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WHAT THE CRIMINAL LAW IS BUILT UPON

Howard Newcomb Morse*

Let us consider how certain doctrines of the Law of Crimes exist in other branches of the common law, sometimes under different nomenclature. The doctrine of merger applies to both Criminal Law and Family Law—the absorption of the attempt into the completed crime and the fiction of the unity of husband and wife. For example, the United States local common law majority rule holds that the misdemeanor no longer merges by operation of law into the felony or the lesser felony into the greater, but rather that the American public prosecutor enjoys an election in the matter. Only the attempt is consolidated by operation of law into the completed crime. Also, the American local common law majority rule holds that the common law fiction of the unity of husband and wife remains in only certain aspects—the wife's taking of her husband's surname, the wife's domicile becoming that of her husband's (the basis for the Real Property rebuttable presumption that possession by the husband is also possession by the wife), the inability of the wife to institute an independent civil action against her husband for support or for either household or non-household services rendered her husband during marriage, the inability of either spouse to testify against the other in a civil or criminal proceeding brought against one of the spouses by either a third person or the State without the other spouse's consent thereto, and the husband's taking title to his wife's earnings in the absence of an express or implied waiver on his part to such right, such waiver based on the theory of a voluntary gift.

Another example is that of motive, which Salmond referred to as "ulterior intent," and which plays an important part in Real Property in the sense that a bad motive helps constitute actionable waste or an illegal so-called "spite fence," although there is a Real Property rebuttable presumption in favor of damages rather than forfeiture, such presumption in a suit for waste by a remainderman against a life tenant is countered somewhat by bad motive on the part of the life tenant with the result that the court may decree a forfeiture which, in the absence of the bad motive of the life tenant, might not have been decreed.


1 Salmond, Jurisprudence 523 (1937).
The doctrine of former jeopardy is simply the Criminal Law counterpart of the civil doctrine of res judicata. Likewise, an ex post facto law is the Criminal Law counterpart of a "law impairing the obligation of contracts." The special defense of entrapment is analogous to the special divorce defense of connivance. And conspiracy is similar to the special divorce defense of collusion.

The doctrine of self-defense is but a part of the law of necessity, which has application as well to Delict and Constitutional Law. In this connection, the word "self" in the phrase "self-defense" has evolved in latitude of meaning and has a meaning quite different in extent from the word "self" in the Real Property phrase "self-help." From the standpoint of life, limb, and liberty, originally under the common law man had the legal right to strike and to kill, if need be, in the protection of only his own person. Later, however, this right was extended so as to include the protection by man of the persons of his immediate family. This enlarged meaning of the word "self" in the phrase "self-defense" is analogous to the meaning accorded the word "personal" in the law of infancy pertaining to the infant's liability on quantum meruit for necessaries purchased which he needed and which were for his personal benefit. The extended meaning of the word "self" in the phrase "self-defense" was further enlarged so as to encompass the protection by man of the persons of any fellow human beings threatened with great and immediate bodily harm unless so threatened in execution of public justice. Or perhaps, regarding this second extension, the word "family" instead was rendered an enlarged meaning in this connection so as to refer to all members of the human family rather than to only one individual family. The present meaning of the word "self" in the phrase "self-defense" thus bears a meaning considerably different in degree from the word "self" in the distraint designation "self-help," which remedy may be exercised, for example, by only a lessor or someone in privity to him.

The rule that all penal statutes should be strictly construed because they are in derogation of the rights of life, liberty, and property of citizens was compared with the Real Property rule to the effect that all statutes delegating the exercise of the power of eminent domain should be strictly construed because they are in derogation of the property rights of freeholders.

The conclusive presumption of knowledge of the law on the part of the defendant in a criminal action is comparable with the conclusive presumption of knowledge on the part of a non-resident defendant to

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a divorce libel resulting from constructive notice in the form of the publication of a divorce citation.

The Criminal Law doctrine of constructive presence whereby either a principal in the second degree who was not de facto at the scene of the crime at the time of its commission is considered de jure as having been so present or a felon standing on one side of a State line who shoots and kills a person standing on the other side of the State line in another State although not de facto at the time of the slaying in the State in which the victim received the mortal wound nevertheless is considered de jure as having been so present is analogous to the Family Law doctrine of constructive desertion whereby the spouse who by bad conduct causes the other spouse to remove from the marital domicile is considered the deserter on the ground that such spouse although remaining de facto in the marital domicile nevertheless removed therefrom de jure at the time the innocent spouse left de facto.

The special criminal defense of alibi is similar to the Family Law defense of non-access available to a husband in proving non-paternity in a criminal action brought against him for his non-support of a child born of his wife.

Under the old common law the killing of a master by his servant or a husband by his wife constituted petty treason. Also, under the old common law an aspect of the doctrine of merger known as the fiction of the unity of husband and wife existed whereby a woman's legal identity became absorbed by that of her husband's upon marriage, with the result that her legal identity was extinguished permanently unless there was a divorce or her husband predeceased her. To be consistent with this artificial conception to the effect that the wife's legal identity was submerged in that of her husband's it would have to be said that the killing of the husband by his wife was an act of suicide on the part of the husband since the act causing death would arise while the matrimonial unity or element still existed, a duality or compound not arising until death. But just as one lie entails several others in its train so too does one legal fiction necessitate another. So it was said that the act causing death gave rise to a partial matrimonial duality for purposes of criminal jurisdiction only, the offense being considered in the nature of treason rather than homicide since the wife owed allegiance to her husband by virtue of having pledged herself in the marriage contract to obey him. It will thus be seen that the second fiction, that of partial duality, was based upon a time distinction.

Under the doctrine of imposed intention, if a defendant stands mute before the bar of justice at arraignment, refusing to enter a plea of guilty or not guilty, the law will create a fiction and enter a plea of not guilty for him. The law is not construing the defendant's intention as his silence might be interpreted as readily to mean guilt as innocence.
Rather, the law is imposing its own intention to fill the existing lacuna in order to be consistent with its own preexisting fiction of the rebuttable presumption of innocence. The doctrine of imposed intention applies to the law of contracts whereby in many instances silence presumes consent. Silence on the part of a debtor converts an open account into an account stated. In regard to a contract for luxuries made during infancy, continued silence on the part of the infant even after reaching his majority effects a ratification. In regard to a contract of sale on trial or approval, silence on the part of the bailee past the time specified in the contract, or, if no time be stipulated, past a reasonable time, will transfer the bailee’s status into that of a buyer. As regards a contract of sale and or return, silence on the part of the conditional buyer past the time designated in the contract, or if no time be provided, past a reasonable time, will operate to preclude the conditional buyer from re-investing title in his seller. In regard to goods patently defective, when there is delivery without an opportunity of inspection on the part of the buyer continued silent retention will result in a waiver of possible objection. Silence on the part of a defendant in a civil action who has received proper service of process presumes his admission of the truth of the allegations contained in the plaintiff’s petition and will result in the entering of a default judgment against him. A man’s failure to execute a will leaves his estate chargeable to the law of descent and distribution, presuming that had he made a will he would have divided his estate in approximately equal portions among his wife and children.

Under the old common law both a convicted felon and an illegitimate child suffered a corruption of blood whereby neither could have heirs nor be heirs. The estate of either escheated upon his death to the Crown. The injustices of this harsh doctrine became recognized first in regard to the illegitimate child who, though his parents had violated the law of God and man, was totally innocent. The doctrine was first modified so as to allow the illegitimate child to inherit from his natural mother and was later modified so as to allow the children of his body to inherit from him. The application of the doctrine to the convicted felon was altogether abolished for it came to be realized that his wife and children, who were entirely innocent of his wrongdoing, were nevertheless punished for it by being deprived of any property of his which they in all likelihood would inherit were it not for the application of the doctrine. Also, it was seen that frequently the escheat to His Majesty resulted in the convicted felon’s wife and children becoming charity wards of the King. Ironically enough, corruption of blood no longer applies to the convicted felon whatsoever but still pertains in a limited form to the illegitimate child generally. In the Constitution of the United States the right to order a forfeiture
of a defendant's estate upon his conviction of treason is recognized.\textsuperscript{4} The doctrine of forfeiture of estate as punishment for wrong applies in the law of real property whereby a life tenant guilty of extreme waste may, at the instance of the remainderman, be shorn of his life estate by the decree of a chancellor or a wife divorced on the ground of her adultery may be divested by a chancellor's decree of her dower inchoate.

Self-defense and mistake of fact, if proved by the defendant by a preponderance of evidence, constitute valid and complete criminal defenses. In self-defense the act causing death and the provocation therefore are proportionate. In self-defense the provocation operates with the same effect as the delict concept of contributory negligence and the divorce doctrine of recrimination. Although the provocation was exerted by the decedent, the State as plaintiff should be considered as his agent, the agency not having terminated upon the victim's death since it is one coupled with an interest.

In mistake of fact the act causing death and the provocation are disproportionate, but the defendant thought them proportionate at the time of commission, and furthermore a reasonable man (the jury) thinks he would have made the same error acting under the same or similar circumstances at the time. In mistake of fact the provocation also operates with the same result as the tortious principle of contributory negligence and the divorce doctrine of recrimination.

Bare or simple provocation, if proved by the defendant by a preponderance of evidence, constitutes a partial defense for the purpose of mitigating or reducing the offense from murder to voluntary manslaughter. In bare or simple provocation, the act causing death and the provocation are disproportionate. That the defendant may have thought them proportionate is immaterial as a reasonable man (the jury) thinks he would not have the same error acting under the same or similar circumstances at the time. The provocation exercised by the decedent is subtracted from the act committed by the defendant and the State as the special agent of the decedent for the purpose of prosecution recovers judgment for the difference in the form of punishment imposed upon the defendant. This is analogous to the delict concept of comparative negligence and to the divorce doctrine of comparative rectitude.

Perhaps the best way to understand the nature of a crime is to consider a crime in its relation to a tort for the two bear certain similarities as well as differences. The imposition of a fine in a criminal case is analogous to the assessing of punitive damages in a delict action. The release of a co-defendant in a criminal proceeding does not operate as

\textsuperscript{4} U.S. Const., Art. III, sec. 3, clause 2.
a release of the other defendant as is the case with joint tort-feasors. One may consent to the infliction of a delict but not to a penal offense. One may settle for the injury received as the result of a tort not amounting also to a felony but not for the injury received as the result of a crime. Intent plays a role in criminal law similar to the role assigned to negligence in tort law. The concept of malum prohibitum, as distinguished from malum in se, although often thought of as a criminal doctrine exclusively, nevertheless figures in tort law in the sense that one joint tort-feasor against whom liability is enforced may in some jurisdictions obtain contribution from his fellow joint tort-feasors in the case of a tort merely malum prohibitum. Contributory responsibility on the part of the injured in a criminal action, if disproportionate to the degree of force exerted against him, will not discharge the defendant from liability, as would be the case in a tort action, but will only mitigate the charge or the punishment.

There is no time limitation on tortious proximity other than the statutes of limitation, but in reference to criminal proximity there is also the year and a day rule pertaining to homicide. In the case of crimes, every crime must be mentioned by name in a statute in order to have the force of law. There is usually a separate statute for each crime. The statutes usually define the crimes; however, if this is not done, the common law definitions obtain. On the other hand, one or two general statutes to the effect that no person shall suffer a wrong without being afforded a remedy by the law can instate all common law torts even though no specific torts be referred to by name.

The injured person may condone a tort but not a crime. However, the State may partially condone a penal offense in the sense that it may elect to prosecute for a lesser degree of the offense. Unlike the delict defense of condonation, the divorce defense of condonation is conditional upon the future good behavior of the erring spouse, similar to the criminal concept of probation. Both crimes and torts are breaches of contracts, statutes or public contracts, with the communal accent on the former and the individualistic emphasis on the latter. The element of malice seems to be the factor which enables society to reach a proportionate degree of guilt and punishment between torts and crimes. Just as the presence of malice authorizes the awarding of punitive damages in a tort action so too does the presence of malice justify indictment for the type of homicide carrying the severest punishment in criminal prosecution.