that *the intention must be expressed in the instrument.* The parties seem to have been discouraged by this decision, and the case slumbered for near a score of years. But once more it made its appearance before the Court of Appeals, and on the 30th January, 1877, was finally determined. The judgment was for the defendant, the Court intimating that *while regretting the rule they had established before, they would not change it.* The note was for $998; the report is silent as to the amount of the costs, but it would naturally be greatly in excess of the claim.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

[Continued from p. 359.]

No one ever doubted that, if a statute says, "Whoever does so and so shall be punished," it does not subject to punishment an insane person, or a person under the age of seven years. But why not? The Legislature has made no exception. Is not the legislative will to be obeyed? What right has a court to set up its notions against the express command of a statute? If the statute is wrong, let the prosecuting officer enter a *nolle prosequi;* or, if he does not choose to do this, let the governor pardon the offender after conviction. Why look to the judges for mercy, when their function is awful justice?

Still, in spite of these high considerations, what is thus assumed to be the legislative will is disobeyed every time an insane person, or an infant below the age of legal capacity, is set at the bar of a court for trial. There is no exception, and no complaint that the judges act in contempt of the legislative authority. But there are localities in which—not always, but now and then, and not in accordance with any intelligible rule yet discovered—the judges, when an unfortunate person who has done the best he could, yet has been misled as to some fact, is brought before them, having violated the letter of the statute by *act*, yet not by *intent*, resort to the high considerations, and turn him over to such mercy as he can find in the prosecuting officer or the governor. The legislative will, they tell us, is plain. The prosecuting officer may disregard it, but the judges should do better, and mind. Or, if the governor chooses, he may accomplish by the pardoning power what he could not by his veto—the annulling of the legislative will.

Now, adapting the before-quoted language of Hoar, J., to this sort of judicial decision, we have the following: "It is singular, indeed, that a man deficient in reason is protected from criminal responsibility for violating the letter of a statute, and another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty."

The jumble comes from an entire ignoring of a familiar and well-settled rule of statutory interpretation. It is, as expressed by the present writer in another connection, that "whatever is newly created by statute draws to itself the same qualities and incidents as if it had existed at the common law."* So that as an insane person will go free who does a thing forbidden by the common law, in like manner he will when the thing done is contrary to a statutory inhibition. And, as one of sound mind will not be punished at the common law if, being circumspect and careful to obey the law, he is misled concerning facts and does the thing which he should were the facts what he believes them to be, so neither will he be punished under a statute. The common-law doctrines are applied to a statutory offence the same as to an offence at common law.

It will be helpful to go for illustrations to two cases, in each of which the true doctrine appears. A statute of the United States declared that "any captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, or negligence, or inattention to his or their respective duties the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter." And it was ruled to be no defence for such a person that his misconduct proceeded from ignorance of the business. "He should not have engaged in a duty so perilous as that of an engineer when he was conscious that he was incompetent."† Here was the wicked mind, and the common-

* Bishop's Stat. Cr., sec. 139.
† United States v. Taylor, 5 McLean, 242, 246.