THE CRIMINAL CODE OF PENNSYLVANIA.

Perhaps in the true sense of the term there is no criminal "code" in Pennsylvania. The whole body of the criminal law has never been reduced to a written code in this state in the sense in which this has been done in some of the states of the Union, in which jurisdictions there are no crimes except those specifically prescribed. The criminal law of Pennsylvania has been only partially codified, all of the English common law of crimes still being in force in Pennsylvania unless expressly or impliedly repealed, or unless inapplicable because of the changed conditions resultant on emigration to a new country, or on the establishment of a new and different form of government.¹

So large a part of the criminal law of Pennsylvania, however, is written law since the Act of 1860 enacted the recommendations of the commission appointed to revise the criminal law of the state, that the work of this commission, with subsequent amendments is commonly spoken of as "The Criminal Code."

LACK OF PRINCIPLE IN CLASSIFYING CRIMES.

At the common law, crimes were classified as felonies and misdemeanors. Without going into nice historical questions we can fairly say that the term "felony" was applied to the more heinous crimes, "misdemeanor" to the more venial ones. In the statutory law both of England and of this country these terms have in general been similarly employed. In the Pennsylvania code the legislature has in the majority of cases in defining each crime designated the crime a felony or a misdemeanor; and,

NOTE:—When the amount of fine or length of imprisonment is stated in this article, the maximum is meant:

¹ Thus it was held by the Supreme Court in *James v. Com.*, 12 S. & R. 220 (1825), that a woman convicted of being a common scold should not be sentenced to the common law punishment of being ducked in the Delaware River. While in the *Guardians of Poor v. Greene* (5 Brown 554), it was held that an ordained deacon and elder in the Methodist Church was not subject to the provisions of the Act of 1803 for refusing to serve as a Guardian of the Poor since by the common law clergymen of the Church of England were not subject to such service.

following the general principle of the common law, affixed the stigma of "felony" to the graver crimes. Viewing the code, however, as a whole there is an utter lack of principle in the grading of crimes as felonies or misdemeanors, either according to the moral heinousness of the offense, or the severity of the punishment.

Bigamy, with its attendant disgrace and illegitimacy, is a misdemeanor,² while embezzlement by a servant is a felony.³ For a clerk or agent to embezzle—by the code called larceny—is a felony;⁴ for a banker, trustee or guardian to embezzle, is only a misdemeanor.⁵

Assault and battery with intent to rape, is a misdemeanor only,⁶ with intent to rob, a felony.⁷ An attempt to rape, is a misdemeanor⁸ while the attempt to burn a stable or a mill, is a felony,⁹ as is the attempt to procure an abortion.¹⁰ Administering a narcotic with intent to commit larceny, is a felony;¹¹ assault and battery endangering the life of an infant, is a misdemeanor.¹² Blackmailing is only a misdemeanor,¹³ while receiving stolen goods is a felony.¹⁴ If one in the heat of a fight, intending to disable or maim his antagonist, should cut him ever so slightly, he is guilty of a felony¹⁵ but, if he "on purpose, and of malice aforethought by lying in wait, shall unlawfully cut out the tongue, put out an eye, cut off the nose—or cut off any limb" of his victim, he commits only a misdemeanor. Also if he "voluntarily malicious and of purpose bite off the . . . limb

² Act 1903, March 27, Sec. 2, P. L. 102.

³ Act 1860, March 31, Sec. 107, P. L. 382.

⁴ *Ib.*

⁵ Act 1860, March 31, Sec. 144, P. L. 382; Act 1863, April 22, Sec. 1, P. L. 531.

⁶ Act 1860, March 31, Sec. 93, P. L. 382.

⁷ *Ib.*, Sec. 102.

⁸ *Ib.*, Sec. 93.

⁹ *Ib.*, Sec. 137.

¹⁰ *Ib.*, Sec. 88.

¹¹ Act 1901, April 24, Sec. 1, P. L. 102.

¹² Act 1860 March 31, Sec. 90, P. L. 382.

¹³ Act 1897, May 27, Sec. 1, P. L. 111.

¹⁴ Act 1860, March 31, Sec. 109, P. L. 382.

¹⁵ *Ib.*, Sec. 83.

or member of another," he is guilty of a misdemeanor.¹⁶ Truly, there must have been giants in those days. The effect of these two sections—83 and 80—is to make it a graver offense to attempt mayhem and fail, than to succeed.

The lack of any principle in this classification of crimes as felonies and misdemeanors is still more strikingly shown when we consider them in relation to the punishment prescribed. The attempt to commit abortion is a felony;¹⁷ while forgery is only a misdemeanor,¹⁸ but the felony is punished only by a fine of \$500, and three years' imprisonment, while the misdemeanor is punished with a fine of \$1000—twice the fine—and ten years' imprisonment—more than three times the imprisonment provided for the felony.

Malicious burning of a warehouse is only a misdemeanor¹⁹ but it is punishable by a fine of \$2000 and ten years' imprisonment; while assault and battery with explosives is a felony, but punishable by only \$500, one-fourth the fine for burning—and three years' imprisonment,²⁰ one-third of that prescribed for the misdemeanor. Embezzlement by a servant is a felony but it is punishable by only three years' imprisonment,²¹ while embezzlement by a factor is a misdemeanor only, but punishable by five years in prison.²² Larceny is a felony, the punishment is \$500 fine and three years' imprisonment,²³ while mayhem, for which the fine is two times greater *viz.*, \$1000, and the imprisonment nearly twice as great, *viz.*, five years, is only a misdemeanor.²⁴ Uttering counterfeit gold or silver coins is only a misdemeanor,²⁵ but uttering or even attempting to utter copper coins for less than their value is a felony;²⁶ but again the

¹⁶ *Ib.*, Sec. 80.

¹⁷ *Ib.*, Sec. 88.

¹⁸ *Ib.*, Sec. 169.

¹⁹ *Ib.*, Sec. 138.

²⁰ Act 1860, March 31, Sec. 84, P. L. 382.

²¹ *Ib.*, Sec. 107.

²² *Ib.*, Sec. 125.

²³ *Ib.*, Sec. 103.

²⁴ *Ib.*, Sec. 80.

²⁵ *Ib.*, Sec. 160.

²⁶ *Ib.*, Sec. 162.

punishment is more severe for the misdemeanor—five years²⁷—than for the felony, for which the penalty is three years' imprisonment.²⁸ Receiving stolen goods is a felony punished by a fine of \$500 and three years' imprisonment,²⁹ while forgery, which is only a misdemeanor, is punished by twice the fine—\$1000—and three and a third times the imprisonment, *viz.*, ten years.³⁰

EFFECT OF EXISTING CLASSIFICATION.

But stigmatizing an offense as a "felony" or a "misdemeanor" is not merely a matter of name, and of academic interest. By the code itself it is made of extreme importance. Section 1 of the Act of 1893³¹ provides that, "every accessory after the fact to any *felony* for whom no punishment is provided, shall be sentenced to pay a fine not exceeding \$500 and to undergo an imprisonment . . . not exceeding 2 years. . . ." No provision is made in the code for accessories after the fact to misdemeanors.

Now, an accessory after the fact to a misdemeanor at common law was not indictable as such at all. He could only be indicted for some substantive crime such as obstructing justice, aiding an escape, or the like. This common law rule was a good one, for misdemeanors were such venial offenses at common law that it was hardly worth while to pursue the person who merely aided a misdemeanant to escape. But as we have seen, by the code many misdemeanors are more heinous and are punished more seriously than many felonies; yet because they are called "misdemeanors" in the code, and because there is no provision in the code for the punishment of those who aid a misdemeanant to escape, such persons cannot be punished at all, unless their acts make them guilty of some substantive crime such as the obstruction of justice; and then there is no limit

²⁷ *Ib.*, Sec. 160.

²⁸ *Ib.*, Sec. 162.

²⁹ *Ib.*, Sec. 109.

³⁰ *Ib.*, Sec. 169.

³¹ P. L. 286.

to the punishment that may be inflicted on them. For example, one who aids an embezzling servant to escape may be punished by two years' imprisonment; while one who aids an embezzling banker to escape is either not punishable at all, or else his punishment is left by the code entirely indefinite; it may be anything short of life imprisonment. If it is desirable to have a maximum punishment prescribed for an accessory after the fact to a felony, it is equally important to have one prescribed for one who occupies the corresponding position in misdemeanors.

It may be remarked in passing that the code in the section on accessories after the fact makes no exception in favor of close relatives of the felon as in other codes is done. The father or mother who aids a son to escape arrest after a felony committed by him, is punished just as one who has not this compelling natural tie as an excuse, notwithstanding that the commissioners in their report say, "This offense is often almost venial, consisting frequently in parents and friends, influenced by the ties of blood, or the impulse of affection, giving aid and comfort to an offender whose crime they abominate and deplore." It must be assumed that the legislature of 1905 either did not agree with the code commissioners in the sentiment above quoted, or else that they did not know of it, for the law-makers of that year provided³² that an accessory after the fact to the *larceny of wire* in use for transmitting electricity, should be punished in the same manner as the thief himself, *viz.*, with seven years' imprisonment, a little over twice as great a punishment as can be inflicted on the accessory after the fact to murder of the first degree.

Allied to the offense of an accessory after the fact is that of compounding a crime, accepting a reward to conceal crime. The code commissioners in 1860 treated compounding by expressly enumerating the crimes it should be an offense to compound. Needless to say since that time many new offenses have been added to the code, offenses quite as serious as those

³² Act March 8, 1905, Sec. 1, P. L. 33.

mentioned, but it is no offense to compound them because they are not mentioned in the act. The punishment for compounding any of the crimes enumerated is \$1000 fine and three years' imprisonment.⁸³ Now larceny is included in the list of crimes the compounding of which is punished; but the crime of larceny itself carries only three years' imprisonment, so that it is, under the code, as grave a crime to conceal for reward the commission of larceny as it is to commit larceny itself. It may be said that this is correct in principle; that it is just as bad to conceal for reward, a crime as to commit it. If so, what is to be said of the compounding of murder; by the same principle the compounder of this crime should be punished with death; but under the code he can be given only the same three years that is meted out to the compounder of larceny. But worse still, bribery is included in the list; now bribery itself is punished with one year's imprisonment; it is, therefore, three times worse to conceal bribery than to commit it. Modern codes grade the penalty for this offense, of compounding, according to the gravity of the offense compounded.

THE GRADING OF PENALTIES.

The work of the commissioners who framed the Code of 1860 shows an utter lack of any consistent theory not only of grading the crimes as felonies and misdemeanors, but also in grading the punishment fixed for the various crimes. It may not be easy to do this in all cases. Persons may intelligently differ as to whether perjury should be more seriously punished than assault and battery, and whether larceny or bigamy be deserving of the greater penalty. But it is difficult to see why embezzlement by a consignee or factor should be punished with five years' imprisonment⁸⁴ and embezzlement by a person transporting the goods to the factor should be punished by one year's imprisonment.⁸⁵

⁸³ Act March 31, 1860, Sec. 10, P. L. 382.

⁸⁴ Act 1860, March 31, Sec. 83, P. L. 382.

⁸⁵ *Ib.*, Sec. 126.

Exhibiting any indecent, lewd or obscene print, painting or statue is by Section 40 of the Act of 1860 made punishable by a fine of \$500 and one year's imprisonment. But putting up in any public place—which would seem to be “exhibiting”—any indecent, lewd or obscene picture representing the human form in a nude or semi-nude condition, carries a fine of only \$300 and no imprisonment.

Should it be a graver offense to exhibit indecent, lewd or obscene pictures, or, to have such pictures in possession with intent to exhibit them? The legislature of 1887 considered that the exhibition of such pictures³⁶ should be punished with a fine of \$300 and no imprisonment, while the possession of them with intent to exhibit should be punished by a fine of \$500 and one year's imprisonment.³⁷ The owner of a house who leases it for the purpose of its being used as a bawdy house, and the keeper of such a house are liable to \$1000 fine and two years' imprisonment,³⁸ while a male loitering about the house thus tempting him—if he has no apparent trade, occupation or business—must pay an equal fine and suffer a year's greater imprisonment.³⁹

Under the Act of 1860,⁴⁰ having in possession tools for the counterfeiting of copper coin is punished by six years' imprisonment,⁴¹ while by the next section the punishment for actually *making* counterfeit copper coin is only three years,⁴² though it cannot be made without the tools to make it.

The punishment for possessing tools for counterfeiting gold, silver or copper is the same⁴³—six years—but the penalty for actually counterfeiting gold or silver coin is, as in the case of counterfeiting copper coin, less than the penalty for possess-

³⁶ Act 1887, May 6, Sec. 4.

³⁷ *Ib.*, Sec. 126.

³⁸ Act 1860, March 31, Sec. 43, P. L. 382.

³⁹ Act 1905, April 18, Sec. 1, P. L. 202.

⁴⁰ Sec. 161.

⁴¹ *Ib.*

⁴² *Ib.*, Sec. 162.

⁴³ *Ib.*, Sec. 161.

ing the tools,⁴⁴ though it is not so much less—being five years instead of three.

Is the possession of tools for counterfeiting copper, gold or silver *coin* of the United States a more, or less, grave offense than the possession of plates for engraving counterfeit *notes* and bonds of the State or the United States? By the Act of 1860⁴⁵ the former may be punished by six years' imprisonment, by the Act of 1867,⁴⁶ the latter can be punished by five years at most.

A curious light is thrown on the safeguarding of children by the Act of 1860.⁴⁷ Section 98 of the Act provides that any one who inflicts "any grievous bodily harm" on any other person shall pay a fine of \$1000 and suffer imprisonment not exceeding three years; while Section 90 of the same act provides that if any master of an apprentice or any one having the legal care or control of an infant shall "maliciously assault such infant or apprentice *whereby his life shall be endangered* or his health shall have been or shall be likely to be *permanently injured*," such master or person shall pay a fine of \$500 and undergo imprisonment not exceeding two years.

The distinction just mentioned is, however, no stranger than that made by the code between a councilman on the one hand and a judge on the other, in the provisions against bribery. Section 48 of the Act of 1860⁴⁸ provides that if any judge—shall accept a bribe, he shall be fined not more than \$1000 and be imprisoned for not more than five years. But by Section 8 of the Act of 1874,⁴⁹ a councilman who accepts a bribe may be fined \$10,000, ten times as much as a judge, and be imprisoned the same number of years—five years. The statute also provides that the councilman shall be incapable of holding any place of profit or trust in this commonwealth there-

⁴⁴ *Ib.*, Sec. 156.

⁴⁵ *Ib.*, Sec. 161.

⁴⁶ Jan. 7: Sec. 3, P. L. 1369.

⁴⁷ March 31, P. L. 382.

⁴⁸ *Ib.*

⁴⁹ May 23, P. L. 230.

after. But the convicted judge is placed under no such disability.

There are sixteen acts or sections of acts on bribery in force now according to P. & L. Dig. of 1910. Some punish the offering or actual giving of bribes, some punish the accepting of bribes, others the soliciting of bribes. A properly framed code would be informed by some principle in punishing these two crimes, the giving of bribes and the receiving of them.

It might regard the offense of offering a bribe as of the same culpability as receiving a bribe when offered to and received by the same officer; or it might regard the offer of a bribe as less serious than the taking of one, or it might regard the offer as more serious than the acceptance. The code shows none of these theories. The person who offers to bribe a juror is regarded by the code as only one-fifth as culpable as the juror who accepts such bribe as far as the penalty of imprisonment is concerned,⁵⁰ one year as against five years; and one-half as culpable as expressed by the fine imposed—\$500 as against \$1000.⁵¹ The principle is reversed in the case of the offerer and acceptor of a bribe offered a voter, to vote for certain candidates. In this case the person offering the bribe is regarded as more blameworthy than the person receiving it; the offeror being subject to a penalty of \$500 and two years' imprisonment;⁵² while the person accepting the bribe is punished by a fine of only one-fifth as much and imprisonment of only one-fourth as much—\$100 and six months.⁵³ When, however, we come to the bribery of these same electors to influence them to vote for a certain measure, such as an amendment to the constitution; we find that the offeror and acceptor are equally blameworthy; the punishment prescribed for them being the same—a fine of \$1000, and one year's imprisonment.⁵⁴ What of a person who neither bribes nor accepts a bribe, but

⁵⁰ Act 1860, March 31, Sec. 48, P. L. 382.

⁵¹ *Ib.*

⁵² *Ib.*, Sec. 51.

⁵³ *Ib.*, Sec. 50.

⁵⁴ *Ib.*, Act 1889, May 9, Sec. 1, P. L. 162.

afterwards learns of it and agrees for a reward not to prosecute it? Should he be punished, and if so, how severely? The code answers the question by providing that one who bribes a voter to vote for a particular candidate at an election may be punished by two years' imprisonment⁵⁵ and one who bribes a voter to vote for a constitutional amendment may be imprisoned for one year,⁵⁶ and a candidate who bribes a voter at a nominating election may be imprisoned for three months.⁵⁷ But one who knows of any of these bribes and agrees for a reward to conceal it, is punished with *three years' imprisonment*,⁵⁸ twelve times as great a punishment as can be meted out to the briber himself in the case of bribery last mentioned. It is well said by the framers of the Code: "This section—is essentially new to our statute law."⁵⁹

RELATION OF FINE TO IMPRISONMENT.

In the case of almost every crime denounced by the code fine and imprisonment are associated. In most cases the penalty provided is fine and imprisonment, in some it is fine or imprisonment. In a few cases imprisonment alone without a fine is prescribed, and in a few others it is a fine alone without imprisonment. We seek in vain for any principle on which the fine is omitted, where it is omitted; or for any principle on which it is inflicted in addition to imprisonment in some cases, and as an alternative to imprisonment in others. Thus the penalty for *exhibiting* indecent pictures on a wall in a public place is a fine of \$300, but no imprisonment,⁶⁰ while by the same act the *drawing* of such pictures on the same wall carries a fine of \$500 and one year's imprisonment.⁶¹ Manslaughter carries a fine of \$1000 as well as imprisonment for twelve

⁵⁵ Act 1860, March 31, Sec. 51, P. L. 582.

⁵⁶ Act 1889, May 9, Sec. 1, P. L. 162.

⁵⁷ Act 1881, June 8, Sec. 1, P. L. 70.

⁵⁸ Act 1860, March 31, Sec. 10, P. L. 382.

⁵⁹ Report on Penal Code, 13.

⁶⁰ Act 1887, May 6, Sec. 4, P. L. 84.

⁶¹ *Ib.*, Sec. 3.

years,⁶² but train robbery⁶³ and murder in the second degree⁶⁴ involve no fine, but fifteen and twenty years in prison respectively. It cannot be the length of the imprisonment that does away with the fine in this latter case, for the crime of aiding in kidnapping may be punished with twenty-five years in prison, but also has a fine \$5000.⁶⁵

More striking still, perhaps, is the lack of any relation between the amount of the fine and the length of the imprisonment provided in the code. In the case of some crimes the fine is small and the imprisonment short, as in blasphemy, which is punished by a fine of \$100 and three months in prison,⁶⁶ extortion⁶⁷ and embracery⁶⁸ punished with \$500 and one year. In a few the fine is large and the imprisonment long, as in accepting bribes by councilmen, \$10,000 and five years,⁶⁹ and malicious injury to railroads, \$10,000 and ten years.⁷⁰ But in others the fine is small while the imprisonment is long and in others the fine large and the imprisonment short.

Taking the punishment of a fine of \$1000 and imprisonment for one year—which is the punishment provided for a simple assault and battery⁷¹—as a normal relation between the amount of the fine and the length of imprisonment, and using this as a point of departure, we find that the fine for involuntary manslaughter,⁷² embezzlement by trustees,⁷³ bigamy,⁷⁴ keeping a bawdy house,⁷⁵ and forgery of public records,⁷⁶ is

⁶² Act 1860, March 31, Sec. 78, P. L. 382.

⁶³ Act 1895, June 25, Sec. 1, P. L. 290.

⁶⁴ Act 1893, April 14, Sec. 1, P. L. 17.

⁶⁵ Act 1901, April 4, Sec. 2, P. L. 65.

⁶⁶ Act 1860, March 31, Sec. 30, P. L. 382.

⁶⁷ *Ib.*, Sec. 12.

⁶⁸ *Ib.*, Sec. 13.

⁶⁹ Act of 1874, May 23, Sec. 8, P. L. 230.

⁷⁰ Act of 1860, March 31, Sec. 142, P. L. 382.

⁷¹ *Ib.*, Sec. 97.

⁷² *Ib.*, Sec. 79.

⁷³ *Ib.*, Sec. 121.

⁷⁴ Act 1903, March 27, Sec. 2, P. L. 102.

⁷⁵ Act 1860, March 31, Sec. 43, P. L. 382.

⁷⁶ Act 1860, March 31, Sec. 15, P. L. 382.

only half great enough, for in those crimes the same fine of \$1000 is associated with two years' imprisonment. For frequenting a bawdy house,⁷⁷ blackmail,⁷⁸ compounding a crime,⁷⁹ stabbing,⁸⁰ it is only one-third great enough; for counterfeiting,⁸¹ assault with intent to rape,⁸² or rob,⁸³ and robbing,⁸⁴ it is only one-fifth what it should be; in assault and battery with intent to kill, the fine is still \$1000, while the imprisonment has lengthened to seven years.⁸⁵ In burglary,⁸⁶ and forgery,⁸⁷ the fine remains \$1000, but imprisonment is ten years; while the rapist is still fined \$1000, but may be imprisoned for fifteen years.⁸⁸ In the crime of breaking and entering a building with intent to commit a felony the proportion of fine to imprisonment, which in assault and battery was one to one, is as one to twenty,⁸⁹ the fine being only \$500, while the imprisonment is ten years.

Clearly the system of fines in the code is not proportioned to the gravity of the crime as expressed by the length of imprisonment, for there is no fine for murder of either the first,⁹⁰ or second degree,⁹¹ or kidnapping;⁹² and the fine for rape is only \$1000, while the imprisonment is fifteen years.⁹³ It is not proportioned inversely to the length of imprisonment, for the fine for malicious injury to railroads is \$10,000 and the imprisonment is *twelve years*.⁹⁴ It is not proportioned to the

⁷⁷ Act 1905, April 18, Sec. 1, P. L. 202.

⁷⁸ Act 1897, May 27, Sec. 1, P. L. 111.

⁷⁹ Act 1860, March 31, Sec. 10, P. L. 382.

⁸⁰ *Ib.*, Sec. 83.

⁸¹ *Ib.*, Sec. 164.

⁸² *Ib.*, Sec. 102.

⁸³ *Ib.*, 102.

⁸⁴ *Ib.*, Sec. 102.

⁸⁵ Act 1876, May 1, Sec. 1, P. L. 92.

⁸⁶ Act 1860, March 31, Sec. 135, P. L. 382.

⁸⁷ *Ib.*, Sec. 169.

⁸⁸ Act 1887, May 19, Sec. 1, P. L. 128.

⁸⁹ Act 1901, March 13, Sec. 1, P. L. 49.

⁹⁰ Act 1860, March 31, Sec. 74, P. L. 382.

⁹¹ Act 1893, April 14, Sec. 1, P. L. 17.

⁹² Act 1901, April 4, Sec. 1, P. L. 65.

⁹³ Act 1887, May 19, Sec. 1, P. L. 128.

⁹⁴ Act 1860, March 31, Sec. 142, P. L. 382.

general ability to pay of the class of persons likely to commit the crime, for burglary⁹⁵ and rape⁹⁶ carry a fine of \$1000, equally with embezzlement by guardians,⁹⁷ trustees⁹⁸ and bankers,⁹⁹ and robbers¹⁰⁰ are fined equally with forgers.¹⁰¹ The proportion is not based on any distinction between crimes against the person and crimes against property, for the same fine is prescribed for assault and battery and embezzlement, for manslaughter and forgery, for rape and counterfeiting.¹⁰²

INCOMPLETE CRIMES.

It is a general principle of criminal jurisprudence that "incomplete crimes" as they are called, such as attempt, and conspiracy to commit a crime, should not be punished as severely as the full, completed crime. It was on this principle that at common law an attempt to commit even the gravest felony, such as murder, was only a misdemeanor. Other codes maintain this principle.

Thus New York has a general provision covering attempts and grading the punishment in proportion to the punishment provided for the completed crime. If the punishment for a certain crime is death or life imprisonment, the punishment for attempting to commit that crime is imprisonment for twenty-five years. In all other cases the punishment for the attempt is one-half the punishment, both as to fine and imprisonment, prescribed for the completed crime.¹⁰³

The Pennsylvania code has no general section on attempts, but in a haphazard manner, in providing for some crimes, provides for the attempt to commit the same, and in some cases has no provision for such attempts. A study of those cases in which

⁹⁵ *Ib.*, Sec. 135.

⁹⁶ Act 1887, May 19, Sec. 1, P. L. 128.

⁹⁷ Act 1863, April 22, Sec. 1, P. L. 531.

⁹⁸ Act 1860, March 31, Sec. 121, P. L. 382.

⁹⁹ *Ib.*, Sec. 114.

¹⁰⁰ *Ib.*, Sec. 102.

¹⁰¹ *Ib.*, Sec. 162.

¹⁰² See notes, *supra*.

¹⁰³ N. Y. Penal Code, Sec. 261.

provision for punishing the attempt is made, shows an entire absence of any theory or principle in assessing the punishment. Thus the penalty for the attempt to commit arson is the same as for the crime of arson itself;¹⁰⁴ for the attempt to commit robbery, the same as for the completed robbery;¹⁰⁵ but the attempt to commit murder is not punished with the same penalty as murder, *viz.*, death or twenty years' imprisonment, but by seven years' imprisonment only;¹⁰⁶ nor is the attempt to rape punished with the penalty for rape, but with only one-third the penalty—five years against fifteen.¹⁰⁷ The attempt to commit sodomy is punished by three years,¹⁰⁸ while sodomy carries ten.¹⁰⁹ But an attempt to commit mayhem, while not punished as mayhem, carries a penalty of a different proportion, *viz.*, three years for the attempt,¹¹⁰ to five years for the completed crime.¹¹¹ No provision is made for an attempt to embezzle, to steal, to extort, or to obtain by false pretense, but the attempt to escape is made equal to a successful escape,¹¹² and to commit an assault on another—which is an attempt to commit a battery—but which does no physical injury, is punished with the same penalty as a severe beating *short* of one doing *serious bodily harm*.

Under the common law it has been a universal principle that guilt could be imputed to a man only when he did a positive act, or omitted to do some act that he was under a legal, as distinguished from a moral, duty to perform. A could stand by and see B drown when with the slightest inconvenience A could save B's life by throwing him a rope, yet A would not be amenable to the law. A can today under the code stand passively by while B, assaults, kills, poisons, robs or rapes C, or

¹⁰⁴ Act 1860, March 31, Sec. 137, P. L. 382.

¹⁰⁵ *Ib.*, Sec. 102.

¹⁰⁶ Act 1876, May 1, Sec. 1, P. L. 92.

¹⁰⁷ Act 1860, March 31, Sec. 93, P. L. 382.

¹⁰⁸ *Ib.*, Sec. 33.

¹⁰⁹ *Ib.*, Sec. 32.

¹¹⁰ *Ib.*, Sec. 83.

¹¹¹ *Ib.*, Sec. 80.

¹¹² *Ib.*, Sec. 3.

steals her property or burns her house or burglarizes her dwelling, and still incur no legal guilt.

But there is one thing A may not do under Section 1 of the Act of 1901, April 24. If A knows that any chloroform, laudanum, chloral or other stupifying and overpowering drug, narcotic or anaesthetic agent, has been placed, dropped or poured into or upon any food or drink, or into or upon any dish, glass or vessel, into which any such food or drink is intended to be placed or poured, and "allow or permit another to eat or drink the same"—mark—either the food, drink, or glass vessel—with intent to enable any person to commit any felony—say larceny—A is liable to ten years' imprisonment in the penitentiary. In other words, A can, knowing, that B intends to murder C, and with intent to enable B to commit such murder, permit or allow B to kill C without being guilty of a criminal offense, but if A allow C to drink the knock-out drops that A knows have been placed for C, with intent to enable B to steal C's watch, A gets ten years' imprisonment. Perhaps the latter result is to be desired, but if so, why confine it to the one case of administering narcotics? ^{112a}

USE OF WORDS IN CHARACTERIZING THE ACT.

The lack of scientific drafting in the code is likewise shown in the use of the words employed in characterizing the act of various crimes; thus Section 1 of the Act of 1865, applying to Philadelphia, uses the phrase "wilfully gives any false alarm of fire"; while Section 1 of the Act of 1895, a general act, has, "Any person or persons who shall knowingly, wantonly and wilfully give . . . a false alarm then and there well knowing the same to be false." Do these words "knowingly," "wantonly" and "well knowing the same to be false," mean any-

^{112a} The phrase, "with intent thereby to enable such offender . . . to commit," followed by the phrase, "with intent to assist such offender in committing," any felony, would seem to mean that the mere passive allowing a person to drink the narcotic would be within the act. If the defendant did more than this the provisions would be unnecessary, for any aiding, assisting or abetting would make him—if present—a principal in the second degree, without the statute.

thing? If they do, then is it a crime to give such alarm in Philadelphia whether it is done "knowingly" or not, and whether the person giving the alarm knows it to be false or not, those words not appearing in the Act of 1865?

The Act of 1860 contains four sections on burning. Section 137 uses the terms, "maliciously and voluntarily burn," Section 138 has "wilfully and maliciously burn"; Sections 139 and 140 "wilfully burn" and Section 1 of the Act of 1881 reverts to "wilfully and maliciously" again.

In assault and battery with firearms the code requires that the battery must be done "unlawfully and maliciously." In assault and battery with explosives, that it be done "unlawfully, maliciously and *wilfully*." Does the addition of the word *wilfully* restrict the scope of the latter offense? It will require an appeal to determine.

There are four sections of acts on the breaking and entering of different kinds of buildings. One passed in 1860,¹¹³ one in 1887,¹¹⁴ one in 1901,¹¹⁵ and one in 1905.¹¹⁶ The first requires the breaking to be done "*wilfully and maliciously*," the second "*wilfully or maliciously*," the third "*wilfully or maliciously*," and the fourth "*wilfully and maliciously*." There would seem to be nothing in the *kinds* of buildings mentioned in the several sections which should require in some cases proof that the entering was both wilful *and* malicious and in others allow a conviction on proof either that the breaking was malicious *or* wilful.

There is no record of any conviction ever having been had in Pennsylvania for a crime committed outside of the state; yet in the section against firing woods¹¹⁷ the words are "if any person shall wilfully set on fire . . . any woods *within the commonwealth*."

Section 105 of the Act of 1860¹¹⁸ on horse stealing, provides in terms that the accessory before the fact shall be pun-

¹¹³ March 31, Sec. 135, P. L. 382.

¹¹⁴ May 23, Sec. 1, P. L. 177.

¹¹⁵ March 13, Sec. 1, P. L. 49.

¹¹⁶ April 22, Sec. 1, P. L. 279.

¹¹⁷ October, 1860, March 31, Sec. 140, P. L. 382.

¹¹⁸ March 31, P. L. 382.

ished in the same manner as the thief; although by another section¹¹⁹ of the *same act* it is expressly provided that accessories before the fact in *all* crimes shall be subject to the same punishment as the principal.

These are only a few of a great many instances of bad draftmanship in the code; nor are they unimportant, nor the criticism merely academic; the effect is to render many crimes uncertain where certainty is above all things to be desired. It took an appeal to the Supreme Court in *Rolland v. Commonwealth*¹²⁰ to determine whether the crime of burglarly described in Section 135 of the Act of 1860, which used the words "break *or* enter," was a new crime or the old common law crime of burglary, which required a breaking *and* entering. The Supreme Court felt obliged to hold that when the commissioners used the word "*or*" they meant "*and*," in order to "produce" as the court said "a consistent and harmonious system." The court remarked that "we are not surprised in view of the wording of . . . the section that the learned judge of the court below instructed the jury . . . that there could be a conviction under the counts which charged an entry without a breaking."

INSTANCES OF LACK OF CO-ORDINATION IN DRAFTING.

(a) *Larceny and Embezzlement*.—By the code embezzlement is punished by two years' imprisonment; larceny by three. Now the distinction between larceny and embezzlement is purely a technical one. If A give his servant five dollars with which to pay a debt he owes B, and the servant convert the money thus given him, he is guilty of larceny; but if B give A's servant five dollars to give to A to pay B's debt to A, and the servant convert it, the servant is guilty of embezzlement only. The modern tendency is to regard these crimes as one and to punish them alike.

Our statute creating the crime of embezzlement is an exact copy of the English statute on embezzlement of 39 Geo. 3

¹¹⁹ Sec. 44.

¹²⁰ 82 Pa. 306.

(1799). The case of *Rex v. Snowley*,¹²¹ which came before the courts in 1830, demonstrated clearly that the statute was poorly drawn, and later it was amended by Parliament. But although the case of *Rex v. Snowley*, decided thirty years before our code was adopted, showed the imperfections of the English statute, our code commissioners, nevertheless, copied the objectionable portion of the original English statute.

(b) *Abortion*.—The commissioners who framed the code introduced two sections on abortion. One covering abortion or attempt to commit abortion followed by the death of the mother or the child,¹²² and the other covering attempts to procure a miscarriage when no death results. In their report on the code, they express the pious hope that the latter section “may put a stop to a crime of too frequent occurrence.”¹²³ The section providing for abortion followed by death affixes a penalty of seven years’ imprisonment and a fine. Now, without this statute, causing the death of the woman under these circumstances would have made the offender guilty of the crime of murder,¹²⁴ the punishment for which under our code is twenty years’ imprisonment. The commissioners therefore, notwithstanding the expressed intention of discouraging this crime actually changed the law in favor of the criminal when the death of the mother followed the abortion. These sections apply equally to the skilled physician who, under the most aseptic conditions performs an abortion as a last resort in order to save the life of the mother, and the professional, or unprofessional, quack who deliberately jeopardizes the life of the mother and child for a paltry fee. Other modern codes contain an express exception in favor of abortions committed in order to save the life of the mother.¹²⁵

(c) *Second Offenses*.—It is a general principle of penology that a second offender should be more severely punished

¹²¹ 4 Car. & P. 390.

¹²² Act 1860, March 31, Sec. 87, P. L. 382.

¹²³ Report on Code, Shields, Penal Code, 71.

¹²⁴ 1 Bish. N. Cr. L., Sec. 382.

¹²⁵ See Cr. Code of N. Y., Sec. 80.

than a first offender. This principle is recognized in the code by the following provision:

"If any person who has been convicted of any offense, other than murder of the second degree, for which the punishment prescribed by this code is imprisonment by separate or solitary confinement at labor, shall after such conviction, be guilty of a similar offense or of any offense for which such punishment is directed, he shall in either case upon conviction, be sentenced to undergo an imprisonment, and be kept at labor, not exceeding *double the period* of time which may by the penal laws of this commonwealth, be prescribed for the crime of which he is convicted."¹²⁶

This enactment provides for an increased punishment—double the ordinary punishment—for the person committing for the second time a crime, the punishment for which is imprisonment by separate or solitary confinement at labor.

There is no reason why the principle imposing a heavier sentence on a person for a second conviction should apply *only* to persons whose first offense is punished by separate or solitary confinement *at labor*. The penological principle is that the person who commits a second offense needs more punishment or more discipline than the first offender. If this punishment or discipline is to be gotten from imprisonment it is as necessary for the misdemeanant as for the felon—if the object is, as it should be, to discourage crime. But even if it were desirable to impose this increased punishment only for the graver offenses, our code does not serve to effectuate that object, for the punishment of "separate or solitary confinement at labor" which is made the test, is not used in the code on any definite principle. It is not provided as a punishment for felonies as distinguished from misdemeanors, for there are some felonies not so punished, *e. g.*, assault and battery with intent to rob,¹²⁷ and many misdemeanors that are: *e. g.*, bigamy,¹²⁸ aggravated assault and battery¹²⁹ and burning with intent to defraud insurers.¹³⁰

¹²⁶ Act 1860, March 31, Sec. 182, P. L. 382.

¹²⁷ *Ib.*, Sec. 102.

¹²⁸ Act 1903, March 27, Sec. 2, P. L. 102.

¹²⁹ Act 1860, March 31, Sec. 98, P. L. 382.

¹³⁰ *Ib.*, Sec. 139.

Nor is this penalty of confinement at labor provided for crimes punished by long terms of imprisonment as distinguished from crimes punished by relatively short terms. For example: attempting to conceal the birth of a bastard child by a mother, carries imprisonment by solitary confinement at labor and only three years' imprisonment,¹³¹ while train robbery¹³² is punished by fifteen years' imprisonment, but not with labor.

Under this provision of the code as to second offenses the person convicted for the second time of ordinary larceny would be subject to twice the punishment for his second offense, while the person convicted of robbery could be punished no more severely for his second, than for the first offense. But though the criminals who for the second or third time commit robbery were not thought sufficiently evil to merit any increased punishment for their repeated crimes, the wretch who undertakes to tell fortunes after having been once convicted of this heinous offense, is punished the second time not only by double the amount of imprisonment prescribed for his first offense, but by special enactment, two and a half times that imprisonment.¹³³ One convicted for the second time of assault and battery with firearms¹³⁴ would receive twice the punishment given for his first offense, but one convicted for the second time of assault and battery with explosives¹³⁵ could be given no increased penalty. In passing, it is interesting to notice and significant of the need for a revision of our code, that when it was framed, the sentence to labor was considered, in general, an aggravation of the punishment of imprisonment, whereas penologists are now trying to introduce enforced labor during imprisonment in all cases as an *amelioration* not an *aggravation* of the prisoner's punishment.

(d) *Other Illustrations.*—The confusion of thought and aim apparent in so many parts of the code is shown by compar-

¹³¹ *Ib.*, Sec. 89.

¹³² Act 1895, June 25, Sec. 1, P. L. 290.

¹³³ Act 1861, April 8, Sec. 1, P. L. 270.

¹³⁴ Act 1860, March 31, Sec. 83, P. L. 382.

¹³⁵ *Ib.*, Sec. 84.

ing the sections punishing the larceny of wire forming part of the system of a telegraph, telephone, electric light or traction company. The section on larceny in general¹³⁶ punishes larceny with three years' imprisonment. But in 1905 an act was passed providing that the larceny of wire forming part of the system of any telegraph, telephone, electric light, or traction company, might be punished by seven years in prison.¹³⁷ Now what was the object of more than doubling the punishment of larceny provided for by this statute? Plainly the object aimed at was the prevention of the danger or great inconvenience to the public in the cutting of wires used in the transmission of telegrams, or telephone messages, and in operating lights and railways. The value of the wire stolen was not important, for the portion stolen might be of much less value than thousands of articles coming under the Act of 1860—such as money, diamonds, *etc.*, for which three years' imprisonment is the maximum. But the danger and inconvenience resulting from the cutting of such wires is not at all dependent on the fact that they are cut and carried away with *intent to convert* the same to the taker's use—all of which is necessary to establish larceny. The danger and inconvenience are just as serious if the wire is cut for purposes of revenge, in malicious mischief, or in tapping the wires. Yet this act applies in the one case only, of stealing or attempting to steal the wire.

So no matter how great the damage done or the mischief intended by the cutting of such wire, unless it was cut with intent to steal, the offender cannot be punished under this section, but must be prosecuted under Section 147 of the Act of 1860, which provides imprisonment of only one year.

In the course of this paper a few of the curious results apparent from a comparison of different sections of the code have been indicated. A few additional examples may not be without interest. If a man gives a narcotic to a woman with intent to render her unconscious so that he may ravish her, he is guilty of a felony, punishable by a fine of \$5000 and ten

¹³⁶ Act 1860, March 31, Sec. 103, P. L. 382.

¹³⁷ Act 1905, March 8, Sec. 1, P. L. 33.

years' imprisonment,¹³⁸ even though he does not administer enough of the drug to have any effect on her; but if he knocks her down with a club and so renders her unconscious, with the same intent to ravish her he is guilty only of a misdemeanor, and can be punished only by a fine of \$1000, and imprisonment for five years.¹³⁹ If he turns the latch of a door and enters her house with intent to rape her, he is guilty of a felony punishable by a fine of \$1000, and imprisonment for ten years,¹⁴⁰ though he proceeds only an inch beyond the threshold; but if he is lucky enough to find the door unlocked, enters and knocks her down with the same intent, he is guilty only of a misdemeanor¹⁴¹ for which the penalty is \$1000 and five years. If finding her asleep he administers a whiff of chloroform to her with the intent to render her temporarily unconscious while he rifles the bureau, he may be punished with ten years' imprisonment,¹⁴² but if he strikes her with a blackjack intending not merely to render her unconscious but also to kill her he can be sentenced to only seven years.¹⁴³

Two strikers separately determine to wreck a passenger train, one removes a rail from the road over which a train is scheduled to pass; another cuts the telegraph wire to prevent the train dispatcher from stopping the train from running into a wreck. The first striker would come within the terms of Section 7 of the Act of 1911 and could be sentenced to pay a fine of \$10,000 and suffer imprisonment for ten years; the second would come within the terms of Section 147 of the Act of 1860 and could not be fined more than \$500 or imprisoned more than twelve months.

If a person owning a bond intrusted it to another for safe keeping and that other converted it to his own use he would be guilty of a felony and liable to three years' imprisonment

¹³⁸ Act 1901, April 24, Sec. 1, P. L. 102.

¹³⁹ Act 1860, March 31, Sec. 93, P. L. 382.

¹⁴⁰ *Ib.*, Sec. 135.

¹⁴¹ *Ib.*, Sec. 93.

¹⁴² Act 1901, April 24, Sec. 1, P. L. 102.

¹⁴³ Act 1860, March 31, Sec. 81, P. L. 382.

under Section 108 of the Act of 1860, but if at the same time this person intrusted another bond to a *banker* and the banker converted it he would only be a misdemeanor, and liable to only two years' imprisonment, by Section 14 of the same act.¹⁴⁴ If an executor having the possession and care of silver plate agree with his butler to make way with it and divide the spoil, and together they carry it away and dispose of it, the executor commits a mere misdemeanor, and can be punished by a maximum imprisonment of two years;¹⁴⁵ while the butler is guilty of a felony, and may be sentenced to three years in prison.¹⁴⁶ If the executor fearing detection informs his daughter of what he has done and demands her aid in helping him to escape and she complies, she is either guilty of no crime, or she may be sentenced to forty years' imprisonment;¹⁴⁷ but if the butler's daughter affords him the same assistance, she can be sentenced to imprisonment not exceeding two years,¹⁴⁸ but both will be misdemeanants only. If the daughter of the executor hide the plate, instead of hiding her father, she is still a misdemeanor only, but may be punished by fifty years' imprisonment;¹⁴⁹ but if the butler's daughter hide the plate for her father she is a felon, but can be given only three years in prison.¹⁵⁰

¹⁴⁴ The explanation of this and some other like anomalies is found in this fact: The framers of the Code finding no existing law to cover the case of larceny by a bailee framed a section (No. 108) to make such act a crime and, properly thinking, that such taking by a bailee was just as heinous as ordinary larceny, called it larceny and made it punishable as such. But they found in the existing statute law of the State (Act April 15, 1858), an "act relating to embezzlement" which contained provisions covering the case of conversion by a banker. This act made such conversion a misdemeanor and fixed the punishment at two years. The commissioner merely copied the sections of this earlier act, apparently not realizing that the broader terms of this new section included the specific persons mentioned in the existing law.

¹⁴⁵ Act 1863, April 22, Sec. 1, P. L. 531.

¹⁴⁶ Act 1860, March 31, Sec. 103, P. L. 382.

¹⁴⁷ She would be an accessory after the fact if her father's act were a felony. The statute makes it a misdemeanor only, and there is no such offense as an accessory after the fact to a misdemeanor. It would be possible, however, to hold that his aid amounted to an obstruction of justice, in which case she could be imprisoned at the discretion of the court.

¹⁴⁸ Act 1893, June 3, Sec. 1, P. L. 286.

¹⁴⁹ Act 1860, March 31, Sec. 120, P. L. 382.

¹⁵⁰ *Ib.*, Sec. 109.

If the executor made way with a horse belonging to the estate, his maximum imprisonment would be still two years; but if the butler made way with another horse he might receive ten years as a penalty.¹⁵¹ If a mule would serve the butler's purpose as well as a horse he had better take the mule for then he could not be sentenced for more than three years;¹⁵² if the mule were not swift enough, however, he might choose an automobile, for the maximum imprisonment for stealing an automobile is the same as that for larceny of the mule, being less than one-third of that for larceny of a horse.¹⁵³

If the driver of a public "coachee" by "wanton and furious driving or racing" unintentionally breaks a chicken's leg he may be punished by five years' imprisonment,¹⁵⁴ the same punishment provided for attempted rape,¹⁵⁵ for mayhem,¹⁵⁶ for counterfeiting,¹⁵⁷ and for robbery;¹⁵⁸ but if the driver of a taxicab is guilty of the same assault on a member of the feathered tribe he is not even indictable. If the driver of this "coachee" while so driving, should accidentally inflict the slightest personal injury on another, he would be liable to a greater punishment than if he deliberately stabbed that other with intent to maim him,¹⁵⁹ or wilfully and maliciously exploded dynamite under him, thus doing him serious bodily harm.¹⁶⁰ This violates one of the cardinal principles of criminal jurisprudence, *viz.*, that crimes of negligence are not so grave as crimes done with deliberate intent, a principle recognized in other parts of the code in providing for murder and involuntary manslaughter.

Three men enter the house of the president of a bank. One

¹⁵¹ *Ib.*, Sec. 105.

¹⁵² It was held in *Com. v. Edwards*, 10 Phila. 215, that stealing a mule was not within Sec. 105 of the Act of 1860.

¹⁵³ *I. e.*, there is no specific crime of larceny of an automobile, hence the crime would come within the general section on larceny.

¹⁵⁴ Act 1860, March 31, Sec. 29, P. L. 382.

¹⁵⁵ *Ib.*, Sec. 93.

¹⁵⁶ *Ib.*, Sec. 80.

¹⁵⁷ *Ib.*, Sec. 164.

¹⁵⁸ *Ib.*, Sec. 102.

¹⁵⁹ *Ib.*, Sec. 83.

¹⁶⁰ *Ib.*, Sec. 84.

forcibly takes the key of the bank's vault from him; the other rapes the banker's wife. Both are arrested on emerging from the house. On conviction both are given the maximum punishment provided by the code. The man who committed rape could be sentenced to pay a fine of \$1000 and to undergo imprisonment for fifteen years,¹⁰¹ the man who took the key could be fined \$10,000 and sentenced to *twenty* years' imprisonment.¹⁰² If a man has been so wronged by another that he feels impelled to obtain satisfaction *vi et armis* he should first ascertain if his intended victim is a voter, and then wait to catch him, in the words of Section 9 of the Act of 1870,¹⁰³ "at or near any election poll during the holding of any election." If the avenger assault there and "unlawfully strike, wound or commit any assault and battery" on the other, while the act will be called a "high" misdemeanor, he can be fined only \$500 and be imprisoned only three months; while if he select a non-voter, or commit the assault and battery elsewhere than "at or near any election poll," he may have to pay a fine of \$1000 and go to prison for a length of time varying from one to seven years;¹⁰⁴ but in the latter case he will have the satisfaction of knowing that he has committed a misdemeanor only and not a "high" misdemeanor. If the avenger were a mariner just out of quarantine it would also interest him to know that it would cost him less to injure seriously a health officer than to injure a private person, if the health regulations had been obeyed before the assault.¹⁰⁵

The writer has attempted to point out in this paper some of the more glaring and interesting defects in the code. He has by no means exhausted them. There is a great need for a complete revision of the code. It is a jumble of inconsistent theories; a great many sections are badly drawn, others are obsolete; many are inconsistent, many are in conflict;

¹⁰¹ Act 1887, May 19, Sec. 1, P. L. 128.

¹⁰² Act 1876, May 8, Sec. 1, P. L. 139.

¹⁰³ April 6, P. L. 53.

¹⁰⁴ Act 1860, March 31, P. L. 382, Sec. 97, 81.

¹⁰⁵ Act 1818, January 29, Sec. 28, 7 Sm. L. 59.

there is much overlapping due to different acts having been passed at different times covering in part the same subject matter, so that it cannot be told whether a given crime should be punished under one section or another prescribing a different punishment.

Blackstone says, "were even a committee appointed once in a hundred years to revise the criminal law, it could not have continued to this hour a felony . . . to be seen for one month in the company of persons who call themselves, or are called Egyptians."

May it not be said with equal truth that if a committee were appointed but once in fifty years to revise our criminal code, this code could not continue to provide a greater punishment for unsuccessful attempts to commit a given crime than for the perpetration of the crime itself; it could not continue to call the uttering of copper coins a felony and the uttering of gold coins a misdemeanor, nor could it continue to punish misdemeanors more seriously than felonies. It could not punish the compounding of bribery, with three times the penalty provided for the commission of bribery itself. It could not inflict a lesser punishment on one who maliciously assaults a child under his care than on one who assaults a grown man; nor on one who assaults a voter at the polls than on one who commits an assault on a non-voter. In short it could not be the patchwork that now we call our code of criminal law.

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