine, taking for example) State .V. Kittle 15 S.E102 where it was held by a divided court that the principal was liable, but the reasoning upon which the majority based their decision is unsound in principle.

The liquor traffic when legalized by the State has a right to be treated like any other legal business

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and the dealer who deals in it however low he may be morally still legally he is entitle to the benefit of the law and in carrying on his business he must employ those who shall work under him for no large enterprise can be carried on by one man he therefore hires his servants it is now said that since he derives profits from the concern that he ought to be held for all acts done in the course of his business and the answer to this is that he is bound, civilly (a) for any and all acts of his agent while in the course of his employment and a money judgment may be collected against the principal by those qualified to bring the action, this is sufficient, the persons are indemnified and if they can show fraud then a criminal action will lie against the master. A further remedy exists, the person who actually sold the liquor is liable criminally (b) regardless of the action against the principal because no action against his master will avoid his guilty wrongs therefore a possible three actions will lie,--Civil against the principal--Criminal against the agent--Criminal against the principal if fraud can be shown.

It is also said that it is necessary to have a criminal

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 (a) Hipp, V. State 5 Blackf. 149..

(b) Reese, V. State 73 Ala. 18

action against principal because if it was not so a principal might get a license and then hire a most incompetent person to run the business and as was said in one case " Bow himself out and leave the servant to run the business as he wished " but the answer to this argument is plain, a principal would not be likely to pursue this course when every dollar he made and more too might be taken away by a civil action and he also might be punished criminally for his negligent acts and find himself in prison, this certainly would be a singular chapter in business principles.

Moreover a licensee holds his license only by sufferance, so to speak, and if any act is done which is illegal it will invalidate the license (A).

It is strange to see how the same Court will look at two different situations almost analogous. The Court of Massachusetts declared that if a sale of adulterated milk was made the offender could be punished regardless of the intent, but a different view is taken on the

liquor question for in Comm. V. Nichols IO Metcalf 259 where a sale was made by a servant contrary to

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(a) Comm. V. Wachendorf 141 Mass. 271.

instructions the Court said that the sale was only prima facie evidence of sale by the master, not conclusive proof, and " If a sale of liquor is made by the servant without the knowledge of the master and really in opposition to his will and in no way participated in by him or approved and this is clearly shown he ought to be acquitted" and this commendable decision was followed in Comm. V. Stevens 26 N.E. 292, for if this was not the law a principal might arise in the morning and find that the night before his servants had done some act which without his knowledge or consent would sweep away all his property and land him in prison but this cannot ordinarily be done unless the people prove beyond a reasonable doubt that there was negligence or bad faith by the principal in order to convict him of a crime under the Statutes (a).

The conviction of a master for the acts of his agent cannot rest upon public policy alone but must rest upon some principle, and this principle must necessarily be that in criminal cases the actual or constructive knowledge of the agent is the knowledge of the principal.

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 (a) Comm. V. Hayes. 145 Mass. 289

Let a case be supposed where the buying of liquor between certain hours of the day would be prohibited, a clerk buys it contrary to law against the express wishes of his master the master according to this principle must be liable to a criminal prosecution but suppose he bought this liquor knowing that it was stolen the innocent master if this principle be allowed to stain our system of justice, be condemned to a long term of imprisonment, he did nothing that was criminal but he must suffer because he was so constituted that he was not Omnipresent.

It is to be greatly desired that Larceny be suppressed and the public demand it but it would be more than unjust if the guilty knowledge which is required universally by all law should be overlooked and the honest merchant be exposed to the punishment of a felon.

A conviction in the above case would not be received as the settled law of any State.

The familiar maxim, "Qui facit per alium, facit per se" has been used to justify the criminal proceeding but it is only applicable to criminal cases where the instruction of the principal has been obeyed and not violated (a). and it was said in that case where the wife had committed

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 (a) State, V. Baker 71 Mo. 475

the offence contrary to the advice of her husband" That it was her independent act which resulted in a violation of the law for if she had followed the instructions of her husband no offense would have been committed and for this act the husband is not responsible" and when liquor is kept lawfully for sale and is sold unlawfully and is sold by a clerk there is no criminal action against principal because there is no unlawful intent which is an essential ingredient of the crime (a) The argument has been many times advanced that if an injustice has been done by the Court or the Legislature that resort should be had to the pardoning power of the Executive in other words that the Courts should follow the strict letter of the law and leave it to the Governor to distribute justice. Can it be possible that the election of an Executive is for the purpose of dealing out justice to offenders that the Courts might do themselves? It seems not, in extreme cases resort is had to Executive clemency but it is comparatively rare speaking in comparison with the great number of convictions, it is the sphere of the Legislature to make the

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(a) State .V. Hayes 67 Iowa 271

laws considering the needs of the people at large and then it is for the Courts to interpret them according to the well defined rules of the law and it is not for them to declare when it is so evident as in the question here that no relief can be granted but that resort should be had to the Executive where if an injustice has been done it can be remedied.

Chap. VI.

~~INTOXICATION AS A DEFENSE TO CRIME~~

It is a legal maxim of the law that a man shall not disable himself and if he knowingly takes any means

by which he is disabled it gives the criminal intent and if while doing one act which was wrong he does another it is none the less criminal. Voluntary intoxication

has been considered by all writers as no defense to crime and at common law it was not only considered not a defense to crime but an aggravation of it for

Blackstone says^a Our law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior^a (a) and Sir Edward Coke declared^a That a drunkard had no privilege thereby but what hurt or ill

soever he doth his drunkenness doth aggravate it^a

but this must be wrong, for example---a man while in his full senses being angry killed a man this would be manslaughter, another while under the influence of

liquor committed a similar crime now ought this man who was intoxicated, be punished for murder because the deed was done while he was under the influence of liquor

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(a) Blackstone's Comm. (Chases Ed.) p. 866.

and the one who had his full sense be allowed to suffer only the punishment for manslaughter? This doctrine has been repudiated and while intoxication is considered no defense still it does not aggravate the crime (a) The rule was laid down in State.V. Bundy 58 Am. Rep. 266 where the Court said" Some cases may be found which suggest limitations of the rule especially as to reducing murder to manslaughter by the indulgence extended to the natural weakness of sudden heat and passion, but we think that the broad current of opinion holds the wise old doctrine that voluntary intoxication of whatever degree is no excuse for crime committed under its influence. Any other principle would be destructive to the peace and order of society, every murderer would soak himself in the liquor for the double purpose of nerving himself for the act and of sheltering his intended crime." This is the almost universal doctrine partly held upon the grounds that intoxication is so easily feined and under this guise intended acts may be committed that it is necessary to the administration of justice but in some classes of crimes as in murder

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 (a) Halle.V. State II Humphrey 154.

deliberation and premeditation make the difference between murder in the first and in the second degree and it is there a question for the jury to say as to the state of the persons mind at the time of the commission of the deed (a) as was said in Swan.V. State 4 Humphrey 136 that though drunkenness in point of law constitutes no excuse or justification in law for crime still when the nature and essence of a crime is made to depend by law upon the peculiar state of the criminals mind at the time and to reference to the act done, drunkenness as a matter of fact affecting such state and condition of the mind is a proper subject for the jury". But where an act if done by a sober man would be murder it can not be reduced to manslaughter by showing the absence of deliberation by reason of the mans intoxication (b).

The most of the cases arising under the subject of intoxication are capital offences and it is desired by showing the intoxication to reduce the degree of the crime and while it has been held that intoxication by reason of the state of mind may reduce murder from

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(a) People.V. Mills 98 N.Y. 182.

(b) Kenney.V. people 31 N.Y. 330.

the first to the second degree it will not reduce the crime to manslaughter.

Insanity in the case of intoxication, as in the case of any crime, will excuse when produced by habitual drunkenness (a) but no matter how high the frenzy was at the time of the commission of the crime

while the person was intoxicated it will not excuse him for it was said in *Scott, V. State* 12 Texas App. 31.

"That if the acts which constitute the crime are excused or justified they are not criminal".

It was said at the beginning that intoxication was no defense for crime, this as a general proposition is correct but one exception must be noticed, where the special intent is necessary to produce the crime as in larceny" Taking the articles with the intent to steal them" or in the case of passing counterfeit money knowing that it was counterfeit, in this class of cases which depends upon a guilty knowledge it should be submitted to the jury for them to say whether under all the circumstances of the case the person was so intoxicated that he could not form the special intent necessary

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(a) U.S.V. Drew 5 Mason 281.

to the commission of the crime, then if the jury find that the intent was lacking they must acquit, this was considered in a case of passing counterfeit money without the knowledge of its being counterfeit the person being so intoxicated at the time and the Court held that it was a sufficient defense.(a)

But this exception applies to but very few cases and hardly affects the general rule, it is hardly necessary to say that if the party was induced by means of threats or device to become intoxicated and it was not his free act and a crime was committed he will be excused, this would be only justice.

C. W. Knapp

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(a) Pigman v. State 14 Ohio 555.

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